

ENGLISH ADMINISTRATIVE COURT UPHOLDS THE FIRST UNEXPLAINED WEALTH ORDER

National Crime Agency v Hajiyeva [2018] EWHC 2534 (Admin)

Introduction

By a decision handed down on 3 October 2018 in *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), the English Administrative Court upheld the first Unexplained Wealth Order (“UWO”) granted under Section 362A of the Proceeds of Crime Act 2002 against the wife of a politically exposed person who had a foreign conviction for fraud and embezzlement.

Background

UWOs were introduced by Sections 1-2 of the Criminal Finances Act 2017 and are a new investigative tool that requires the subject to give a statement that, *inter alia*, sets out the nature and extent of their interest in specified property and explain how that interest was obtained. In the event that the subject fails to comply with a UWO, the subject property is presumed to be recoverable through civil recovery proceedings. The particular matters that must be established before the court in order for a UWO to be made are set out in detail in Part 8 of the Proceeds of Crime Act 2002.

Upon a without notice application by the UK’s National Crime Agency, the Administrative Court (Supperstone J) granted a UWO in respect of a single property purchased by a BVI company in 2009 and believed to be beneficially owned by the respondent and her husband at all material times. The respondent’s husband was between March 2001 and March 2015 the chairman of a majority state-owned bank in a non-EEA state, whereupon he resigned and was arrested on 5 December 2015 in that state. In October 2016, he was convicted of misappropriation, fraud and embezzlement and sentenced to 15 years’ imprisonment and ordered to pay approximately \$39 million to the bank. It was believed that the respondent herself was also arrested *in absentia* in June 2016 and was wanted in connection with the investigation into the bank.

The respondent filed an application for the UWO to be discharged on the following bases:

1. her husband was not a “*politically exposed person*” as required;
2. her husband’s role had been seriously mischaracterised in the course of submissions to the court that the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the property to be obtained;

3. it had been wrong to rely on her husband's conviction;
4. the relevant standard of proof had not been met;
5. a penal warning was wrongly attached to the UWO;
6. the UWO was contrary to the respondent's rights under Article 1 of Protocol 1 to the European Convention on Human Rights ("A1P1 ECHR");
7. the UWO was contrary to both the privilege against self-incrimination and spousal privilege;
8. in all the circumstances of the case, the court's exercise of its discretion was wrong.

Decision

The Administrative Court (Supperstone J) dismissed the respondent's application for the UWO to be discharged.

Section 362B of the Proceeds of Crime Act 2002 required the court to be satisfied that: (i) the property was held by the respondent; (ii) its value was greater than £50,000; (iii) there were reasonable grounds to suspect the respondent's known income sources would not have been sufficient for the property to be obtained; and (iv) that the respondent or their family member was a "*politically exposed person*" which was defined in Section 362B(7)(a) as "*an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the UK or another EEA State*" and to which, within the terms of Section 362B(8), Directive 2015/849/EU applied.

Supperstone J held, applying the wide definitions of "*politically exposed person*" and "*state-owned enterprise*" in Directive 2015/849/EU, that the respondent's husband was a "*politically exposed person*" for the purposes of a UWO as he had been from 2001-2015 the chairman of a bank owned 50-60% by the country's Finance Ministry, which had ultimate control over it. The respondent's husband had thus been "*entrusted with prominent public functions*" by a state or international body. As the respondent's husband was a "*politically exposed person*", so too was the respondent.

Supperstone J held that there was no exclusionary rule that prevented the English court from relying on the fact of a foreign conviction even if it had been flagrantly unfairly obtained. Notwithstanding that it was well known that the criminal justice system of the relevant foreign country in the instant case had serious deficiencies, it was not necessary for the National Crime Agency to determine at the investigation stage whether the trial of the respondent's husband had been unfair. In any event, there was evidence independent of that trial which provided corroboration for the allegations of misuse of bank funds by issuing credit cards to his family members: the respondent had used 35 credit cards (issued by the bank) in order to run up enormous debts against the bank (more than £16 million between September 2006 and June 2016) under the Harrods Customer Loyalty Rewards Card Scheme. Supperstone J held overall that the National Crime Agency had established the "*income requirement*" for a UWO.

Supperstone J rejected the submission that, by virtue of Section 362C of the Proceeds of Crime Act 2002, the court had no jurisdiction to attach a penal notice to a UWO. Whilst the statute set out the consequences of non-compliance with a UWO (that the property was presumed to be recoverable), it did not oust the court's power to enforce a UWO through a penal notice (and committal proceedings). Furthermore, there was a strong public interest in ensuring that UWOs (and court orders generally) were not disobeyed at the option of one party.

Supperstone J held that, if there had been interference with the respondent's A1P1 ECHR rights, it was, in the circumstances, proportionate. It had been established that there were grounds to believe that the property was obtained by the respondent/her husband through unlawful conduct and the interference was modest. The UWO only required the respondent to provide information about a single property.

Supperstone J held that the UWO was not contrary to either the privilege against self-incrimination or spousal privilege because both only applied to criminal offences under English law by virtue of Section 14(1) of the Civil Evidence Act 1968. There was nothing to suggest that the respondent or her husband would be prosecuted for English law criminal offences. Furthermore, it was clear that it had been the intention of Parliament to abrogate the privileges in the case of UWOs – because if privilege applied so as to prevent compliance the entire UWO procedure would be rendered “*very largely nugatory*”. Furthermore, it was probable that any foreign law offence would be an offence to which the Fraud Act 2006 applied which, under Section 13, excluded privileges “*in proceedings related to property*”. Supperstone J also rejected the contention that compliance with the UWO would cause a real risk of prosecution in the relevant foreign country.

Overall, Supperstone J held that, as the National Crime Agency had met the requirements of the Proceeds of Crime Act 2002 for a UWO to be made, and any interference with the respondent's rights was proportionate, the application for the discharge of the UWO was rejected.

In a separate judgment, *National Crime Agency v A (Ruling on Anonymity)* [2018] EWHC 2603 (Admin), Supperstone J discharged a previous order giving the respondent, her husband and two of his lawyers anonymity on the basis that the anonymity was not required for the protection of their interests and because there were no grounds for a derogation from the principle of open justice.

Concluding Remarks

UWOs were a much anticipated development in ongoing efforts by nation states to tackle fraud, bribery and corruption. Supperstone J's judgment marks the first guidance from the English courts on what is required to be satisfied by the applying enforcement agency under the Proceeds of Crime Act 2002. The effectiveness of UWOs is likely to be a matter of intense focus from lawyers and others involved in anti-corruption and regulatory matters.