

Criminal Finances Act 2017: Unexplained Wealth Orders

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Abstract

The Criminal Finances Act (CFA) 2017 has introduced the novel Unexplained Wealth Orders (UWO) which represent a significant statutory overhaul in asset recovery in the United Kingdom (UK). In this chapter, the reader is introduced to the CFA 2017 with a specific focus on the provisions governing UWOs. The chapter includes case studies of the first three UWO cases in the UK, considers the mixed reaction to the introduction of these largely untested tools and assesses the legislative and compliance effectiveness of these novel provisions.

Civil asset recovery has historically been a much-debated area, however, despite initial challenges, society has gradually accepted it as a necessary tool for combating modern crime. One of the questions discussed in this chapter is whether the asset recovery provisions introduced by the CFA 2017 extend these powers beyond proportionate. In any event, deservedly or not, these new provisions attract much public interest. However, despite the popular belief that a UWO is a powerful tool in fighting the so called “oligarch wealth” it is clear from the legislation as well as the case law so far, that a UWO is not a “final destination” for enforcement agencies, but rather an “investigative tool” to assist in obtaining information to support asset recovery proceedings.

1. Introduction

This chapter will examine and evaluate the recent legislative changes in financial crime legislation in the United Kingdom (UK), in particular those introduced by the Criminal Finances Act (CFA) 2017 as recently amended by the Economic Crime (Transparency and Enforcement) Act (ECA) 2022. The CFA 2017 has not only introduced a number of essential changes to the anti-money laundering regime (AML),¹ created new corporate offences of failure to prevent facilitation of tax evasion,² but also implemented the novel Unexplained Wealth Orders (UWO).³ Although there is no doubt that the changes in the AML regime and ‘the failure to prevent’ offences created by the CFA 2017 are of high importance and deservingly attracted much interest, the focus of this chapter is on the novel UWO provisions. The so called ‘oligarch wealth’ and the consequent introduction and implementation of UWOs has dominated and continue to dominate the headlines. Most notably the first ever UWO case⁴ in this jurisdiction attracted unprecedented media interest as famously in this case the Respondent was reported to have spent £16m in Harrods over a decade.⁵

Presently, this public interest persists due to the ominous issues raised in the episodes of the popular BBC drama *McMafia*,⁶ and more importantly due to the conflict in

¹ Proceeds of Crime Act 2002, Part 7

² Criminal Finances Act 2017, Part 3

³ Criminal Finances Act 2017, Part 1

⁴ *National Crime Agency v Hajieva* [2018] EWHC 2534 (Admin); *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108 (appeal)

⁵ Dominic Casciani, ‘Woman in £16m Harrods spend fights wealth seizure’ BBC (London, 12 December 2019) < <https://www.bbc.co.uk/news/uk-50763204>> accessed 12th December 22

⁶ Dominic Casciani, ‘Zamira Hajiyeva: How the wife of a jailed banker spent £16m in Harrods’ BBC (London, 28 May 2019) < <https://www.bbc.co.uk/news/uk-48433012>> accessed 12 December 2022; Rupert Neate, ‘McMafia law: woman who spent £16m at Harrods is jailed banker's wife’ Guardian (London, 10 October 2018) < <https://www.theguardian.com/uk-news/2018/oct/10/wife-of-mcmafia-banker-with-16m-harrods-spending-habit-named>> accessed 12 December 2022

Ukraine⁷ which fuelled calls for a stricter approach to be taken against the so called “oligarch wealth”.⁸ This resulted in the implementation of the ECA 2022, which amongst other important changes, amended the UWO regime under FCA 2017,⁹ in order to remedy some of the problems highlighted by the UWO case law so far. However, as there have not been any UWOs reported since the ECA 2022 came into force, it remains to be seen how successful these amendments will be in practice.

As such, it is important to look at the events that led to the implementation of UWOs in more detail.

2. **Criminal Finances Act 2017**

In 2015, a report on “recovery of corrupt assets” published by Transparency International UK unsurprisingly concluded that ‘the regime was not fit for purpose’.¹⁰ The taskforce recommended the ‘adoption of a new investigative measure called a UWO, requiring a person holding property to explain their interest in that property, or in another words, explain their wealth’.¹¹ Following the National Risk Assessment of Money Laundering and Terrorist Financing in 2015,¹² and the publication of the Panama Papers,¹³ a consultation on the use of UWOs was launched by the UK

⁷ February 2022

⁸ Alex Therrien, ‘Ukraine conflict: UK sanctions target Russian banks and oligarchs’ BBC (London, 24 February 2022 <<https://www.bbc.co.uk/news/uk-60515626>> accessed 1 March 2022

⁹ Economic Crime (Transparency and Enforcement) Act 2022, Part 2

¹⁰ Transparency international; ‘Empowering the UK to Recover Corrupt Assets Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery’ (May 2015) <https://www.transparency.org.uk/sites/default/files/pdf/publications/March2016_UWO.pdf> accessed 02 June 2022

¹¹ *ibid*

¹² HM Treasury and Home Office, ‘UK national risk assessment of money laundering and terrorist financing’ (15 October 2015) <<https://www.gov.uk/government/publications/uk-national-risk-assessment-of-money-laundering-and-terrorist-financing>> accessed 15 July 2022

¹³ In 2016; see generally Sam Bourton & Nicholas Ryder, *Corrupt Corporations and the Facilitation of Tax Crimes: A Review of the United Kingdom's Enforcement Mechanisms*, 85 *Law and Contemporary Problems* 213-246 (2023)

Government. This resulted in the publication of the ‘Action Plan for Anti-Money Laundering and Counter-Terrorist Finance’,¹⁴ which stressed the need to create more effective legal powers for enforcement agencies, reforming the existing supervisory regime as well as better international cooperation in this area. The Government pledged that these changes will ‘represent the most significant change to the anti-money laundering and terrorist finance regime in over a decade.’¹⁵ Subsequently, the Criminal Finances Bill was introduced in October 2016 and received Royal Assent shortly after, on 27 April 2017 with UWO provisions coming into force on 31 January 2018.

Before the CFA 2017, the UK¹⁶ has not seen any significant developments in this area since the Proceeds of Crime Act (POCA) 2002. The CFA 2017, apart from adding fuel to the civil asset recovery debate, acted as a political tool when it was rushed through Parliament before the 2017 elections. This Act is ambitious and from the start intended to represent a significant statutory overhaul of this area. Accordingly, the preamble to the Act states that the Act was passed to,

amend the POCA 2002; make provision in connection with terrorist property; create corporate offences for cases where a person associated with a body corporate, or partnership facilitates the commission by another person of a tax evasion offence; and for connected purposes.¹⁷

¹⁴ HM Treasury and Home Office, ‘Action Plan for anti-money laundering and counter-terrorist finance (April 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517992/6-2118-Action_Plan_for_Anti-Money_Laundering__web_.pdf> accessed 14 June 2022

¹⁵ Ibid, page 3; see also see National Crime Agency, ‘Joint Money Laundering Intelligence Taskforce’ <<https://www.nationalcrimeagency.gov.uk/what-we-do/national-economic-crime-centre>> accessed 06 May 2022

¹⁶ The main focus within the UK is on the jurisdiction of England and Wales

¹⁷ Preamble to the Criminal Finances Act 2017

In addition, the Explanatory Notes to the Act state that the ‘FCA makes the legislative changes necessary to give law enforcement agencies new capabilities and powers to recover the proceeds of crime, and to tackle money laundering, corruption and terrorist financing.’¹⁸ As such, the Act extends POCA by introducing a range of new civil enforcement powers, the most significant of which are UWOs and Account Freezing Orders (AFOs).¹⁹

Looking specifically at UWO provisions, Part 1 Chapter 1 of the Act creates the novel UWOs and supporting AFOs,²⁰ which can be applied for by ‘enforcement authorities’,²¹ in relation to a specific property and without notice if necessary.²² The Home Office described UWOs ‘as investigation orders issued by the High Court on satisfaction of a number of tests (...), and a UWO as an investigative power it is not (by itself) a power to recover assets.’²³ This is an important clarification. Firstly, the Home Office confirms the limited reach of a UWO as an investigative tool, rather than the ultimate ‘solve it all’ phenomenon that it is often portrayed by the media but also by the

¹⁸ Explanatory notes to the Criminal Finances Act 2017, para 1

¹⁹ Criminal Finances Act 2017, Part 1 Chapter 1, amends Part 8 of POCA 2002

²⁰ Criminal Finances Act 2017, Part 1, Chapter 1

²¹ Proceeds of Crime Act 2002, Part 1 Ch 1, s.362A, namely the National Crime Agency, HM Revenue and Customs, the Financial Conduct Authority, the Director of the Serious Fraud Office, or the Director of Public Prosecutions,

²² Criminal Finances Act 2017, Part 1, Chapter 1

²³ Home Office, ‘Circular 003/2018: unexplained wealth orders’ (February 2018)

<<https://www.gov.uk/government/publications/circular-0032018-criminal-finances-act-unexplained-wealth-orders/circular-0032018-unexplained-wealth-orders>> accessed 20 August 2022, para. 2

government.²⁴ Secondly, it clearly identifies that there are a number of tests or requirements that needs to be satisfied for a UWO to be granted.

The first requirement is that ‘The High Court must be satisfied that there is reasonable cause to believe that the respondent holds the property (in respect of which the order is sought)²⁵ and the value of the property is greater than £50,000’.²⁶ Therefore, it is clear that the person must ‘hold’ the relevant property. In addition to the natural meaning of “holding” property, crucially, this would include situations ‘where a person has effective control over the property,²⁷ a person is the trustee of a settlement in which the property is comprised²⁸ or a person is a beneficiary (whether actual or potential) in relation to such a settlement’.²⁹ In this respect, ‘a person is to be taken to have “effective control” over property if, from all the circumstances, it is reasonable to conclude that the person exercises, is able to exercise, or is entitled to acquire, direct or indirect control over the property’.³⁰ The reader will notice that this point will be significant when considering the UWO caselaw later in this chapter.

²⁴ Editorial, ‘Russian oligarchs in UK told to explain luxury lifestyles’ BBC (London, 3 February 2018) <<https://www.bbc.co.uk/news/uk-42926819>> accessed 15 April 2022; Benjamin Kentish, ‘Oligarchs suspected of corruption face being forced to explain source of their wealth’ Independent (London, 3 February 2018) <<https://www.independent.co.uk/news/uk/politics/oligarchs-corruption-unexplained-wealth-order-money-laundering-russia-ben-wallace-london-a8192401.html>> accessed 15 April 2022; HM Treasury, ‘UK takes top spot in fight against dirty money’ (7 December 2018) <<https://www.gov.uk/government/news/uk-takes-top-spot-in-fight-against-dirty-money>> accessed 22 August 2022

²⁵ Criminal Finances Act 2017, Proceeds of Crime Act 2002, s.362B (2)(a)

²⁶ Criminal Finances Act 2017, Proceeds of Crime Act 2002, s.362B (2)(b)

²⁷ Proceeds of Crime Act 2002, s.362H(2)(a)

²⁸ Proceeds of Crime Act 2002, s.362H(2)(b)

²⁹ Proceeds of Crime Act 2002, s.362H(2)(c)

³⁰ Proceeds of Crime Act 2002, s.362H (3)

The second requirement is that ‘the High Court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property’.³¹ Importantly, an alternative test has been added to this section by the recent ECA 2002 which states that this requirement may also be satisfied if ‘there are reasonable grounds for suspecting that the property has been obtained through unlawful conduct’.³²

The third requirement is that the ‘High Court must be satisfied that either the respondent is a politically exposed person’ (PEP)³³, ‘or there are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime’³⁴ ‘or a person connected with the respondent is, or has been, so involved’.³⁵ The word ‘or’ is important here as it clearly indicates that a UWO can be sought under any of the two limbs, either under the ‘PEP’ provision³⁶ or under the ‘involved/connected to serious crime provision’.³⁷ It is important to note this vital distinction as it follows that if a UWO is applied for in relation to a PEP, an involvement or link to serious crime is not necessary. The simple fact that someone is a PEP seems to satisfy this requirement.

In this respect, a PEP is defined as, ‘a person who is or has been, entrusted with prominent public functions by an international organisation or by a State other than the

³¹ Proceeds of Crime Act 2002, s.362B (3)

³² Proceeds of Crime Act 2002, s.362B (3)(b)

³³ Proceeds of Crime Act 2002, 362B (4)(a)

³⁴ Proceeds of Crime Act 2002, 362B (4)(b)(i) ‘whether in a part of the United Kingdom or elsewhere.’

³⁵ Proceeds of Crime Act 2002, 362B (4) (b)(ii)

³⁶ Proceeds of Crime Act 2002, 362B (4)(a)

³⁷ Proceeds of Crime Act 2002, 362B (4)(b)

United Kingdom or another EEA State; a family member, known to be a close associate (...) or otherwise connected with that person'.³⁸ It follows therefore that under these provisions such a PEP must be an individual from outside the UK and EEA and as such, this provision does not apply to EU/EEA or domestic PEPs. Therefore, it is clear that this provision makes differences between the treatment of people not only based on their social status (i.e., 'prominent public figure')³⁹ but also on their nationality (non-EEA/UK).⁴⁰

The next step is crucial for the outcome of the UWO. Having been served with an order, 'the respondent must provide a statement setting out the nature and extent of their interest in the property, explaining how the property was obtained (...) as well as any other information specified in the UWO'.⁴¹ In theory, upon a receipt of a satisfactory and timely answers, no further action is to be taken against the respondent. However, a rebuttable presumption arises,

if the respondent fails without reasonable excuse to comply (or purport to comply) with the requirements imposed by the UWO within the period specified by the court, the property is presumed to be recoverable property (i.e., property obtained through unlawful conduct) for the purpose of civil recovery proceedings under Part 5 of POCA, unless the contrary is shown.⁴²

³⁸ Proceeds of Crime Act 2002, 362B (7); see also Proceeds of Crime Act 2002, 362B (8)

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ Proceeds of Crime Act 2002, 362A (3)

⁴² Proceeds of Crime Act 2002, s.362C(2) and (5); *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 9

Ultimately, an application for a UWO can be brought at any stage of the investigation and does not have to be linked to any proceedings. Therefore, it follows that the nature of UWOs is investigative and crucially, no criminal offence needs to be proved. Indeed, the UWO caselaw so far⁴³ confirms that a UWO is an investigative tool rather than a power to recover assets.⁴⁴ This is consistent with the sentiments expressed in the Circular on UWOs in which the Home Office confirmed that UWOs are simply ‘an addition to a number of powers already available in POCA to investigate and recover the proceeds of crime and should therefore not be viewed in isolation’.⁴⁵

Conversely, CFA 2017 imposes criminal liability under s 362E in instances where ‘a person (...) in purported compliance with a requirement imposed by an UWO, makes a statement that the person knows to be false or misleading,⁴⁶ or recklessly makes a statement that is false or misleading in a material particular’.⁴⁷ The penalty for this offence is ‘on conviction on indictment, to imprisonment for a term not exceeding 2 years, or to a fine, or to both’,⁴⁸ and ‘on summary conviction⁴⁹ to the general limit in a magistrates’ court, or to a fine, or to both’⁵⁰

⁴³ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin); *National Crime Agency v Hajiyeva* [2020] EWCA Civ 108; *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin); *National Crime Agency v Mansoor Mahmood Hussain & others* [2020] EWHC 432 (Admin)

⁴⁴ *ibid*

⁴⁵ Home Office, ‘Circular 003/2018: unexplained wealth orders’ (February 2018) <<https://www.gov.uk/government/publications/circular-0032018-criminal-finances-act-unexplained-wealth-orders/circular-0032018-unexplained-wealth-orders>> accessed 20 August 2022, para 2.

⁴⁶ Proceeds of Crime Act 2002, 362E (1)(a)

⁴⁷ Proceeds of Crime Act 2002, 362E (1)(b)

⁴⁸ Proceeds of Crime Act 2002, 362E (2)(a)

⁴⁹ in England and Wales

⁵⁰ Proceeds of Crime Act 2002, 362E (2)(b)

Finally, as noted above, the notable recent amendments implemented by the ECA 2022 include registration of overseas companies and other entities,⁵¹ an alternative test to the ‘Income Requirement’ for UWOs discussed later in this chapter⁵² and the much needed “cost capping,”⁵³ following the considerable cost of UWO proceedings so far.

3. Case law

The next section will look at the first three UWOs⁵⁴ that have been granted in this jurisdiction.

3.1 UWO 1: *National Crime Agency v Hajiyeva*⁵⁵

Starting with the test case, the first ever UWOs were granted initially against Mrs A following a without notice application by the National Crime Agency (NCA).⁵⁶ Following the subsequent ruling that the identity of Mrs A as Mrs Hajiyeva could be revealed, the facts of this case have been widely reported.⁵⁷ Mrs Hajiyeva was required to show the lawful source of the money used to purchase the property in Knightsbridge and a golf club in Berkshire, with staggering total value of approximately £22m.⁵⁸

⁵¹ Economic Crime (Transparency and Enforcement) Act 2022, Part 1

⁵² Economic Crime (Transparency and Enforcement) Act 2022, Part 2, s.47; Proceeds of Crime Act 2002, s.362B(3)

⁵³ Economic Crime (Transparency and Enforcement) Act 2022, s 52

⁵⁴ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin) 2018 WL; *National Crime Agency v Mansoor Mahmood Hussain & others* [2020] EWHC 432 (Admin); *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin)

⁵⁵ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin); *National Crime Agency v Hajiyeva* [2020] EWCA Civ 108 (appeal)

⁵⁶ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin) before the Honourable Mr Justice Supperstone

⁵⁷ Dominic Casciani, ‘Woman who spent £16m in Harrods revealed’ BBC (10 October 2018) < <https://www.bbc.co.uk/news/uk-45812210> > accessed 22 August 2022

⁵⁸ *National Crime Agency, Court dismisses UWO appeal by Zamira Hajiyeva*’ NCA (5 February 2020) < <https://nationalcrimeagency.gov.uk/news/court-dismisses-uwo-appeal-by-zamira-hajiyeva?highlight=WyJ1d28iLCJ1d29zIl0> > accessed 1 May 2022

Unsurprisingly, this case attracted unprecedented interest by the media and the general public for many reasons, but famously for the fact that, the investigation revealed that, Mrs Hajiyeva allegedly spent startling £16m in Harrods over a decade,⁵⁹ understandably triggering public outcry over unchallenged ‘oligarch wealth’ in the UK.

To better understand how these novel provisions work in practice, it is worth looking at the fact of this case and the application of the provisions in more detail. Starting with the facts, by the end of this chapter, the reader will learn that “complexity” is the overriding common factor in all three UWO cases. This is unsurprising as these novel provisions have been ultimately passed to remedy the inadequacy of the previous provisions to deal with cases involving complicated arrangements, including complex and offshore ownership structures and trusts.⁶⁰ The three cases considered in this chapter demonstrate not only how these provisions are attempting to deal with such complexities, but also provide some indication of their success rate.

In the present case, applying the requirements discussed above, the NCA submitted that they had ‘reasonable cause to believe that Mrs Hajiyeva “held” the properties specified in the order and the value of the property was greater than £50,000’.⁶¹ Further, the NCA submitted that Mrs Hajiyeva was caught by the definition of a PEP (see above)⁶² because she was a wife of Jahangir Hajiyev, ‘who was from 2001 to 2015 the chairman of the International Bank of Azerbaijan, in which the State had a controlling stake, and

⁵⁹ Dominic Casciani, ‘Woman who spent £16m in Harrods revealed’ BBC (10 October 2018) < <https://www.bbc.co.uk/news/uk-45812210> > accessed 22 August 2022

⁶⁰ Explanatory notes to the Economic Crime (Transparency and Enforcement) Act 2022, para 14

⁶¹ Proceeds of Crime Act 2002, s.362B

⁶² Proceeds of Crime Act 2002, 3362(6)(b) and (8)

as such he was a PEP for the purposed of the Act'.⁶³ He 'was arrested in Azerbaijan in 2015 and subsequently charged with various offences including misappropriation, abuse of office, large-scale fraud and embezzlement, convicted and sentenced to 15 years imprisonment'.⁶⁴ It was the NCA's case that the properties in their UWO applications were linked to him and therefore it followed, that they were linked to the proceeds of his crime.⁶⁵ Conversely, it is important to note that, Mrs Hajiyeva herself was not convicted of these offences.⁶⁶

In her appeal against the orders, Mrs Hajiyeva's argued that she was not a PEP. This submission was rejected by the court,⁶⁷ concluding that 'Mrs Hajiyeva was a PEP because it was common ground that she was a "family member" (wife) of Mr Hajiyev who was a PEP and as such she fell within the definition of a PEP'.⁶⁸ Equally, the court disagreed with her submission that the 'income requirement'⁶⁹ was not met.⁷⁰ The reader will recall that for a UWO to be granted, 'the court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property'.⁷¹ The court felt that Mrs Hajiyeva's explanation of the 'lawful sources of income' was unsatisfactory when she stated in her evidence that 'as to the purchase of the property, this was my husband's responsibility. I had no

⁶³ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 16-17

⁶⁴ *Ibid*, para 18-19

⁶⁵ *ibid*

⁶⁶ *Ibid*, para 20,

⁶⁷ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 54

⁶⁸ Proceeds of Crime Act 2002, s. 362B (4); *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 24 and 54

⁶⁹ Proceeds of Crime Act 2002, s. 362B (3)

⁷⁰ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 88

⁷¹ Proceeds of Crime Act 2002, s. 362B (3)

knowledge of any of the payments made to purchase the property, our family home, their source, or any other details.’⁷² Therefore, the court concluded that in the absence of evidence of sufficient income by Mrs Hajiyeva and due to the fact that her husband Mr Hajiyev ‘was a state employee⁷³ and therefore it was very unlikely that he would have sufficient income to fund the acquisition of these properties,’ their wealth could not be explained,⁷⁴ and as such the presumption has not been rebutted in this case.

In an important clarification regarding a potential interference of UWOs with the ‘right to peaceful enjoyment of their possessions under Protocol 1 Art 1, of the European Convention on Human Rights (ECHR)’, the court did not accept that ‘the UWO interfered with the interests of Mrs and Mr Hajiyev’s peaceful enjoyment of their property as the UWO only concern property in a general sense’.⁷⁵ The court confirmed that ‘mere inference with the enjoyment of property is not sufficient and loss of a quiet and pleasant environment, without evidence of loss of value, is not enough to engage Art. 1’⁷⁶ Equally, the court disagreed that ‘the UWO offended the privilege against self-incrimination and spousal privilege⁷⁷ because the privileges apply only as regards criminal offences under the law of any part of the UK and penalties provided for by such law’.⁷⁸ The court’s view was that ‘Parliament in creating the UWO procedure has necessarily intended the privileges be abrogated’.⁷⁹ The court further explained that

⁷² *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 59

⁷³ ‘Between 1993 and 2015’, *Ibid*, para 63

⁷⁴ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 63

⁷⁵ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 99, Mr Justice Supperstone citing Carnwath LJ in *Thomas v Bridgend CBC* [2012] QB 512, para 38.

⁷⁶ *Ibid*

⁷⁷ Civil Evidence Act 1968, s.14(1); *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 105.

⁷⁸ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin) at para [106]

⁷⁹ *Ibid*, para 110

because a ‘UWO imposes a requirement to provide information and to produce documents’⁸⁰ ‘these powers would be rendered very largely nugatory if privilege applied here.’⁸¹ Lastly, as to the court’s discretion to grant such an order, the court was satisfied that ‘the statutory criteria for making the order have been met, any interference with Mrs Hajiyeva’s rights was proportionate, and the terms of the order were justified’.⁸² Dismissing the appeal, the court pointed out that, in any event ‘the UWO has been made against Mrs Hajiyeva as she informed the Home Office that she is the ultimate beneficial owner and the registered proprietor of the property’.⁸³

Mrs Hajiyeva’s list of unsuccessful and costly challenges included an appeal to the Court of Appeal,⁸⁴ where the court, dismissing the appeal pointed out that the report which was submitted in evidence as an explanation of Mrs Hajiyeva’s husband’s wealth ‘was not such as to come close to undermining the reasonable suspicion that such income would have been insufficient to fund the purchase of the property’,⁸⁵ and in fact, ‘posed more questions as to the source of his wealth than it answered’.⁸⁶ Consequently, at these early stages, the successful outcome of the “test” UWO case was perceived as an ultimate success, not only for the NCA but also for these innovative legislative provisions.

⁸⁰ *Ibid*, para 112; Proceeds of Crime Act 2002, s.362A (3), (5) and (6)

⁸¹ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 112

⁸² *Ibid*, para 117-121; para 119

⁸³ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), para 120

⁸⁴ *National Crime Agency v Hajiyeva* [2020] EWCA Civ 108 per Lord Burnett of Maldon, Lord Justice Davis and Lord Justice Simon; National Crime Agency, Court dismisses UWO appeal by Zamira Hajiyeva’ NCA (5 February 2020) <

<https://nationalcrimeagency.gov.uk/news/court-dismisses-uwo-appeal-by-zamira-hajiyeva?highlight=WyJ1d28iLCJ1d29zII0>> accessed 1 May 2022

⁸⁵ *National Crime Agency v Hajiyeva* [2020] EWCA Civ 108, para 42

⁸⁶ *Ibid*, para 43

Ultimately, this case demonstrates the application of the provisions to a PEP. In contrast, the next case considered in this chapter, *NCA v Hussain*,⁸⁷ focuses on the application of a UWO to a person with a link to serious crime under s. 362B(4)(b).⁸⁸

3.2 UWO 2: *National Crime Agency v Hussain*⁸⁹

The second UWO case brought by the NCA was against Mansoor Hussain.⁹⁰ Again, in this case the NCA made a successful without notice application for a UWO and an IFO against Mr Hussain. However, this case was different in a number of aspects. Firstly, it was brought under the second limb of s.362B(4), namely the so called “serious crime requirement”,⁹¹ and did not involve a non-EEA/UK PEP. Secondly, it did not relate to the so called ‘oligarch wealth’ but rather to organised crime in the UK. Thirdly, in contrast to the other two UWO cases considered in this chapter, Mr Hussain ultimately “agreed a settlement with the NCA”.⁹²

By way of background, ‘Mr Hussain was a self-employed director of a number of companies purportedly engaged in property development and management and has never been convicted of a criminal offence’.⁹³

⁸⁷ *National Crime Agency v Hussain & others* [2020] EWHC 432 (Admin)

⁸⁸ Proceeds of Crime Act 2002

⁸⁹ *National Crime Agency v Mansoor Mahmood Hussain, Laurel Terrace Limited, Land88 Limited, Jayco88 Limited, Cubic Business Park Limited, 88M Group Limited, 2 Park Square Limited* [2020] EWHC 432 (Admin)

⁹⁰ At the time of writing only the NCA has applied for UWOs

⁹¹ Proceeds of Crime Act 2002, s.362B(4)(b)

⁹² Dominic Casciani, ‘Unexplained Wealth Orders: Suspected money launderer gives up £10m of property.’ BBC (7 October 2020) <<https://www.bbc.co.uk/news/uk-54442979>> accessed 10 July 2022

⁹³ ‘Apart from one police caution for battery in 2009, *National Crime Agency v Mansoor Mahmood Hussain & others* [2020] EWHC 432 (Admin), per Mr Justice Murrey para 7

The NCA submitted that,

‘they had sufficient evidence to support a reasonable suspicion that Mr Hussain, acted as a "professional enabler" or professional money launderer for a number of well-known criminals who operate in the Leeds/Bradford area...channelling the money through corporate vehicles in order to fund the purchase of properties, principally held by or through companies that he controlled’⁹⁴ and ‘that there are reasonable grounds for suspecting that the respondent's lawfully obtained income would have been insufficient to enable the respondent to obtain the properties’.⁹⁵

In contrast to *NCA v Hajiyeva*⁹⁶ above (as well as *NCA v Baker*⁹⁷ considered later in this chapter), in which the UWOs was granted against PEPs, in *NCA v Hussain*,⁹⁸ the Serious Crime requirement played a central. As explained above, for the Serious Crime Requirement to be met, ‘the court must be satisfied, that there are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime,⁹⁹ or a person connected with the respondent is, or has been, so involved.’¹⁰⁰ The court in this case explained that ‘a person has been involved in serious crime if he has committed a serious offence; has facilitated the commission by another person of a serious offence; or has conducted himself in a way that was likely to facilitate the commission by

⁹⁴ ‘Worth up to £9.97m’, *NCA v Hussain* [2020] EWHC 432 (Admin), para 10

⁹⁵ *Ibid*, Proceeds of Crime Act 2002, 362B (3)

⁹⁶ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin)

⁹⁷ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin)

⁹⁸ *National Crime Agency v Mansoor Mahmood Hussain & others* [2020] EWHC 432 (Admin),

⁹⁹ ‘Whether in a part of the United Kingdom or elsewhere’

¹⁰⁰ Proceeds of Crime Act 2002, 362B (4)(b)

himself or another person of a serious offence'.¹⁰¹ The NCA submitted that 'Mr Hussain played a wider role in relation to organised crime in the Bradford area, standing at the centre of a network of organised crime as a designated "cleanskin."'¹⁰² As such, the NCA submitted that 'Hussain's activities not only facilitated the commission of individual serious crimes, but they also facilitated organised crime on a large scale'.¹⁰³ Ultimate, excepting the NCA's submissions, the court was satisfied that all the relevant elements required by the Act were satisfied and granted the UWO, which was the very first UWO under this limb. In contrast to the other two UWO cases considered in this chapter, in this case, although Mr Hussain complied with the order, albeit unsuccessfully, he ultimately "agreed a settlement with the NCA in which he has handed over properties totalling to just under £10million".¹⁰⁴

Arguably, considering the court's unproblematic interpretation and application of the provisions in this case, the law under 'reasonable grounds for suspecting that the person is involved/connected with serious crime'¹⁰⁵ limb seems not only more straightforward and conclusive, but also far more cost efficient. It follows therefore, that making an application under this limb might be more effective. This proposition is consistent with the approach and results in this area in other jurisdictions.¹⁰⁶

¹⁰¹ *National Crime Agency v Hussain* [2020] EWHC 432 (Admin), para 45-55; Proceeds of Crime Act 2002, s. 362B(9)(a); see also Serious Crime Act 2007

¹⁰² *National Crime Agency v Hussain* [2020] EWHC 432 (Admin), para 106: 'a person with no serious criminal convictions to this name, who enables those operating the criminal activities of the organised crime gangs with which he is connected by providing a money-laundering service.'

¹⁰³ *Ibid*, para 106

¹⁰⁴ Dominic Casciani, 'Unexplained Wealth Orders: Suspected money launderer gives up £10m of property.' BBC (7 October 2020) <<https://www.bbc.co.uk/news/uk-54442979>> accessed 10 July 2022

¹⁰⁵ Proceeds of Crime Act 2002, 362B (4)(b)

¹⁰⁶ See for example UWO provisions in Australia and Civil Asset Recovery provisions in Ireland.

Ultimately, this case was yet another successful UWO test case with a much-welcomed progress in the long journey of ‘fine tuning’ of these novel and largely untested provisions. Consequently, following the NCA’s double success, it seemed that the legislation was drafted well as it allowed the courts to appropriately engage with relevant provisions, as well as clarify where clarification was needed. The overriding objective of the provisions was also achieved, namely, to investigate and deal with unexplained wealth and any potential proceeds of crime.

However, everything dramatically changed only few months later as the NCA’s winning streak was broken by the ruling in a complex case of *NCA v Baker*,¹⁰⁷ where not only the court held for the respondent but also, undeniably criticised the NCA’s perception of these novel provisions.¹⁰⁸

3.3 UWO 3: *National Crime Agency v Baker*¹⁰⁹

The third and, at the time of writing this chapter, the last reported UWO, (and correspondent IFO) was brought once again without notice by the NCA, against Mr Baker and granted by Mr Justice Supperstone in May 2019. Consistently with the previous cases, the media covered the case extensively.¹¹⁰ The mystery of the UWO

¹⁰⁷ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin)

¹⁰⁸ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin) see judgment of Mrs Justice Lang

¹⁰⁹ *Ibid*

¹¹⁰ Jamie Johnson, ‘Criminal wealth of Khazak dictator ‘lives on’ in London, High Court McMafia trial told’ *The Telegraph* (11 March 2020)

<<https://www.telegraph.co.uk/news/2020/03/11/criminal-wealth-khazak-dictator-lives-london-nca-tells-high/>> accessed 20 May 2022; Ben Ellery, ‘Plush London homes ‘were bought with McMafia cash’ *The Times* (12 March 2020)

Respondent Mr Baker being an English solicitor was quickly solved, as it was reported that the UWOs actually related to three properties in London prominent areas, registered to Foundations in Panama¹¹¹ and Curaçao.¹¹² In addition, it was the NCA's case that the properties were in fact owned for the benefit of Dariga Nazarbayeva (DN) and her son Nurali Aliyev (NA), both prominent PEPs in Kazakhstan.¹¹³ In that respect, the NCA submitted that 'the properties were in fact acquired as a means of laundering the proceeds of unlawful conduct by NA's father and DN's ex-husband Mr Rakhat Aliyev (RA), who died in prison in Austria in 2015'.¹¹⁴ The reason why Mr Baker, 'a solicitor specialising on trusts law¹¹⁵ and a professional trustee',¹¹⁶ was one of the respondents¹¹⁷ was because he 'acted in his professional capacity in relation to the properties and was the president of the Foundations in Panama which were the registered owners of property 1 and 3'.¹¹⁸

In response to the UWO 'extensive information about the purchase and transfer of the properties, their registered owners and ultimate beneficial owners was provided'.¹¹⁹ It was disclosed that although it was correct that 'DN was the ultimate beneficial owner

<<https://www.thetimes.co.uk/article/plush-london-homes-were-bought-with-mcmafia-cash-hk80v0bft>> accessed 20 May 2022

¹¹¹ Property 1 and 3; *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), para 67 and 156

¹¹² Property 2, *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), para 174

¹¹³ Daughter and grandson of former President of Kazakhstan; *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), para 6

¹¹⁴ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), para 3

¹¹⁵ of England and Wales

¹¹⁶ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), para 146

¹¹⁷ There were five Respondents in this case namely Andrew Baker (1), Villa Magna Foundation (2), Manrick Private Foundation (3), Alderton Investments Limited (4) and Tropicana Assets Foundation (5). All three UWOs concerned properties in London.

¹¹⁸ *ibid*, para 3, para 146

¹¹⁹ *ibid*, para 6

of Properties 1 and 3 and her son, NA of Property 2, the basis of the NCA's application was factually incorrect, as the purchases of the properties were unconnected to RA and his supposed criminal activities and he never was the ultimate beneficial owner of the properties'.¹²⁰ It was submitted that 'DN had her own wealth, independent of her ex-husband'.¹²¹ She was 'independently economically active, she was a successful businesswoman, a prominent politician in Kazakhstan and a daughter of an ex-President of Kazakhstan'.¹²²

The court accepted these submissions and in contrast to the first two UWO cases discussed earlier in this chapter, in the present case, the respondents and the beneficiary owners ultimately succeeded in explaining the origins of their wealth, satisfying the court that the money these properties were bought with had no link to RA and his criminal activities.¹²³ Discharging the orders,¹²⁴ Mrs Justice Lang cited the Code of Practice, which states that,

a UWO provides law enforcement with a tool to obtain information and documentation in relation to property that appears to be disproportionate to the known income of an individual or company. A fundamental aim of the power, therefore, is to access evidence that would otherwise not be available.¹²⁵

¹²⁰ Ibid, para 6-7

¹²¹ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin)

¹²² first President, Nursultan Nazarbayev, who resigned from office in March 2019 after nearly three decades in power; *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin) para 71.

¹²³ Ibid

¹²⁴ Ibid, para 218

¹²⁵ Ibid, para 61-62; Home Office revised Code of Practice reflecting amendments made by the CFA 2017 (31 January 2018), para 176.

She stressed that ‘it is important not to lose sight of the relatively limited purpose of UWOs, only being one of a number of investigative tools contained in Part 8 of POCA 2002, whose purpose is simply to obtain information’.¹²⁶ She further stated that a UWO is potentially intrusive¹²⁷ and stressed that ‘obtaining of confidential material using compulsory powers attracts the protection of Article 8 ECHR. Therefore, it follows that the use of these powers must always be proportionate’¹²⁸ and, in line with the Code of Practice ‘fully and clearly justified (...) and it should always be considered whether the necessary objectives can be achieved by less intrusive means.’¹²⁹

A number of points are clear from this judgment. Firstly, Mrs Justice Lang urged ‘the need for caution in treating complexity of property holding through corporate structures as grounds for suspicion’,¹³⁰ in the absence of ‘additional evidential basis.’¹³¹ She stated that,

the use of complex offshore corporate structures or trusts is not, without more, a ground for believing that they have been set up, or are being used, for wrongful purposes, such as money laundering. There are lawful reasons – privacy, security, tax mitigation - why very wealthy people invest their capital in complex offshore corporate structures or trusts.¹³²

¹²⁶ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), para 61

¹²⁷ *Ibid*, para 63

¹²⁸ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), Mrs Justice Lang at para. 64 citing *R v (Hafner) v City of Westminster Magistrates Court* [2009] 1 WLR 1005, at 21-22

¹²⁹ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), para 65, Home Office revised Code of Practice reflecting amendments made by the CFA 2017 (31 January 2018), para 21.

¹³⁰ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), para 96

¹³¹ *Ibid*, para 97

¹³² *Ibid*, para 97

In addition to discharging the orders, Mrs Justice Lang expressed her concern over the way the case was investigated and presented by the NCA. On one occasion she went as far as stating that ‘the NCA failed to carry out a fair-minded evaluation of the new information provided by the Respondents’.¹³³ This is an important clarification as it reminds the enforcement authorities of their obligation to continuously review their cases and act accordingly if new information is discovered or disclosed.

4. **Conclusion**

Evidently, there are some legal and compliance issues and uncertainties surrounding UWOs. It is not in dispute that civil recovery process has historically been a controversial area, however, it seems that despite initial challenges (for instance, on the issue of human rights), the society has gradually accepted it as a necessary tool for combating modern crime.

Nevertheless, one of the questions posed here is whether UWO provisions pose a mission creep to extend civil recovery powers beyond proportionate. Ultimately, the legislation seems to treat people differently, depending on their nationality and social status as there are significant differences in the UWO processes depending on whether such an order involves a PEP or is applied for under the ‘serious crime’ limb. In relation to PEPs, involvement in serious crime does not need to be considered and yet, the PEP may face a penalty if he or she does not provide a timely or satisfactory answer. This is

¹³³ Ibid, para 217

a vital distinction because, the respondent in such a case is, in a way, required to ‘prove’ their ‘innocence’ i.e., that their wealth is legitimate.¹³⁴

And indeed, in the first UWO case, Mrs Hajiyeva's lawyers stressed that, the UWO she was subject to as a PEP ‘does not and should not be taken to imply any wrongdoing by her.’¹³⁵ This is clear from the strict interpretation of the UWO legislation. This is however easier said than done. Although this distinction will be clear to the legal practitioners, this might not be obvious to the general public and the media. In the words of Mrs Justice Lang in *Baker* ‘the obtaining of confidential material using compulsory powers attracts the protection of Article 8 ECHR, it follows that the NCA’s exercise of its UWO powers must be proportionate.’¹³⁶ In any event, it is clear that a UWO is not a ‘final destination’ for the enforcement agency, but rather an ‘investigative tool’ to assist in obtaining information, which would potentially otherwise be inaccessible, perhaps due to secrecy laws in offshore jurisdictions.

Ultimately, in agreement with the courts, it is questionable whether UWOs are worth the media attention they are getting. On the other hand, some may argue that any publicity that brings attention to these pressing issues is better than none.

¹³⁴ See *Woolmington v DPP* [1935] UKHL 1

¹³⁵ *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin)

¹³⁶ *National Crime Agency v Baker & others* [2020] EWHC 822 (Admin), Mrs Justice Lang at para. 64 citing *R v (Hafner) v City of Westminster Magistrates Court* [2009] 1 WLR 1005, at 21-22

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