

Court of Appeal provides guidance on unexplained wealth orders (National Crime Agency v Hajiyeva)

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Corporate Crime analysis: Mrs Hajiyeva's case attracted a great deal of publicity when the unexplained wealth order (UWO) was imposed upon her in February 2018. Known for her lavish spending in Harrods, her case caught the interest of the press—not least as it was the first UWO to have been obtained. Her appeal focused on two primary arguments. Firstly that her husband was not a politically exposed person (PEP) for the purposes of the Proceeds of Crime Act 2002 (POCA 2002) and secondly that reliance upon her husband's conviction in Azerbaijan to establish the source of her wealth was misplaced because her husband's conviction was as a result of a grossly unfair trial. The Court of Appeal had little difficulty in dismissing the appeal. In doing so the court upheld the definition of a PEP as adopted by Mr Justice Supperstone in his original ruling, ensuring that a broad definition will continue to be applied in future cases. Written by Sarah Wood, barrister, at 5 St Andrews Hill, London.

National Crime Agency v Hajiyeva [\[2020\] EWCA Civ 108](#), [\[2020\] All ER \(D\) 34 \(Feb\)](#)

What are the practical implications of this case?

Law enforcement agencies have, to date, made limited use of UWOs. While the SFO, FCA, HMRC and CPS have the ability to apply for the order, only the National Crime Agency (NCA) have made use of the power. This judgment confirms that the threshold for obtaining an order is very low which may mean that there will be an increase in the number of applications made. By not restricting the definition of a PEP, the Court of Appeal has ensured that this statutory criterion remains broad and relatively easy to meet. However when making future applications, law enforcement agencies would be wise to ensure that they do not rely purely upon an overseas conviction to establish that there is a reasonable ground to suspect that an individual's legitimate income is insufficient if there is any possibility that it could be argued that the conviction was obtained unfairly.

What was the background?

Mrs Hajiyeva is the wife of the former chair of the International Bank of Azerbaijan who was sentenced to 15 years imprisonment in 2016 following his convictions in Azerbaijan for misappropriation, abuse of office, large-scale fraud and embezzlement while employed by the bank. On 19 February 2018, the NCA filed the application for its first UWO in respect of a property that had been purchased on 22 December 2009 for £11.5m in the name of Vicksburg Global Inc. That application was granted without notice of hearing on 27 February 2018 by Supperstone J, as was a further UWO in respect of an additional property. Mrs Hajiyeva challenged the UWO at a hearing that took place between 24 and 26 July 2018. The judge rejected the challenge in a judgment that was handed down on 3 October 2018. On 29 March 2019, Haddon-Cave LJ granted permission to Mrs Hajiyeva to appeal the order of 3 October 2018 on the basis that the appeal raised issues in relation to the first UWO case to come before the courts and that it would be beneficial to have guidance from the Court of Appeal on the scope of statutory powers underlying UWOs.

What did the court decide?

Introduced by the [Criminal Finances Act 2017](#), UWOs enable the High Court to direct that an individual must provide a statement setting out their interest in particular property and explain how they have acquired it. Before making a UWO the court must be satisfied that (i) there are reasonable grounds to suspect that the known sources of the individual's income would have been insufficient to enable the individual to acquire the property and (ii) that the individual is either a PEP or that there are reasonable grounds to suspect that they are involved in serious crime. Mrs Hajiyeva's appeal focused on both preconditions. Firstly she argued that Supperstone J had erred in having placed reliance upon Mr Hajiyev's conviction as that had been obtained unfairly. While acknowledging that there may be cases where the circumstances of a foreign conviction may be such that it could not form a proper ground for reasonably suspecting that lawful income was insufficient to enable the acquisition of material property, the Court of Appeal stated that this case did not fall within that category. This was

because the fact of the conviction was only one of a number of factors relied upon by the NCA in its application. The other factors included the fact that Mr Hajiyev was a state employee between 1993 and 2015 and his legitimate income would have been insufficient to purchase the property. Similarly, while there was evidence that he had been involved with companies and property transactions, the income generated was insufficient to undermine the suspicion.

Secondly Mr Hajiyev sought to argue that the definition of a PEP as set out within [POCA 2002, s 362B](#) required the person to have been entrusted with prominent public functions by the state. The court rejected that argument and in doing so found that there was no need for the prominent public function to have been imposed by the state. The court found, by reference to European Directives, that it was not necessary to look to see how the role had been created. It followed that, having found that the Bank was a state-owned enterprise, Mr Hajiyev fell within the definition of a PEP. As a family member, Mrs Hajiyeva was also found to be a PEP in accordance with the statute.

In addition to challenging whether the preconditions for the imposition of an order had been met, Mrs Hajiyeva also argued that the UWO offended the rule against self-incrimination (as the NCA could not give an undertaking as to the use of the statement in Azerbaijan) and spousal incrimination, both here and in Azerbaijan. [POCA 2002, s 362F](#) specifically provides that a statement in response to a UWO may not be used in evidence against that person in criminal proceedings. This protection is limited to potential offences in the UK. In dismissing this aspect of the appeal, however, the court upheld Supperstone J's ruling that the statutory scheme had impliedly abrogated the spousal privilege and, in any event, the risk of Mr Hajiyev being prosecuted in the UK was negligible. Similarly, the risk of Mrs Hajiyeva's responses being used in Azerbaijan against both her and her husband was also negligible and so did not justify the exercise of the discretion in her favour. The court did acknowledge that the risk of prosecution abroad could be a relevant factor when deciding whether to exercise a discretion to make an order.

Case details

- Court: Court of Appeal
- Judge: Lord Burnett, Lord Justice Davis and Lord Justice Simon
- Date of judgment: 5 February 2020

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