Neutral Citation Number: [2020] EWCA Civ 108

Case No: C1/2018/2417

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon Mr Justice Supperstone

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 February 2020

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE DAVIS
and
THE RT HON LORD JUSTICE SIMON

- -

Between:

ZAMIRA HAJIYEVA	**Appellant**
and	
NATIONAL CRIME AGENCY	**Respondent**

- -
- -

James Lewis QC and **Ben Watson** (instructed by **Gherson**) for the **Appellant**
Jonathan Hall QC and **Tom Rainsbury** (instructed by the **NCA**) for the **Respondent**

Hearing date: 12 December 2019

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Approved Judgment

The Lord Burnett of Maldon, Lord Justice Davis and Lord Justice Simon:

Introduction

1. This is an appeal from the decision of Supperstone J, dated 3 October 2018, dismissing an application made by Mrs Hajiyeva (the 'appellant') to discharge an Unexplained Wealth Order ('UWO') that he had previously made at a 'without notice' hearing on 27 February 2018.

2. The facts are set out fully in the judge's comprehensive and clear judgment [2018] EWHC 2534 (Admin); and, for the purposes of this appeal, it is unnecessary to do more than summarise some of the more material points.

3. The appellant is a national of Azerbaijan, a state outside the European Economic Area, and is married to Mr Jahangir Hajiyev. The case for the respondent, the National Crime Agency (the 'NCA'), was founded on her connection with identified property in London SW3 ('the Property'). The Property was purchased on 22 December 2009 by Vicksburg Global Inc, a company incorporated in the British Virgin Islands. The price which was said to have been paid for the Property was £11,500,000. Vicksburg Global Inc was, and remains, registered as the sole proprietor. On the same day that the Property was purchased, a mortgage was secured against it in favour of Barclays Bank (Suisse) SA. The charge was executed in relation to a loan facility for 'up to £7,475,000'. On 23 December 2014, Vicksburg Global Inc applied to the Land Registry to discharge the charge against the Property; and Barclays Bank (Suisse) SA confirmed that the Property was no longer charged as security.

4. On 3 June 2015, in her application for indefinite leave to remain in this country, the appellant informed the Home Office that she was the beneficial owner of Vicksburg Global Inc. On 31 January 2018, the British Virgin Islands Financial Investigation Agency informed the NCA that the beneficial owner of Vicksburg Global Inc was in fact Mr Hajiyev.

5. From March 2001 to March 2015, Mr Hajiyev was the chairman of the International Bank of Azerbaijan ('the Bank'). At all material times the Bank was the largest bank in the country; and the Azerbaijan Democratic Republic (the 'State') had a controlling shareholding of not less than 50.2%. Mr Hajiyev resigned from the Bank in March 2015. On 5 December 2015, he was arrested in Azerbaijan and subsequently charged with various offences in connection with his employment at the Bank. These included charges of misappropriation, abuse of office, large-scale fraud and embezzlement. On 14 October 2016, he was convicted after a trial in the Serious Crimes Court in Baku and sentenced to a term of 15 years' imprisonment. In addition, he was ordered to pay to the Bank a sum of approximately US$39m.

6. It appears that, on or about 23 June 2016, the appellant was 'arrested' in her absence by the State authorities and declared to be 'wanted' in connection with avoiding an investigation into the Bank.

7. On 19 February 2018, the NCA filed its application for a UWO, together with an application for an Interim Freezing Order, in respect of the Property. That application was granted at the 'without notice' hearing on 27 February 2018. The court also

granted an application for a second UWO in respect of another property. That order was discharged and replaced by a further UWO and a freezing order on 27 April 2018. The implementation of these further orders is presently stayed pending the resolution of these proceedings.

8. At a hearing before the judge, which took place between 24 and 26 July 2018 in conditions of anonymity, the appellant applied to discharge the UWO on eight grounds. The judge rejected all these grounds in his judgment of 3 October 2018 and refused leave to appeal. The appellant's application for leave to appeal was accompanied by an urgent application for permission to appeal an order, also made on 3 October, revoking the anonymity order which had been made on the first day of the hearing. On 9 October, Sales LJ refused permission to challenge the revocation of the anonymity order. On 29 March 2019, Haddon-Cave LJ granted permission to appeal the substantive order on five grounds, on the basis that the appeal raised issues in relation to what was 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.

9. Although the appellant had been arrested on 30 October 2018, pursuant to an extradition request from Azerbaijan, on 30 September 2019, Senior District Judge (Chief Magistrate) Emma Arbuthnot found that her extradition to Azerbaijan would be incompatible with her rights under the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and discharged the appellant under section 87(2) of the Extradition Act 2003.

10. Before turning to the five grounds of appeal, we set out the material parts of the applicable statutory and regulatory scheme.

The statutory and regulatory scheme for UWOs

11. Unexplained Wealth Orders were introduced under part 8 of the Proceeds of Crime Act 2002 ('POCA') by the Criminal Finances Act 2017. They are part of an investigative regime.

12. Section 362A of POCA provides, under the heading, 'Unexplained wealth orders':

> (1) The High Court may, on an application made by an enforcement authority, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for the making of the order is fulfilled.
>
> (2) An application for an order must -
>
> (a) specify or describe the property in respect of which the order is sought, and
>
> (b) specify the person whom the enforcement authority thinks holds the property ("the respondent") (and the person specified may include a person outside the United Kingdom).

(3) An unexplained wealth order is an order requiring the respondent to provide a statement -

(a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made,

(b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),

(c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and

(d) setting out such other information in connection with the property as may be so specified.

(4) The order must specify -

(a) the form and manner in which the statement is to be given,

(b) the person to whom it is to be given, and

(c) the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.

(5) The order may, in connection with requiring the respondent to provide the statement mentioned in subsection (3), also require the respondent to produce documents of a kind specified or described in the order.

(6) The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).

(7) In this Chapter 'enforcement authority' means -

(a) the National Crime Agency,

…

13. Section 362B sets out the 'Requirements for making of unexplained wealth order':

(1) These are the requirements for the making of an unexplained wealth order in respect of any property.

(2) The High Court must be satisfied that there is reasonable cause to believe that -

(a) the respondent holds the property, and

(b) the value of the property is greater than £50,000.

(3) 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.

(4) The High Court must be satisfied that -

(a) the respondent is a politically exposed person, or

(b) there are reasonable grounds for suspecting that—

(i) the respondent is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere), or

(ii) a person connected with the respondent is, or has been, so involved.

…

(7) In subsection (4)(a), 'politically exposed person' means a person who is -

(a) an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State,

…

(8) Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 applies for the purposes of determining -

(a) whether a person has been entrusted with prominent public functions (see point (9) of that Article),

(b) whether a person is a family member (see point (10) of that Article), and

(c) whether a person is known to be a close associate of another (see point (11) of that Article).

14. We should note that section 362B(7)(a) has been amended by the Law Enforcement and Security (Amendment) (EU Exit) Regulation 2019, but not in a way that is material to this appeal. Its effect is to remove the implicit reference to the UK as being 'another' EEA State.

15. Directive 2015/849/EU, referred to in s.362B(8) of POCA, contains 68 recitals of which it is only necessary to refer to the following:

> Whereas:
>
> …
>
> (4) Money laundering and terrorist financing are frequently carried out in an international context. Measures adopted solely at national or even at Union level, without taking into account international coordination and cooperation, would have very limited effect. The measures adopted by the Union in that field should therefore be compatible with, and at least as stringent as, other actions undertaken in international fora. Union action should continue to take particular account of the FATF Recommendations and instruments of other international bodies active in the fight against money laundering and terrorist financing. With a view to reinforcing the efficacy of the fight against money laundering and terrorist financing, the relevant Union legal acts should, where appropriate, be aligned with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation adopted by the FATF in February 2012 (the 'revised FATF Recommendations').
>
> …
>
> (12) There is a need to identify any natural person who exercises ownership or control over a legal entity. In order to ensure effective transparency, Member States should ensure that the widest possible range of legal entities incorporated or created by any other mechanism in their territory is covered. While finding a specified percentage shareholding or ownership interest does not automatically result in finding the beneficial owner, it should be one evidential factor among others to be taken into account. Member States should be able, however, to decide that a lower percentage may be an indication of ownership or control.
>
> …
>
> (22) The risk of money laundering and terrorist financing is not the same in every case. Accordingly, a holistic, risk-based approach should be used. The risk-based approach is not an unduly permissive option for Member States and obliged entities. It involves the use of evidence-based decision-making in order to target the risks of money laundering and terrorist financing facing the Union and those operating within it more effectively.

…

(31) It should be recognised that certain situations present a greater risk of money laundering or terrorist financing. Although the identity and business profile of all customers should be established, there are cases in which particularly rigorous customer identification and verification procedures are required.

(32) This is particularly true of relationships with individuals who hold or who have held important public functions, within the Union or internationally, and particularly individuals from countries where corruption is widespread. Such relationships may expose the financial sector in particular to significant reputational and legal risks. The international effort to combat corruption also justifies the need to pay particular attention to such persons and to apply appropriate enhanced customer due diligence measures with respect to persons who are or who have been entrusted with prominent public functions domestically or abroad and with respect to senior figures in international organisations.

(33) The requirements relating to politically exposed persons are of a preventive and not criminal nature, and should not be interpreted as stigmatising politically exposed persons as being involved in criminal activity. Refusing a business relationship with a person simply on the basis of the determination that he or she is a politically exposed person is contrary to the letter and spirit of this Directive and of the revised FATF Recommendations.

16. Article 3, within Chapter I, Section 1 of the Directive, defines the terms used:

(6) 'beneficial owner' means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:

(a) in the case of corporate entities

(i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information.

> A shareholding of 25% plus one share or an ownership interest of more than 25% in the customer held by a natural person shall be an indication of direct ownership. A shareholding of 25% plus one share or an ownership interest of more than 25% in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership. This applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control. Control through other means may be determined, inter alia, in accordance with the criteria in Article 22(1) to (5) of Directive 2013/34/EU of the European Parliament and of the Council;
>
> …
>
> (9) 'Politically exposed person' means a natural person who is or who has been entrusted with prominent public functions and includes the following:
>
> (a) heads of State, heads of government, ministers and deputy or assistant ministers;
>
> (b) members of parliament or of similar legislative bodies;
>
> (c) members of the governing bodies of political parties;
>
> …
>
> (g) members of the administrative, management or supervisory bodies of State-owned enterprises;
>
> (h) directors, deputy directors and members of the board or equivalent function of an international organisation
>
> No public function referred to in points (a) to (h) shall be understood as covering middle-ranking or more junior officials.

17. Chapter I, Section 2 is headed, 'Risk assessment'; and Article 8 provides:

> 1. Member States shall ensure that obliged entities take appropriate steps to identify and assess the risks of money laundering and terrorist financing, taking into account risk factors including those relating to their customers, countries or geographic areas …

18. Article 22 is contained in Chapter II, Section 3, 'Enhanced customer due diligence':

> Where a politically exposed person is no longer entrusted with a prominent public function by a Member State or a third country, or with a prominent public function by an international organisation, obliged entities shall, for at least 12 months, be required to take into account the continuing risk posed by that person and to apply appropriate and risk-sensitive measures until such time as that person is deemed to pose no further risk specific to politically exposed persons.

Grounds 1 and 2

19. It is clear from the structure of section 362B that there were two relevant preconditions for the making of a UWO in the present case: the first involved an assessment of the known sources of a person's lawfully obtained income, see section 362B(3), and the second involved consideration of whether that person is a 'politically exposed person', see section 362B(4)(a).

20. Mr James Lewis QC submitted (ground 1) that the judge erred in his interpretation of the statutory test for identifying a politically exposed person, as defined in section 362B(7)(a) of POCA. He argued that a politically exposed person was 'an individual who is, or has been, *entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or [another] EEA State*' (emphasis added). The express terms of the statutory test therefore required that the individual was entrusted with 'prominent public functions' either (i) by an international organisation, or (ii) by a State, other than the United Kingdom or another EEA state. Although the appellant was a 'family member' of Mr Hajiyev, who was Chairman of the Board of the Bank between March 2001 and March 2015, and as such was a member of the administrative and/or management body above middle or more junior rank, there was no evidence that he was entrusted with prominent public functions 'by an international organisation or by a State other than the United Kingdom or another EEA State'. The judge's approach was effectively to decide that someone carrying out a prominent public function must necessarily have been entrusted with that function by the state.

21. The judge considered this argument at [43] to [47] of the Judgment:

> 43. Mr Lewis submits the 2015 Directive is aimed at money laundering by private institutions, whereas Parliament added the extra words concerning entrustment because the domestic law is different in purpose.
>
> 44. Further, Mr Lewis submits that the additional phrase cannot have been intended only to exclude those States because that analysis does not address the alternative basis on which a person may be 'entrusted', that is 'by an international organisation'. The words of the statute, he submits, are clear.
>
> 45. The obvious inference is that heads of State and heads of government, for example, who fall within Article 3(9)(a) of the 2015 Directive, have been 'entrusted with prominent public functions'. However, no such inference can be drawn, Mr

> Lewis submits, in relation to members of the administrative, management or supervisory bodies of SOEs (who fall within Article 3(9)(g)).
>
> 46. Mr Lewis refers to the many well-known sovereign wealth funds which are very substantial state-owned funds that invest in the global financial markets like private equity and hedge funds. For example, the Dorchester Hotel is owned by the Brunei Investment Agency, an arm of the Ministry of Finance of Brunei, and the Qatar Investment Authority holds investments in Sainsbury's. Mr Lewis suggests that, adopting the NCA approach, directors of the Dorchester are PEPs (Brunei being a non-EEA state with a majority shareholding). In the UK Channel 4 is a publicly owned corporation whose board is appointed by Ofcom, in agreement with the Secretary of State for Culture, Media and Sport. Does it follow, Mr Lewis asks, that Channel 4 would be considered to be a SOE and the Chairman of the Board a PEP for the purposes of Article 9(g) of the 2015 Directive.
>
> 47. I do not accept this submission.

22. Nor do we.

23. The Directive, which forms both the background to and guidance on the interpretation of the provisions of section 326B(7), is concerned with an assessment of the risk of money laundering, see recitals (22) and (31); and Chapter I, Section 2, makes clear that its requirements are preventative rather than criminal in nature, see recital (33). This does not suggest that the interpretation of the provisions should be confined.

24. Section 362B(7)(a) defines a politically exposed person as ‘an individual who is, or has been, entrusted with prominent public functions’. Section 362B(8) makes clear that article 3(9) of the Directive is to be applied for determining whether a person has been ‘entrusted with prominent public functions’.

25. The words, ‘an individual who is, or has been, entrusted with prominent public functions’ match those of article 3(9) of the Directive. The issue is whether the following words, ‘by an international organisation or by a State other than the United Kingdom or [another] EEA State’, have the effect of adding a further qualification: that the individual has to be specifically entrusted either by an international organisation or by a State. In our view, the focus of the statutory wording is on the status of the entrusted person and not how that person has come to be entrusted with prominent public functions. The intent is to exclude from the definition of a politically exposed person those who are entrusted with prominent public functions in either the UK or another EEA State.

26. This impression is reinforced, first, by the terms of article 22 of the Directive, which refers to a ‘politically exposed person … no longer entrusted with a prominent public function’ without any reference as to how the PEP is to be entrusted. Article 22 does not prescribe a specific mechanism by which the prominent public function is to be entrusted to the individual. This suggests that, provided an individual occupies one of

the roles listed under article 3(9) of the Directive, they are 'entrusted with prominent public functions'.

27. Secondly, article 3(7) of the *Travaux Preparatoires* for the Directive (COM (2013) 45 Final), draws a distinction between 'foreign' and 'domestic' politically exposed politically exposed persons:

> (a) 'foreign politically exposed persons' means natural persons who are or have been entrusted with prominent public functions by a third country;
>
> (b) 'domestic politically exposed persons' means natural persons who are or who have been entrusted with prominent public functions.

28. This view is also reinforced by the French text of article 3(9), which reads: '*'personne politiquement exposée', une personne physique qui occupe ou s'est vue confier une fonction publique importante et notamment'.* Again, there is no reference as to how the important and significant public function is conferred.

29. It follows that, if the Bank were a State-owned enterprise (the issue that arises on ground 2), Mr Hajiyev fell within the definition of a politically exposed person because he was its Chairman and therefore fell within sub-paragraph (g) of article 3(9) of the Directive. In other words, by definition he is to be treated as 'entrusted with prominent public functions'. The appellant was also a politically exposed person because she was a family member of Mr Hajiyev, see section 362B(4)(a) and (7)(b) of POCA.

30. In these circumstances it is unnecessary to consider the further material relied on by the NCA, the ministerial statement made in the House of Commons in the Public Bill Committee stage on 17 November 2016, referred to at [51] to [53] of the judgment below, nor whether it satisfied the test for the admission of such statements as an aid to interpretation described in *Pepper v. Hart* [1993] AC 593.

31. Mr Lewis argued (ground 2) that, even if this were the correct approach, the judge should not have been satisfied that the Bank was 'a State-owned enterprise'. There was, he submitted, a distinction between an enterprise that was state-owned and a company whose shares were owned in part by a government body. The Bank was simply a commercial bank substantially owned by the government of Azerbaijan. The mischief that was intended to be covered by the statutory provisions related to corrupt state officials and not what may, or may not, have occurred in a company in which a government had a shareholding. While the judge was right to conclude that the test for deciding whether an enterprise was state-owned involved a fact-dependant enquiry, see his judgment at [35], it followed that he was wrong to conclude that an institution was 'state-owned', simply because the State had a majority stake in it: a shareholding, even a majority shareholding, was not sufficient to establish that the enterprise was state-owned. He gave various examples, as he had given to the judge, of commercial enterprises in this country whose shares were owned by overseas entities which could not properly be described as 'state-owned' enterprises. He also submitted that section 362B was an intrusive power which should be construed narrowly.

32. The judge approached the matter broadly at [38]:

> At all material times the Government of the non-EEA Country had a majority shareholding in the Bank and had ultimate control of the Bank.

In our view he was right to do so.

33. This was not an issue that fell to be determined by a close analysis of foreign law. The evidence was clear that the State had more than a 50% shareholding in the Bank. On the facts of the case, the judge was entitled to conclude that it had ultimate control, and consequently Mr Hajiyev was a politically exposed person, being a person who had been entrusted with a prominent public function as a member of the management of a state-owned enterprise. In these circumstances, it is unnecessary to consider other issues which may arise in relation to commercial investments by foreign sovereign fund bodies in order to assess whether they are 'state-owned'.

34. We would add that the appellant also criticised the judge for not taking into account the views of Mr Agil Layijov, the appellant's Azerbaijani lawyer, as to the actual status of the Bank and whether it was a 'state organisation' as a matter of Azerbaijani law. In our view the Judge was entitled to reject the evidence of Mr Layijov for the reasons he gave. Mr Layijov was not, and did not purport to be, an independent expert; and the application of these provisions of POCA ultimately falls to be decided as a matter of English law, which may view the matter differently from how it would be viewed as a matter of local law.

Ground 3

35. This is a complaint that the judge was wrong to conclude that the 'income requirement' of section 362B(3) had been met. The appellant relied on evidence, largely from Mr Layijov, as to what was said to be the unfairness of Mr Hajiyev's trial, see [66]-[74] of the judgment. Mr Lewis argued that the judge was wrong to base any reliance on his conviction.

36. The judge expressed himself, at [84] of the judgment as follows:

> I am not persuaded that [Mr Layijov] demonstrates a flagrant denial of [Mr Hajiyev's] Article 6 rights so as to require the NCA, and this court to ignore his conviction at this investigation stage.

37. The relevant requirement for making a UWO is set out in section 362B(3) and (4)(a): the court must be satisfied that there are reasonable grounds for suspecting that the known sources of the lawfully obtained income available to the politically exposed person would have been insufficient to enable him or her to obtain the property.

38. We would accept that the circumstances of a foreign conviction may be such (and would be such if there were a breach of *jus cogen* norms) that it could not form a proper ground for reasonably suspecting that lawful income was insufficient to enable the acquisition of material property (or that a person was involved in serious crime, within the meaning of section 362B(3) and (4)(b)).

39. However, in the present case Mr Hajiyev's conviction for fraud and embezzlement was only one of the strands relied on by Mr Hall QC in support of grounds for reasonable suspicion that the known sources of Mr Hajiyev's lawfully obtained income would have been insufficient for the purposes of enabling him to obtain the Property.

40. As the judge put it at [88]:

> In any event [Mr Hajiyev's] conviction was only one of a number of factors relied upon by the NCA, and I am satisfied that the income requirement is satisfied, irrespective of any reliance on the conviction.

41. In many cases the process by which an acquisition is made may be a legitimate starting point.

42. In the present case there were other factors. First, there was the evidence of Mr Hajiyev's status as a state employee and the unlikelihood that, as such, his legitimate income between 1993 and 2015 would have been sufficient to generate funds used to purchase the Property. Secondly, although there was evidence that he had been involved with companies and property transactions, it 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, see judgment at [58].

43. That evidence was contained in a report from Werner Capital, dated August 2011, which was intended to show that Mr Hajiyev was a 'high-net worth individual', with an assessed net worth of over US$72m. However, this report posed more questions as to the source of his wealth than it answered. The information as to the source of his wealth was very vague and included a sum of US$20m said to have been acquired by him at a time when he was a student.

44. In our view the judge, having considered all the evidence, was fully entitled to reach his evaluative judgement at [63]:

> As a state employee between 1993 and 2015, it is very unlikely that such a position would have generated sufficient income to fund the acquisition of the Property.

Ground 4

45. Under this heading, Mr Lewis submitted that the judge was wrong to hold that the UWO did not offend the rule against self-incrimination and/or spousal privilege. He accepted that the UWO scheme protected his client's privilege against self-incrimination in this jurisdiction by section 362F(1), which provides:

> A statement made by a person in response to a requirement imposed by an unexplained wealth order may not be used in evidence against that person in criminal proceedings.

46. However, he argued that (1) the UWO failed to ensure the privilege from being required to give answers tending to expose her husband to a risk of prosecution in the United Kingdom ('spousal privilege') and, (2) in the absence of any formal

undertaking by the NCA as to the future use to which any response to the UWO might be put in Azerbaijan, the order failed to protect the appellant's privilege against both self-incrimination and spousal incrimination in Azerbaijan, both of which arose as a matter of discretion. Mr Lewis commended the approach of Gloster J in *Akciné Bendrové Bankas Snoras (in Bankruptcy) v. Antonov and Baranauskas* [2013] EWHC 131 (Comm) at [45] to [46], in which she required an undertaking to be given in comparable circumstances.

47. The judge approached the issue of spousal privilege and the privilege against self-incrimination together, at [104] to [116].

48. Section 14 of the Civil Evidence Act 1968 as amended, provides:

> (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty -
>
> (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
>
> (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

49. The judge concluded that it was clear from section 14(1)(a) that the privileges 'apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law'. Accordingly, the appellant and her husband had no right to invoke either privilege in relation to a risk of prosecution for criminal offences outside the United Kingdom, although he recognised that the risk of prosecution abroad could be a relevant factor when deciding whether to exercise a discretion to make an order.

50. The judge did not consider that the appellant's evidence disclosed a real and appreciable risk that either she or her husband would be prosecuted for offences in the United Kingdom (see *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547). Accordingly, the threshold test for the privileges to apply has not been satisfied (see *Matthews and Malek on Disclosure* (5th Ed) at § 13.11). Although the appellant had asserted both privileges in her witness statement, she did not identify what elements of the requested information would give rise to the alleged risk. In short, she had not said which answers to which questions might incriminate her. Mere assertion of the privilege against self-incrimination was not sufficient (see *JSC BTA Bank v. Ablyasov* [2009] EWCA Civ 1125, per Sedley LJ at [39]). Although she said that she had been advised that her responses to the questions posed in Schedule 3 to the UWO and the requirement to produce documents in Schedule 4 to the UWO could be used to incriminate her and/or her husband in criminal proceedings in the United Kingdom, or in Azerbaijan, the court had to be

satisfied of the risk of prosecution (see *R (CPS) v. Bolton Magistrates' Court* [2004] 1 WLR 835), which the judge was not.

51. He also found that in creating the UWO procedure by means of the Criminal Finances Act 2017, Parliament had necessarily intended that the privileges be abrogated (see *Bank of England v. Riley* [1992] Ch 475, per Ralph Gibson LJ at pp.484 to 485; *Bishopsgate Investment Management Ltd v. Maxwell* [1993] Ch 1, per Dillon LJ at p.20; and *R v. Hertfordshire CC ex. parte Green Environmental Industries Ltd* [2000] 2 AC 412, per Lord Hoffmann at p.420). A UWO imposed a requirement to provide information and to produce documents (see section 362A(3), (5) and (6)) and the power to make such orders 'would be rendered very largely nugatory if privilege applied' ,see *Beghal v. DPP* [2016] AC 88, per Lord Hughes at pp.117 to 118 on the privilege impliedly excluded in schedule 7 of the Terrorism Act 2000. Section 362F of POCA contained a 'use immunity' clause which, as Lord Hughes in *Beghal* (at [62]) observed, often suggests a parliamentary intention to exclude the privilege.

52. That left open the issue of discretion, see the second sentence of [49] above. The judge noted that, although the appellant was not entitled to invoke the privileges as of right, any risk of prosecution in the United Kingdom or abroad could, in principle, be relevant when deciding whether to exercise the discretion to make a UWO under section 362A(1) POCA 2002 (see *R (River East Supplies Ltd) v. Crown Court at Nottingham* [2017] 4 WLR 135, at [45]). However, in the judge's view the disclosure of information under the UWO about the Property would not give rise to a real or appreciable risk of prosecution of Mr Hajiyev or the appellant in either the United Kingdom or Azerbaijan, even on the unlikely assumption that the appellant would return there. In any event, there was no evidence that they would be at risk of further criminal proceedings. Further, the judge bore in mind that any information which was provided by the appellant would be provided to the NCA which, as a public body, had a duty to act consistently with the European Convention on Human Rights, and was bound to comply with the Overseas Security and Justice Assistance guidance which included specific processes for deciding whether disclosure to a third party would give rise to an impermissible risk. There was no suggestion that the NCA would use or disclose information sought otherwise than for the purposes of the statute (see *Bank of England v. Riley* (above) at p.486); and no further safeguards, whether by way of undertakings from the NCA or otherwise (see *SOCA v. Khan* [2012] EWHC 3235 (Admin), per Cox J at [46]), were required.

53. We have summarised this part of the judgment because, in our view, it cannot be improved upon. Although the appellant criticised the judge's approach and reasoning, we are not persuaded that the approach was erroneous, the reasoning flawed or the conclusion wrong. The judge dealt convincingly with the two critical points made by Mr Lewis.

54. First, although section 362F protected the appellant from self-incrimination in this jurisdiction, it failed to ensure the privilege she enjoyed against being required to give answers tending to expose her husband to a risk of prosecution in this country. In short, the judge concluded that the statutory scheme had impliedly abrogated the spousal privilege and the risk of his being prosecuted in this country was, in any event, negligible.

55. Secondly, the risk of her responses to the request being used in Azerbaijan against her husband and her, was also negligible and, in any event, did not justify the exercise of discretion in her favour.

56. In our view this ground of appeal also fails.

Ground 5

57. The final ground of appeal was that it was a wrong and disproportionate exercise of discretion to make the UWO in the present case.

58. We need say nothing further about this point because Mr Lewis very properly recognised that, if he failed on the other grounds, he could not succeed on this 'sweep-up' point. In our view the concession was rightly made, not least because it involved a challenge to the exercise of a discretion.

Conclusion

59. For the reasons set out above, the appeal must be dismissed.