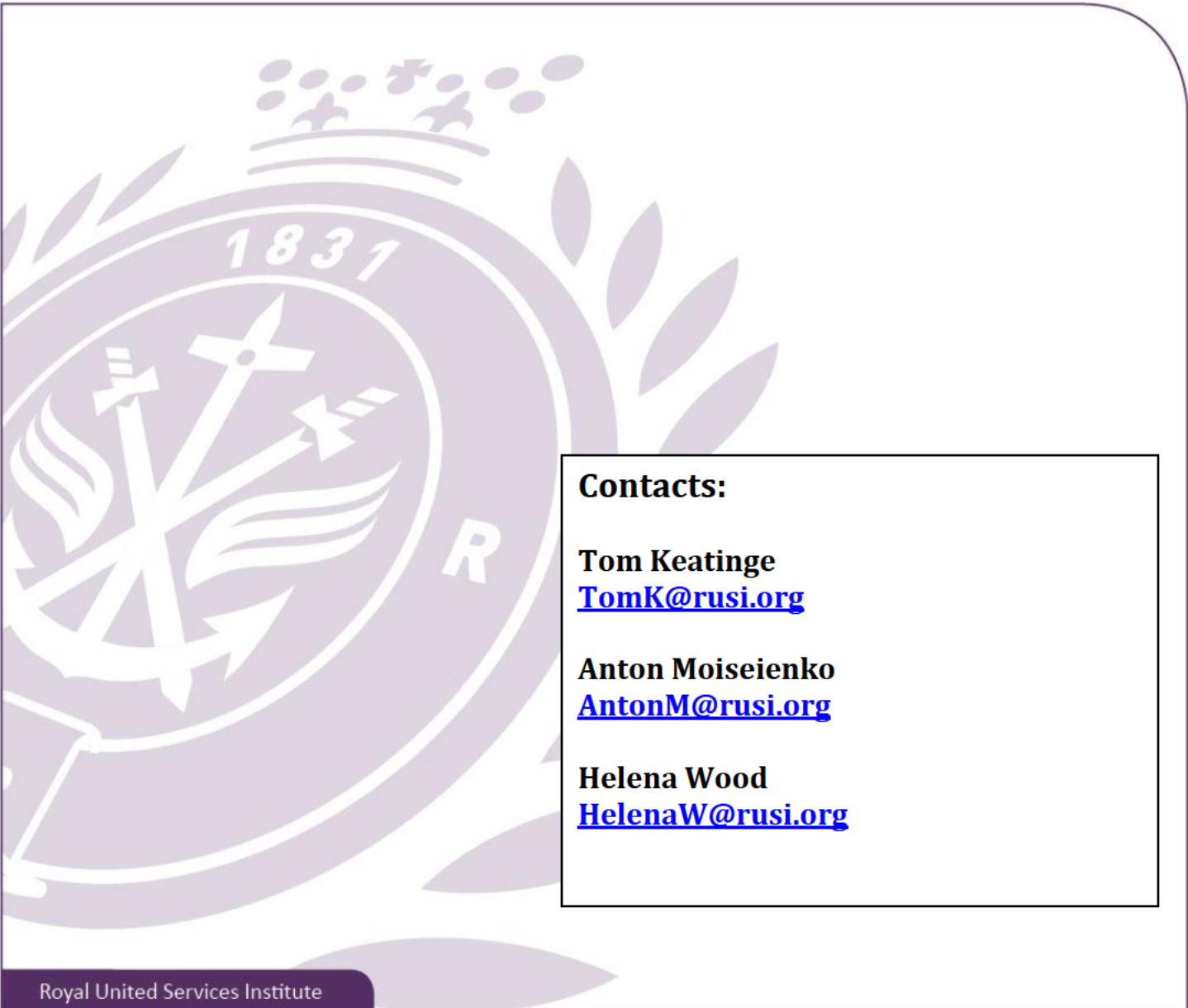


Unexplained Wealth Orders: UK Experience and Lessons for British Columbia

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1. Introduction

This report offers an overview of the UK's¹ law and practice in relation to Unexplained Wealth Orders (UWOs) and relevant international experience. The report has been prepared by the Centre for Financial Crime & Security Studies at the Royal United Services Institute at the request of the Commission of Inquiry into Money Laundering in British Columbia (Cullen Commission).

1.1. Background

In the UK, a UWO compels disclosure of information about unexplained wealth. It is underpinned by the threat of reversing the burden of proof in respect of the property should the information not be supplied. In short, it is an investigatory tool aimed to facilitate civil recovery (forfeiture).² This is a model of addressing unexplained wealth that differs from the approach taken in other countries where certain property is presumed to be of criminal origin for civil recovery purposes, such as Ireland and Australia.

In those countries, a UWO does not require the disclosure of information as such, but rather stipulates that, once a law enforcement agency meets a certain initial threshold – such as showing reasonable grounds to believe that the person's wealth exceeds his or her lawful income – that person's property is liable to forfeiture unless he or she proves it is of legitimate origin. In the abstract, the distinction between the UK model and this approach may appear to be a subtle one but, as discussed below, it is stark in practice.

The UK's experience of implementing UWOs is notable not only due to their experimental design but also because a lot of thought had been put by Parliament into developing a system that tackles unexplained wealth while respecting human rights. These considerations, as well as subsequent implementation challenges such as the National Crime Agency's defeat in *NCA v Baker*,³ make the UK a useful case study for countries that consider introducing their own unexplained wealth provisions.

1.2. Objective

The objective of this report is to offer an overview of the UK's law and practice and compare it to overseas experience. The report also situates those countries' approaches against the background of international standards contained in the UN Convention against Corruption (UNCAC). The selection of comparator countries is explained in section 5 of this report below, but as a general proposition it is believed to be illustrative of various issues that a jurisdiction embarking on the design of its own UWO framework is likely to encounter.

1.3. Methodology

The methodology of the report is based on a review of publicly available information concerning the operation of UWOs, including legislation, court judgments, press reports and academic articles. These are cited as appropriate. The authors have also had the benefit of informal discussions with UK law enforcement officers and legal professionals since the entry into force of the UK's UWO provisions in January 2018. In the interests of brevity and clarity, the report endeavours to identify key issues rather than provide a comprehensive summary of each country's legislation, which can be found by using the references provided throughout.

¹ UWOs are available in all UK jurisdictions, namely England and Wales, Scotland and Northern Ireland.

² Home Office, 'Code of Practice Issued Under Section 377 of the Proceeds of Crime Act 2002: Investigations', January 2018, p. 40, para. 169.

³ *NCA v Baker et al* [2020] EWHC 822 (Admin), [2020] All ER (D) 59 (Apr).

In this manner, the report addresses the issues that the Cullen Commission requested the authors to consider, namely:

1. What is a UWO?
2. How does it compare to other forms of civil asset forfeiture?
3. In what jurisdictions has it been implemented?
4. How has it been implemented in those jurisdictions and how does it fit with existing civil asset forfeiture mechanisms?
5. What are the experiences of UWO-adopting jurisdictions with respect to their implementation?
6. Has UWO legislation in any of the implementing jurisdictions been subject to legal challenge, and if so, what is the result?
7. Conclusion: a summary of merits/weaknesses of UWOs, highlight important lessons learned from jurisdictions that have used them.

1.4. RUSI's Expertise

The Royal United Services Institute (RUSI) is an independent research institute founded in 1831 to provide authoritative analysis of issues related to national security and defence. RUSI's current research covers a broad array of subjects, ranging from military sciences to terrorism to financial crime. RUSI is not affiliated with the UK or any other government and is mostly funded on a per-project basis by public- and private-sector sponsors. It is a registered charity overseen by the Charity Commission for England and Wales and is committed to values of impartiality and non-partisanship.

RUSI's Centre for Financial Crime & Security Studies (CFCS) was formed in 2014 in an acknowledgement of the impact that financial threats have on national and global security. CFCS work addresses a range of such threats, including money laundering by organised crime groups and corrupt regimes; terrorist financing; the financing of proliferation of weapons of mass destruction; and sanctions evasion. A central aspect of CFCS research is engaging with law enforcement agencies and the private sector, including but not limited to financial institutions, to understand the practical effect of governmental policies, legislation and regulation.

RUSI's financial crime analysis has been cited by the Financial Action Task Force,⁴ Her Majesty's Treasury⁵ and Europol⁶ among others. CFCS staff members have testified in front of the UN Security Council,⁷ Canadian Senate,⁸ US Congress,⁹ UK House of Commons¹⁰ and European Parliament¹¹. CFCS

⁴ For example, in FATF, 'Money Laundering and the Illegal Wildlife Trade', June 2020, pp. 9, 38, 39.

⁵ For example, in Treasury's response to the Treasury Select Committee's response on economic crime in 2019 (<<https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2187/218703.htm>>).

⁶ Europol, 'EU Drug Markets Report 2019', 2019, pp. 32, 211.

⁷ For example, presentation to the meeting of the Security Council on Preventing and Countering the financing of terrorism in 2019 (<<http://webtv.un.org/meetings-events/watch/aria-formula-meeting-of-the-security-council-on-preventing-and-countering-the-financing-of-terrorism/5997083040001/?term=&page=2>>).

⁸ For example, testimony to the National Security and Defence Standing Committee in 2017 (<<https://sencanada.ca/en/Committees/SECD/NoticeOfMeeting/446019/42-1>>).

⁹ For example, testimony to the US House Financial Services Committee subcommittee on illicit finance in 2018 (<<https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=108543>>).

¹⁰ For example, testimony to the Home Affairs Committee on POCA 2002 in 2016 (<<https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/2504.htm>>).

¹¹ For example, presentation of RUSI's report on virtual currencies and terrorist financing in 2018 (<<http://www.europarl.europa.eu/ep-live/en/committees/video?event=20180618-1500-COMMITTEE-TERR>>).

has received funding from the UK's Foreign and Commonwealth Office¹² and Department for International Development,¹³ US State Department¹⁴ and European Parliament,¹⁵ as well as multiple civil society donors and private sector funders.

1.5. Structure

The report proceeds to discuss (a) the UK's UWO legislation in brief; (b) the domestic and international background to the UK's introduction of UWOs; (c) the UK's use of UWOs, including judicial challenges against the issuance of UWOs; (d) other countries' experience of using unexplained wealth provisions, and (e) lessons from the UK and international experience.

2. UK's UWOs in Brief

A UWO requires the respondent to explain how he or she acquired property in respect of which the UWO is issued. UWOs were introduced by means of amendments to the Proceeds of Crime Act 2002 (POCA 2002)¹⁶ that came into force on 31 January 2018.¹⁷

POCA 2002 authorises the High Court to make a UWO in respect of any property if certain conditions are satisfied, namely:

- Either the respondent is a politically exposed person (PEP) from outside the European Economic Area (EEA)¹⁸; or the respondent or the respondent's associate is reasonably suspected of involvement in serious crime. The reason behind limiting the reach of UWOs to non-EEA PEPs is the premise that obtaining information about possible wrongdoing from an EEA country is unlikely to pose significant difficulty.¹⁹
- The value of the property is at least equal to £50,000.

If the respondent fails to comply with a UWO, there is a rebuttable presumption that the property concerned is recoverable under Part 5 of POCA 2002.²⁰ In other words, it is presumed to be of criminal origin unless proven otherwise and liable to be confiscated on that account. In that respect, the burden that would otherwise be on the enforcement agency to demonstrate that the property has been obtained through unlawful conduct is reversed.²¹

The UWO can be accompanied by an interim freezing order (IFO) that prohibits transacting in the property concerned. An enforcement authority can apply for both the UWO and IFO without notice to the respondent.²² Applications for a UWO and IFO can be contained in the same document, and

¹² For a project on the financial footprint of human trafficking in Sudan.

¹³ For a report on financial integrity and corruption in Pakistan (<<https://rusi.org/publication/occasional-papers/security-through-financial-integrity-mending-pakistan%E2%80%99s-leaky-sieve>>).

¹⁴ For workshops and trainings on countering North Korean proliferation and money laundering activities in Africa and Asia.

¹⁵ For a report on virtual currencies and terrorist financing (<[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604970](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604970)>).

¹⁶ UWOs were introduced by the Criminal Finances Act 2017 (CFA 2017), which inserted sections 362A–362R and 396A–396U into POCA 2002.

¹⁷ Home Office, 'Circular 003/2018: Unexplained Wealth Orders', 1 February 2018.

¹⁸ An economic union including all EU member countries and Iceland, Liechtenstein and Norway.

¹⁹ Baroness Williams at HL Deb 28 March 2017, vol 782, col 498.

²⁰ Section 362C(2) POCA 2002.

²¹ The term 'reversal of the burden of proof' has therefore been used widely by both the UK government and members of the House of Commons. See Criminal Finances Act Deb 17 November 2016, col 89; HL Deb 19 March 2017, vol 790, col 68; HC Deb 25 October 2016, vol 616, col 207; HC Deb 21 February 2017, vol 621.

²² Section 362J(5) POCA 2002.

all UWOs this report discusses have been issued in conjunction with IFOs to prevent the dissipation of property. If an IFO is in place, the enforcement authority has 60 days after the respondent complies with the UWO to decide if it wishes to commence civil recovery proceedings.²³ There is doubt as to whether this is enough time to make that determination in relation to what may be complex, cross-border crime.²⁴ The explanations and documents furnished by the respondent can be used by the state in further civil litigation but, with limited exceptions for crimes such as perjury, are inadmissible in criminal prosecution.²⁵

To date, there is little clarity as to what a failure to comply with a UWO means, other than not responding to the UWO at all. POCA 2002 provides that ‘purported compliance’ is to be treated as compliance, which suggests that providing a spurious explanation as to the origins of one’s property does not amount to a failure to comply.²⁶ However, making false or misleading statements in response to a UWO is a criminal offence.²⁷

The agencies entitled to apply for a UWO – known under POCA 2002 as enforcement authorities – include:

- The National Crime Agency (NCA), the lead investigative agency against organised crime;
- The Serious Fraud Office (SFO), the investigatory and prosecutorial agency focused on serious fraud and corruption;
- The Crown Prosecution Service (CPS), the lead prosecution agency for England and Wales;
- The Public Prosecution Service for Northern Ireland;
- Her Majesty’s Revenue and Customs (HMRC), the tax agency;
- The Financial Conduct Authority (FCA), the UK’s financial regulator;²⁸ and
- The Scottish Ministers,²⁹ who act in practice through the Crown Office, which is Scotland’s prosecutorial agency.³⁰

3. UK’s Introduction of UWOs

The introduction of UWOs was prompted by concerns about high-end money laundering in the UK, especially that involving the proceeds of overseas crimes. Those concerns were exacerbated by the difficulties of obtaining evidence from jurisdictions afflicted by widespread corruption,³¹ as well as extant judicial authority to the effect that the lack of explanation as to how property was acquired did not constitute a ground for confiscation.³²

3.1. Domestic Background

The prevailing consensus is that the UK attracts significant amounts of illicit wealth. The NCA estimates that tens to hundreds of billions of pounds in criminal proceeds are laundered through the

²³ Section 362D(3) POCA 2002.

²⁴ Helena Wood, ‘Reaching the Unreachable: Attacking the Assets of Serious and Organised Criminality in the UK in the Absence of a Conviction’, RUSI Occasional Paper, June 2019, p. 18.

²⁵ Section 362F POCA 2002.

²⁶ Section 362C(5) POCA 2002.

²⁷ Section 362E POCA 2002.

²⁸ Section 362A(7) POCA 2002.

²⁹ Section 396A(1) POCA 2002.

³⁰ Home Office, ‘Circular 003/2018: Unexplained Wealth Orders’, 1 February 2018.

³¹ Donald Toon, Director of Prosperity at the NCA, at Criminal Finances Act Deb 15 November 2016, col 5; Mark Thompson, COO at the SFO, at Criminal Finances Act Deb 15 November 2016, col 21.

³² *Director of Assets Recovery Agency and Others v Green and Others* [2005] EWHC 3168 (Admin).

UK annually.³³ The precise amount is impossible to ascertain but this assessment is indicative of the magnitude of the problem,³⁴ which informed the discussions surrounding the UK's financial crime regime that ultimately led to the adoption of UWO legislation.

3.1.1. Challenges of the UK's Confiscation Regime

Non-governmental organisations such as Transparency International and Global Witness have long highlighted the UK's appeal to corruption officials and wealthy organised crime figures.³⁵ London real estate is often cited as an attractive investment for criminals seeking stability and respectability. Among other journalist and civil society investigations, a documentary produced by Channel 4 in 2015 showed how several real estate agents agreed to facilitate the anonymous purchase of high-value London real estate by a customer who claimed to have diverted the funds from Russia's health ministry.³⁶

In 2016, the UK government held the Global Anti-Corruption Summit in London, which was presented as evidence of its high-level commitment to tackle the proceeds of corruption and other crimes.³⁷ This event took place in the aftermath of the Arab Spring and Ukrainian revolution, both of which had been propelled by anti-corruption protests and resulted in the EU's effort to freeze the funds of respective countries' former governmental officials.³⁸

By that time, the UK had obtained some limited success in prosecuting corrupt foreign officials. For instance, the former governor of the Nigerian Delta province James Ibori was convicted of money laundering in the UK in 2013,³⁹ along with a slew of his family members and associates.⁴⁰ UK courts have also been used by foreign governments seeking to recoup assets from corrupt former leaders. The ex-President of Zambia Frederick Chiluba was successfully sued in the High Court of England and Wales in 2007 in relation to \$72 million that he and other former public officials had misappropriated.⁴¹

³³ HM Government, *Serious and Organised Crime Strategy*, Cm9718 (London: The Stationery Office, November 2018), p. 13, para. 25.

³⁴ Anton Moiseienko and Tom Keatinge, 'The Scale of Money Laundering in the UK: Too Big to Measure?' RUSI Briefing Paper, 2019.

³⁵ See, e.g., Transparency International UK, 'London Property: A top destination for money launderers', December 2016 <<http://www.transparency.org.uk/publications/london-property-tr-ti-uk/>>; Global Witness, 'Blood Red Carpet', March 2015 <https://www.globalwitness.org/documents/17790/global_witness_blood_red_carpet_march_2015.pdf>.

³⁶ Randeep Ramesh, 'London estate agents caught on camera dealing with 'corrupt' Russian buyer', *The Guardian*, 7 July 2015 <<https://www.theguardian.com/uk-news/2015/jul/07/london-estate-agents-caught-on-camera-russian-buyer>>.

³⁷ Anti-Corruption Summit 2016, 'About', <<https://www.gov.uk/government/topical-events/anti-corruption-summit-london-2016/about>>.

³⁸ Francesco Biagi, 'Will surviving constitutionalism in Morocco and Jordan work in the long run? A comparison with three past authoritarian regimes' (2014) 3 *Cambridge Journal of International and Comparative Law* 1240, pp. 1241–1242; Lisa Anderson, 'Demystifying the Arab Spring' (2011) 90(3) *Foreign Affairs*; OSCE, 'Anti-Corruption Reforms in Ukraine: Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan' (2015) pp. 10–14.

³⁹ *R v James Ibori* [2013] EWCA Crim 815, [2014] 1 Cr App Rep (S) 73.

⁴⁰ *R v Theresa Ibori* [2011] EWCA Crim 3193; *R v Onuigbo (aka Okoronkwo)* [2014] EWCA Crim 65; *R v Gohil* [2014] EWCA Crim 1393; *R v Preko* [2015] EWCA Crim 42, [2015] All ER (D) 50 (Feb); *R v McCann* [2011] EWCA Crim 2038.

⁴¹ *Attorney General of Zambia v Meer Care & Desai (a firm) & Ors* [2007] EWHC 952 (Ch). See also the appeal at *Attorney General of Zambia v Meer Care & Desai (a firm) & Ors* [2008] EWCA Civ 1007.

There was, however, a widespread sense that the UK's record in criminal confiscation and civil recovery did not match the country's prominence in cross-border financial crime schemes, especially in instances where the UK's law enforcement relied on cooperation of countries with troubled justice systems. For example, in one case the NCA froze funds allegedly belonging to a former Ukrainian health minister only to be informed that Ukraine's prosecution service had cleared him of any wrongdoing – a decision that was then reversed by the Ukrainians after the assets were dissipated.⁴² Even in Ibori's case, although a confiscation order was issued for £89.78 million in 2013, only £49.57 million of these were assets whose location was known.⁴³

Proposals to introduce UWO legislation in the UK appear to originate in the work of a Taskforce convened by Transparency International UK in 2014. Based on a review of publicly available information and members' experience,⁴⁴ the Taskforce concluded that existing UK law did not allow for effective action against the proceeds of overseas corruption if cooperation from respective overseas jurisdictions was not forthcoming.⁴⁵

Faced with the task of designing an approach to tackling illicit wealth that would be compatible with human rights, Transparency International's proposal was to require information to be provided in response to a UWO and to deem the property recoverable if no response or a false response was provided.⁴⁶ This proposal was mentioned, alongside the option of introducing an illicit enrichment offence (see section 3.2 below), in the UK government's 2016 anti-money laundering and counter-terrorist financing plan, which concluded that the existing legal regime did not 'go far enough in providing law enforcement agencies with the powers they need to deal with money laundering for which the predicate offence was committed overseas'.⁴⁷

3.1.2. Challenges of the UK's SAR Regime

The initial thinking surrounding UWOs in the UK, as reflected in Transparency International's report first published in 2015 and re-issued in 2016, aimed in part at overcoming a challenge in the operation of the UK's suspicious activity reports (SAR) regime. To explain the issue at hand, it is necessary to provide a brief overview of what is colloquially known as a 'consent SAR' or a 'defence against money laundering SAR'.

If a regulated entity in the UK is asked to carry out an activity – typically, a financial transaction – that it suspects may involve money laundering or terrorist financing, it can file a SAR and at the same time request the NCA's permission to proceed with the transaction. If the request is granted, the entity has a legal defence against charges of money laundering or terrorist financing in relation to the transaction.

At the time Transparency International published its analysis, the NCA had 31 days to decide whether to grant the request or seek a freezing order in respect of the property concerned based on

⁴² Oliver Bullough, 'The money machine: how a high-profile corruption investigation fell apart', *The Guardian*, 12 April 2017.

⁴³ HC 942 Public Accounts Committee, 'Written evidence from the Crown Prosecution Service, Home Office and the National Crime Agency', 27 January 2014
<<https://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/942/942we03.htm>>.

⁴⁴ The Taskforce membership comprised of several distinguished lawyers and civil society activists.

⁴⁵ Transparency International UK, 'Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and Other New Approaches to Illicit Wealth and Asset Recovery', May 2015 (updated March 2016), p. 20.

⁴⁶ *Ibid*, p. 28.

⁴⁷ Home Office and HM Treasury, 'Action Plan for anti-money laundering and counter-terrorist finance', April 2016, p. 21, para. 2.31.

‘a reasonable cause to suspect’ it was the proceeds of crime. Upon the expiry of the 31-day moratorium period, the transaction was deemed to be allowed. This was often insufficient to reach an informed decision in a complex cross-border case.

Transparency International’s proposed solution was to use UWOs as a means of collecting additional information following the submission of a consent SAR. Based on that proposal, the 31-day moratorium period would be paused once a UWO was issued and until a response to the UWO was provided. This context adds texture to the early thinking that ultimately led to the framing of a UWO as an investigative tool. In the end, the Criminal Finances Act 2017 included a discrete solution to this problem by enabling the moratorium to be extended to up to 186 days,⁴⁸ irrespective of whether a UWO was issued.

According to one report published after UWOs became available to UK law enforcement agencies, it is possible that the issuance of a UWO will by dint of its publicity contribute to the submission of SARs in respect of the respondent.⁴⁹ This, however, appears to be little more than a marginal benefit. It may also have the effect of prompting regulated entities to drop business relations with respondents to the UWO regardless of the merit of the order, which is problematic from a human rights standpoint.

3.2. International Background

In proposing the introduction of UWOs, Transparency International drew on existing overseas experience, as well as international treaties. Responses to unexplained wealth have long been considered at the international level. The most far-reaching approach is enabling criminal prosecution of public officials for owning property whose provenance they cannot explain, referred to as illicit enrichment in the UNCAC. Article 20 of UNCAC says:

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Article 20 of the UNCAC is analogous to Article IX of the Inter-American Convention against Corruption (IACC), with the exception that the provisions of the former are non-binding while those of the latter are. This is because the compatibility of the illicit enrichment offence with the presumption of innocence proved controversial during the negotiations leading to the UNCAC’s adoption. According to the official record of the negotiations, ‘many delegations indicated that they faced serious difficulties, often of a constitutional nature, with the (...) reversal of the burden of proof’.⁵⁰

Stolen Asset Recovery Initiative (StAR) undertook a review of the criminalisation of illicit enrichment in 2012 and found that 44 jurisdictions had criminalised illicit enrichment, most of them developing countries. Both before and after StAR’s report, domestic courts in various jurisdictions took differing

⁴⁸ Section 336A POCA 2002.

⁴⁹ See Shilpa Aurora and Steve Smith, ‘Unexplained Wealth Orders: Looking Beyond the Headlines’, ACAMS White Paper, 2020.

⁵⁰ UNODC, ‘Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption’, 2010, p. 196, A/AC.261/IPM/4.

views on whether the offence can be reconciled with the presumption of innocence.⁵¹ Canada and the US are among the states who view the illicit enrichment offence as incompatible with the presumption of innocence, as expressed in their reservations to the IACC.⁵²

A less draconian approach to illicit wealth is to facilitate the non-conviction based confiscation of property whose lawful provenance cannot be adequately demonstrated. Article 31(8) of the UNCAC, whose provisions are likewise non-mandatory, says:

States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

The Convention's official drafting history does not reflect any discussion on human rights or the presumption of innocence that may have occurred during the negotiations. It appears likely that the strength of feeling expressed, if any, was less than in the context of criminalising illicit enrichment.

Several states have availed themselves of the option to enact such legislation, in some cases prior to the adoption of the UNCAC. A review by the US law firm Booz Allen Hamilton published in 2012 focused specifically on the experience of (a) Ireland, where a reversal in the burden of proof was introduced in 1996 insofar as civil forfeiture of criminally acquired property was concerned, and (b) Australia, where a similar approach was adopted first in Western Australia in 2000 and then at the commonwealth level in 2002.⁵³

Under both Irish and Australian federal legislation, once the state demonstrates that certain conditions are met (as discussed in greater detail in section 5 of this report below), the property is deemed to be liable to confiscation as proceeds of crime unless the respondent proves otherwise. In other words, the burden of proof is reversed in that specific respect, but only once the initial conditions are satisfied by the respondent. As will become apparent, the UK has chosen the approach that follows a different, more complicated pattern.

3.3. Parliamentary Deliberations

The Criminal Finances Act was introduced in 2016 and presented by, Ben Wallace, then-Minister of State for Security and Economic Crime, as a means of targeting 'criminals who declare themselves almost penniless, yet control millions of pounds' as well as corrupt overseas officials.⁵⁴ UWO provisions were included in the bill from its inception and, according to the Explanatory Notes, reflected 'the fact that it may be difficult for law enforcement agencies to satisfy the evidential

⁵¹ For instance, courts in Egypt, Italy and Ukraine have ruled criminal illicit enrichment provisions to be incompatible with constitutional human rights guarantees. Courts in Argentina and Lithuania have upheld them. See Lindy Muzila et al, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, Stolen Asset Recovery Initiative, 2012, pp. 29-30 (covering Egypt, Italy and Argentina respectively); Constitutional Court of the Republic of Lithuania, *Ruling on the Compliance of Paragraph 1 of Article 1891 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania*, No KT4-N3/2017, 15 March 2017, <<https://www.lrkt.lt/en/court-acts/search/170/ta1688/content>>; Olga Vorozhbyt and Oleksii Gerasymchuk, 'Constitutional Court of Ukraine strikes down law criminalizing illicit enrichment', DLA Piper, 13 March 2019 <<https://www.dlapiper.com/en/ukraine/insights/publications/2019/03/constitutional-court-of-ukraine-strikes-down-law-criminalizing-illicit-enrichment/>>.

⁵² See <http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption_signatories.asp#Canada>.

⁵³ Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders', January 2012.

⁵⁴ HC Deb 25 October 2016, vol 616, col 198.

standard at the outset of an investigation given that all relevant information may be outside of the jurisdiction’.⁵⁵

With minor amendments,⁵⁶ UWO legislation was adopted in substantially the same form as originally proposed. A UWO would require the respondent to *explain* how property was acquired without going so far as placing on the respondent the burden to *prove* that it was legitimately acquired. If no explanation was provided, the property was deemed recoverable by the state. But if an explanation was forthcoming, the burden remained on the state to prove that the property was the proceeds of crime under POCA 2002.

The overall reception of the UWO provisions was positive in both Houses, with little opposition on human rights grounds. For instance, Lord Phillips, former President of the UK Supreme Court, spoke in favour using the civil standard in proving circumstances based on which a UWO could be issued.⁵⁷ Parliamentary debates revolved around the details of the proposed provisions and foreshadowed several of the issues that arose later in the context of applying UWOs. These included:

- Whether the respondent fails to comply if the explanation provided is spurious;⁵⁸
- Whether there was a need for the capping of costs that could be imposed on enforcement authorities in UWO-related litigation;⁵⁹ and
- Whether the property confiscated would be kept by the UK or shared with the state where the predicate offence took place.⁶⁰

3.3.1. *Purported Compliance*

Of these, the issue of what it meant to comply with a UWO was crucial because it is non-compliance that triggers the presumption that the property is recoverable. In view of the stipulation that ‘purported compliance’ was to be treated as compliance, Sir Edward Garnier, a barrister and member of the House of Commons, said:

I am concerned about the Bill’s use of the words “purports to comply”. (...) [P]urporting to do something means either doing or attempting to do one’s best, or doing something speciously — appearing, falsely, to do something. Albeit that we accept that that expression is used in earlier legislation, we need to be clear that to pretend to do something should not be a defence or an answer to an accusation of failure to comply with an unexplained wealth order.⁶¹

Similar sentiments were expressed in the House of Lords by another practicing barrister, Lord Faulks.⁶² The logic behind the government’s approach to purported compliance was explained by Baroness Williams, then-Minister of State at the Home Office:

If a person does not comply with a UWO, their property is presumed to be recoverable under civil recovery proceedings. Given the severe consequences of not complying, it is right that

⁵⁵ Criminal Finances Bill, Explanatory Notes, 13 October 2016, p. 5, para. 13.

⁵⁶ For instance, the inclusion of what is now Section 362H POCA 2002 concerning property held through trusts and company arrangements.

⁵⁷ HL Deb 28 March 2017, vol 782, col 490.

⁵⁸ HC Deb 25 October 2016, vol 616, col 208; HL Deb 28 March 2017, vol 782, col 486; HL Deb 28 March 2017, vol 782, col 497.

⁵⁹ HC Deb 21 February 2017, vol 621; Criminal Finances Act Deb 17 November 2016, col 89.

⁶⁰ HC Deb 25 October 2016, vol 616, col 222.

⁶¹ HC Deb 25 October 2016, vol 616, col 208.

⁶² HL Deb 28 March 2017, vol 782, col 486.

this rebuttable presumption should not apply to a person who purports to provide a response. This avoids any legal ambiguity as to when the presumption will apply. However, where that individual provides responses that do not satisfy the enforcement agency, he or she then runs the risk that the poor quality of the responses will encourage the agency to take further action, and in those circumstances the burden of proof switches back to law enforcement, as is normal.

Purported compliance applies to a scenario where all the requirements of a UWO have been met but where the response is less than satisfactory. The agency is able to tailor the request for information very specifically, so will have some control over this. We do not want to get into arguments before the courts as to whether the presumption should apply and whether the individual has complied.⁶³

The Home Office's Code of Practice on POCA Investigations⁶⁴ exhibits some uncertainty as to the import of 'purported compliance'. On the one hand, it acknowledges that the term covers scenarios 'where a person has provided a response to each of the requirements of an order but the recipient is not wholly satisfied with the response'.⁶⁵ On the other hand, the Code of Practice argues that it is not 'intended to excuse a poor or limited response and the respondent is expected to provide full and genuine information; failure to do so could still amount to non-compliance with the order'.⁶⁶ As summed up by one commentator, the position appears to be that:

[S]imply serving a blank document on time, for example, would not seem to relieve the respondent on the ground of purported compliance where a number of specific orders for the provision of information had been made.⁶⁷

This underscores the hurdle that the enforcement agency must overcome to set off the presumption that the assets are recoverable.⁶⁸ This aspect of the legislation was often overlooked in media coverage and expert commentary alike. In the press, UWOs swiftly acquired reputation as a dramatic step-change in the UK's response to economic crime, and the Criminal Finances Act 2017 became known the McMafia law, an allusion to a BBC-produced television series about politically connected Russian organised criminals operating in the UK.⁶⁹

3.3.2. *Cost Capping*

The exposure of law enforcement agencies to litigation costs was another issue broached on Parliament's floor before the Criminal Finances Act 2017 was adopted. One MP asked whether 'the courts can and should use various cost-capping measures to ensure that we are not unreasonably exposed to very high costs'.⁷⁰ Others tabled a proposal to prohibit courts from awarding costs

⁶³ HL Deb 28 March 2017, vol 782, col 497.

⁶⁴ Binding on enforcement authorities under Section 377(5) POCA 2002.

⁶⁵ Code of Practice Issued Under Section 377 of the Proceeds of Crime Act 2002 (fn 2 above) p. 44, para. 189.

⁶⁶ Ibid, p. 44, para. 190.

⁶⁷ James Mather, 'Unexplained Wealth Orders: Practical and Legal Issues', 2018, p. 15, para. 1.28 <https://www.serlecourt.co.uk/images/uploads/documents/James_Mather_UWOs.pdf>.

⁶⁸ The explanation offered by Ben Wallace was more equivocal. He said that '[i]f the person does not comply with an unexplained wealth order, either by not responding or not responding fully to the terms of the order, the property identified in the order is presumed to be recoverable under any subsequent civil recovery proceedings'. Criminal Finances Act Deb 17 November 2016, col 79.

⁶⁹ See, e.g., Rupert Neate, 'McMafia' law: woman who spent £16m at Harrods is jailed banker's wife', The Guardian, 10 October 2018.

⁷⁰ HC Deb 21 February 2017, vol 621.

against enforcement authorities in connection with the issuance of a UWO, which the government opposed on the following grounds:

[I]t remains our view that any awards of costs should follow the same rules that apply in other, similar matters. The general principle that the loser pays is a well established position. Changing it could lead to unfortunate unintended consequences in relation to other powers and procedures. In any case, the judge has a general discretion to award costs that are proportionate.⁷¹

As a result, costs in relation to UWOs are awarded on the same basis as in other cases. This does not mean that cost-capping is never available,⁷² but ‘exceptional circumstances’ must be present.⁷³

3.3.3. *International Recovery*

Since UWOs are a tool for collecting information that can be used in civil recovery, in most aspects proceedings that involve UWOs are no different from other civil recovery proceedings. Among other things, this is true in respect of how recovered property is disposed of. In line with usual practice under the Asset Recovery Incentivisation Scheme, 50% of the confiscated money goes to the Home Office and the remaining amount is split between the prosecuting agency, the police force and the courts.⁷⁴ Whether any of the recovered funds are shared with foreign countries in cases of grand corruption is then a matter for the government’s discretion rather than legal obligation. Although the UNCAC contains some rules on the subject, they do not require the repatriation of assets confiscated without the victim country’s involvement or help.⁷⁵ During parliamentary debates, the question was asked whether a foreign country where the crime occurred would at all receive a notification about the confiscation, but no answer was forthcoming from the government at that moment.⁷⁶

In short, rather than introducing a raft of changes to the UK’s civil recovery system, the introduction of UWOs was the addition of an investigative tool aimed at facilitating civil recovery in the UK, whose role and purpose is explained in the following section.

3.4. *UWOs in the UK’s Civil Recovery Framework*

The stated rationale of UWOs is to serve as a ‘tool to obtain information and documentation’ that facilitates civil recovery.⁷⁷ Civil recovery is the UK’s term for non-conviction based confiscation, which involves proving on the balance of probabilities that the property is unlawfully obtained. Civil recovery provisions are contained in Part 5 of POCA 2002 and were enacted to facilitate the confiscation of criminally obtained property, especially in the context of organised crime. Their adoption was intensely controversial and their critics, including Parliament’s Joint Committee on

⁷¹ Criminal Finances Act Deb 17 November 2016, col 89.

⁷² The Code of Practice states: ‘Enforcement authorities considering the use of a UWO should have regard to the cost-capping provisions contained within the practice direction of the Civil Procedure Rules. The rules allow for cost-capping in appropriate cases; costs should not be the sole factor in deciding whether or not to apply for a UWO’. Code of Practice Issued Under Section 377 of the Proceeds of Crime Act 2002 (fn 2 above) p. 41, para. 173.

⁷³ Civil Procedure Rules 3F Practice Direction 1.1 <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/practice-direction-3f-costs-capping>>.

⁷⁴ Home Office, ‘Asset recovery statistical bulletin 2012/13 – 2017/18’, September 2018, p 8. See also Mick Beattie, National Police Chiefs Council, at Criminal Finances Act Deb 15 November 2016, col 5.

⁷⁵ Article 57(3) UNCAC.

⁷⁶ HC Deb 25 October 2016, vol 616, col 222.

⁷⁷ Code of Practice Issued Under Section 377 of the Proceeds of Crime Act 2002 (fn 2 above) p. 41, para. 176.

Human Rights, predicted that civil recovery would be found by courts to be in breach of the Human Rights Act, which implements the European Convention on Human Rights.⁷⁸ Contrary to that view, both the UK Supreme Court and the European Court on Human Rights (ECtHR) have since ruled that civil forfeiture was compatible with human rights.⁷⁹

Central to POCA 2002 are the concept of ‘recoverable property’ and ‘property obtained through unlawful conduct’. For property to be obtained through unlawful conduct, it is not necessary for the state to prove which specific crime the property derives from as long as ‘it is shown that the property was obtained from one of a number of kinds of conduct, each of which would have been unlawful’.⁸⁰

The operation of the UK’s civil recovery regime has at various points faced criticism from the National Audit Office, House of Commons’ Public Accounts Committee and House of Commons’ Home Affairs Committee.⁸¹ The annual reports of the NCA and its predecessor, Serious and Organised Crime Agency (SOCA), show civil recovery figures averaging £5 million per annum in 2010-2020, an amount that is arguably derisory compared to the estimated scale of money laundering in the UK.⁸² In relation to overseas corruption specifically, Transparency International’s report in 2016 noted that its Taskforce members were only aware of one civil recovery case involving a foreign public official, *SOCA v Agidi*.⁸³

As reflected in the Code of Practice, a ‘UWO is an investigation tool under Part 8 of POCA intended to assist in building evidence’.⁸⁴ In line with that precept, the Code of Practice requires the applicant to consider ‘whether alternative tools of investigation could be used in obtaining any relevant documents and information’.⁸⁵ (The High Court cited this statement in *NCA v Baker* to shed light on the purpose of the UWO.)⁸⁶ It is worth noting that the Criminal Finances Act 2017 has enabled the issuance of disclosure orders in respect of both money laundering investigations and civil recovery investigations.⁸⁷ UWOs and disclosure orders can therefore be issued in similar circumstances. The distinction is that the issuance of a disclosure order requires an investigation to be ongoing. It also necessitates a separate freezing order application in order for the property to be restrained whereas a UWO can be issued in conjunction with an IFO.

4. UK’s Use of UWOs

The Home Office’s impact assessment in June 2017 assumed, based on consultations with law enforcement agencies and legal practitioners, that approximately 20 UWOs would be issued per year.⁸⁸ A press report in February 2019 suggested that the NCA was looking into the potential

⁷⁸ Joint Committee on Human Rights, ‘Eleventh Report’, Session 2001-02, 4 February 2002, paras. 17-26.

⁷⁹ *Gale v Serious Organised Crime Agency* [2011] UKSC 49; *Gogitidze et al v Georgia*, ECtHR, App No 36862/05, Judgment of 12 May 2015.

⁸⁰ Section 242(2)(b) POCA 2002.

⁸¹ See Joanna Dawson et al, ‘Criminal Finances Bill (Bill 75 of 2016-17)’, House of Commons Library Briefing Paper 07739, pp. 8-9.

⁸² The calculation is based on the NCA’s most recent annual report (NCA, ‘Annual Report and Accounts 2019-20’, 2020, p. 87) and the figures from eight earlier annual reports cited in Wood (fn 24 above) p. 11.

⁸³ *SOCA v Christopher Agidi and Angela Agidi* [2011] EWHC 175 (QB), discussed in Transparency International UK, ‘Empowering the UK to Recover Corrupt Assets’ (fn 45 above) p. 17.

⁸⁴ Code of Practice Issued Under Section 377 of the Proceeds of Crime Act 2002 (fn 2 above) p. 40, para. 169.

⁸⁵ *Ibid*, p. 41, para. 176.

⁸⁶ *NCA v Baker et al* [2020] EWHC 822 (Admin), [2020] All ER (D) 59 (Apr), para. 61.

⁸⁷ Section 357(3) POCA 2002.

⁸⁸ Home Office, ‘Criminal Finances Act – Overarching Impact Assessment’, 20 June 2017, p. 13, para. 22.

issuance of UWOs in approximately 140 cases.⁸⁹ A year later, in January 2020, it was reported that London's Metropolitan Police was 'seeking to employ UWOs in roughly 20 investigations against drug traffickers and other criminals amid public concern that violence tied to illicit narcotics has spiraled out of control'.⁹⁰

To date, however, only 15 UWOs in four cases are known to have been issued, which are discussed below.⁹¹ All of them have been obtained by the NCA.⁹² Only the UWO in *NCA v Hussain* has resulted in successful asset recovery (see below in section 4.2), although it is arguable that the primary objective of obtaining information was also achieved in other cases.

4.1. Zamira Hajiyeva

In February 2018, the High Court issued UWOs in respect of London real estate owned by Zamira Hajiyeva, an Azerbaijan citizen and wife of the former chairman of the International Bank of Azerbaijan, an Azerbaijani state-owned bank.⁹³ Her husband had been convicted of large-scale fraud and embezzlement in Azerbaijan in 2016. Hajiyeva herself was arrested in the UK in October 2018 based on Azerbaijan's extradition request but her extradition was found by a UK judge to be incompatible with the European Convention on Human Rights and therefore refused.

Hajiyeva unsuccessfully argued for the discharge of the orders in the High Court. Over the course of the proceedings, Supperstone J revoked the anonymity order which had hitherto protected her identity from disclosure.⁹⁴ The Court of Appeal refused permission to challenge the revocation of the anonymity order but proceeded to hear her appeal against the High Court's judgment denying the discharge of the UWOs.

In the Court of Appeal, Hajiyeva argued that (a) her husband was not a PEP merely on account of being the chairman of a state-owned bank; (b) at any rate, the bank was not state-owned; (c) there were no reasonable grounds for suspecting that the known sources of her lawfully obtained income were insufficient for the purchase of the properties at hand; (d) UWOs infringed the rule against self-incrimination and/or spousal privilege; and (e) in any case, the High Court was wrong to exercise its discretion to issue the UWO. All of these grounds of appeal failed.⁹⁵

4.2. Mansoor Mahmood Hussain

In May 2019, the NCA obtained a UWO in relation to a property owned by Mansoor Mahmood Hussain, described as a money-laundering enabler of organised crime gangs operating in the Bradford area. Hussain applied to the High Court for the discharge of the orders, but his application

⁸⁹ Irene Madongo, 'UK looks into 140 unexplained wealth orders, many linked to Russians', KYC360, 8 February 2020 <<https://www.riskscreen.com/kyc360/news/update-uk-looks-into-140-unexplained-wealth-orders-many-linked-to-russians-nca/>>.

⁹⁰ Koos Couvée, 'London Police Consider Asset Freezes in Crackdown on Violence', moneylaundering.com, 6 January 2020.

⁹¹ Written parliamentary answer by James Brokenshire MP, 24 February 2020, <<https://questions-statements.parliament.uk/written-questions/detail/2020-02-11/665#>>.

⁹² Questions to the Mayor, 'Unexplained wealth orders', 19 March 2020 <<https://demo.london.gov.uk/questions/2020/1304>>.

⁹³ The facts are described based on the Court of Appeal's judgment in *NCA v Hajiyeva* [2020] EWCA Civ 108, [2020] All ER (D).

⁹⁴ As described at *NCA v Hajiyeva* [2020] EWCA Civ 108, [2020] All ER (D) para. 8.

⁹⁵ Three further grounds had been relied on in the High Court, which were likewise unsuccessful.

was rejected after Murray J went through various requirements for the issuance of the orders and found they were satisfied.⁹⁶

In October 2020, the NCA announced that in August 2020 it had achieved a settlement with Hussain whereby he surrendered to the NCA 45 properties and other assets worth just under £10 million. The High Court issued a recovery order based on that settlement in October 2020.⁹⁷ According to the NCA, Hussain submitted a 76-page statement in response to the UWO that ‘inadvertently gave NCA investigators clues to make a bigger case against him’ and thus prompted him to settle.⁹⁸ In an apparent justification of the settlement as opposed to criminal prosecution, an NCA official was quoted as saying that the settlement ‘not only meets our operational goals, but frees up our investigators and legal team to pursue other cases’.⁹⁹

This case lends weight to the view that the requirement to explain their wealth may hold out greater dangers for organised crime figures than corrupt politicians or other individuals who are likely to invest great effort in the appearance of legitimacy. In some instances, alleged organised crime group participants may be tempted to walk away from the property rather than divulge potentially damaging information.

Another notable aspect of the case was that, when the NCA applied for the UWO to be issued, two media outlets originally challenged the judge’s decision to hold the hearing in private. Their applications were subsequently withdrawn. However, Murray J found it helpful to confirm that, although due regard must be had to individual circumstances of each case, ‘the presumptive starting point is that a UWO application will be made without notice and that the hearing of the UWO application and any related IFO application will be in private’.¹⁰⁰ In contrast, once a UWO is issued, the names of the people concerned are routinely disclosed, as exemplified by the lifting of the anonymity order in *NCA v Hajiyeva*.

4.3. ██████████

In July 2019, the NCA obtained a UWO in relation to six properties owned by ██████████, a woman residing in Northern Ireland.¹⁰¹ There is no mention in the public domain of any litigation that may have ensued. ██████████ was reportedly suspected of ties with paramilitary groups involved in cigarette smuggling,¹⁰² most likely on account of ██████████, a convicted criminal and member of the Irish Republican Army.¹⁰³

4.4. Baker and Others

⁹⁶ *NCA v Mansoor Mahmood Hussain et al* [2020] EWHC 432 (Admin) [2020] 1 WLR 2145.

⁹⁷ NCA, ‘Businessman with links to serious criminals loses property empire after settling £10m Unexplained Wealth Order case’, 7 October 2020, <<https://www.nationalcrimeagency.gov.uk/news/businessman-with-links-to-serious-criminals-loses-property-empire-after-settling-10m-unexplained-wealth-order-case>>.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ *NCA v Mansoor Mahmood Hussain et al* [2020] EWHC 432 (Admin) [2020] 1 WLR 2145, para. 88.

¹⁰¹ NCA, ‘NCA secures Unexplained Wealth Order against properties owned by a Northern Irish woman’, 21 July 2019, <<https://www.nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-order-against-properties-owned-by-a-northern-irish-woman>>.

¹⁰² Kate Beioley, ‘UK unexplained wealth order targets suspected paramilitary links’, *Financial Times*, 31 July 2019.

¹⁰³ Ciaran Barnes, ‘Dissident smuggler ██████████ at centre of £215m dirty cash probe’, *The Belfast Telegraph*, 27 January 2020 <<https://www.belfasttelegraph.co.uk/sunday-life/news/dissident-smuggler-█████████-at-centre-of-215m-dirty-cash-probe-38895218.html>>.

Alongside *NCA v Hussain*, the other most significant UWO case so far is the one that has seen a successful challenge to the issuance of the order, *NCA v Baker*.¹⁰⁴ It demonstrates the challenges the state has to overcome in establishing the reasonable grounds to suspect that the value of the property outmatches the defendant's lawful income, as well as reveals defects in the drafting of the legislation insofar as nominees or trustees are concerned.

In May 2019, the NCA obtained three UWOs in relation to London real estate. The NCA suspected these properties to have been purchased from the proceeds of crimes committed by Rakhat Aliyev, a former Kazakh public official who died in an Austrian prison while awaiting trial for alleged murder. Aliyev, who at various times held posts such as Director of the Tax Police and Deputy Foreign Affairs Minister in Kazakhstan, was later suspected by Kazakh authorities of involvement in multiple crimes including theft, extortion and kidnapping.

In August 2019, the respondents, together with the beneficial owners of the three properties, provided a reply to the NCA that was presented as voluntary submission of information rather than compliance with all requirements contained in the UWOs. In it, the NCA was informed that the beneficial owners of the properties were Rakhat Aliyev's ex-wife Dariga Nazarbayeva and their son, Nurali Aliyev. Like her late ex-husband during his lifetime, Dariga Nazarbayeva is well-connected in Kazakhstan's political circles. She served as the Chair of Kazakhstan's Senate and is the daughter of the country's former president.

The NCA refused to withdraw the UWOs based on the information provided and insisted on compliance with the terms of the orders. The respondents made the application to the High Court to have the UWOs discharged, which Lang J granted.

The respondents to the UWOs were Andrew Baker, the president of two Panamanian foundation that each owned one of the properties, and four corporate entities, including said two foundations. The issuance of UWOs vis-à-vis them was possible because a UWO can be directed not only at the beneficial owner of a property but also at those who have 'effective control' over it.¹⁰⁵ This provision had been included in the Criminal Finances Act 2017 specifically to 'ensure that the orders have the greatest possible impact once law enforcement agencies can use them'.¹⁰⁶

Based on the literal wording of POCA 2002, all the other requirements for the issuance of the UWO must likewise be satisfied in respect of the *respondent*. This leads to the paradoxical situation that, if a UWO is directed at a nominee or trustee, the enforcement authority must demonstrate that he or she – rather than the property's beneficial owner – is a PEP or that reasonable grounds exist for suspecting him or her of involvement in serious crime, as well as showing a mismatch between the respondent's lawful income and the value of the property.

In the end, this was the approach that Lang J took. In discussing the first of the three UWOs, which was directed at Baker and the Panamanian foundation of which he was the president, she reasoned as follows:

- Based on the information disclosed to the NCA in August 2019, Nazarbayeva was the owner of the property, which she had purchased after selling company shares obtained as part of her divorce settlement with Rakhat Aliyev in 2007. This finding informed much of Lang J's subsequent reasoning as she reiterated that the property was not owned by Aliyev and

¹⁰⁴ *NCA v Baker* (fn 3 above).

¹⁰⁵ Section 362H(2) POCA 2002.

¹⁰⁶ HC Deb 26 April 2017, vol 624, col 1150.

apparently was not purchased out of the proceeds of crime. According to Lang J, ‘if the NCA wish to allege that [the shares] were a tainted gift, that would be a matter for civil recovery proceedings under POCA 2002’.¹⁰⁷

- Since effective control over the foundation lay with its Foundation Council and beneficiary rather than its president, Baker could not be said to hold the property in question.¹⁰⁸ However, Lang J proceeded to consider if the other requirements were met. She made no reference to the fact that the UWO was also directed at the foundation itself, which appears to have satisfied the holding requirement.
- In discussing whether Baker’s lawful income was sufficient to cover the value of the property, Lang J acknowledged the lack of clarity as to how the requirement should be applied to nominees or trustees as opposed to beneficial owners of the property.¹⁰⁹ In her view, to identify the value of the property it was necessary to estimate the value of the interest that Baker held in the property. Doing so was ‘difficult’ because Baker had no interest of his own in the property to speak of.¹¹⁰ Citing (a) this difficulty, as well as (b) ‘cogent evidence’ that Dariga Nazarbayeva was the property’s beneficial owner, the judge decided that (c) the income requirement was not met.¹¹¹ The logical connection between these three statements is less than transparent and Lang J arguably failed to meaningfully address the issue she herself identified – that is, the challenge of applying to nominees or trustees the criteria that were clearly drafted with beneficial owners in mind.
- In relation to the PEP/serious crime requirement, the NCA’s case was that Baker was involved in laundering the proceeds of Aliyev’s crimes. Lang J dismissed this argument by reference to her finding that the property was not purchased by Aliyev or from his money.

Having found for these reasons that the conditions for the issuance of the UWO were not satisfied and discharged it, Lang J repeated her reasoning in respect of the other UWO that concerned a property beneficially owned by Nazarbayeva and held via another Panamanian foundation.

In relation to the property owned by Nurali Aliyev, the NCA’s case was likewise that it had been purchased by his father Rakhat from the proceeds of his crimes. Based on the evidence in front of her, Lang J accepted that the property was purchased by Nurali Aliyev from the \$65 million that a Kazakh bank legitimately lent him in 2008.¹¹² Nurali Aliyev, who was 23 at the time, was the chairman of that bank’s board when the loan was made.¹¹³

Having established that he ‘was sufficiently independent of his parents by 2008 to purchase Property 2 for himself’, Lang J discharged the UWO on the basis that there was no discrepancy between lawful income of either Nurali Aliyev or the corporation through which he held the property, nor was any link to serious crime proven.¹¹⁴

Another issue of note that arose during the hearing was the NCA’s reliance on the ‘complex and secretive’ manner in which the properties had been obtained, which was arguably suggestive of criminality.¹¹⁵ In Lang J’s view, the use of complex corporate structures was not, without more, a

¹⁰⁷ *NCA v Baker* (fn 3 above) para. 77.

¹⁰⁸ *Ibid*, para. 120.

¹⁰⁹ *Ibid*, para. 131.

¹¹⁰ *Ibid*, paras. 135-137.

¹¹¹ *Ibid*, paras. 137-139.

¹¹² *Ibid*, paras. 178-179.

¹¹³ *Ibid*, para. 177.

¹¹⁴ *Ibid*, para. 178.

¹¹⁵ *Ibid*, para. 95.

ground for suspicion. And, for a suspicion to arise based on such circumstantial evidence, it had to be of such a nature as to give rise to an ‘irresistible inference’ of criminality.¹¹⁶

In summary, the judgment raises more questions than it answers, especially in its failure to point out a satisfactory approach to applying statutory requirements for the issuance of UWOs to nominees or trustees. However, in June 2020 the Court of Appeal refused permission to appeal due to no real prospect of success.¹¹⁷

It has been reported that the respondents are seeking £1.5 million in costs from the NCA and the court has already obliged the NCA to make an interim payment of £500,000.¹¹⁸ This is in stark contrast to the Home Office’s prediction that court costs associated with UWOs would range around £5,000-10,000 consistent with the costs of disclosure order and property freezing order applications.¹¹⁹

4.5. Lessons from the UK’s Use of UWOs

One might argue that the UWOs in *NCA v Baker* have enabled the NCA to gather information about the beneficial owners of the properties and the history of their acquisitions that may not have been available otherwise. But the NCA’s resistance to the discharge of the orders suggests it was not wholly satisfied with the information supplied. Furthermore, in the absence of further judicial clarification, the way is open for nominees or trustees to contest the issuance of UWOs on the grounds that they do not fall within the legislative parameters such as the PEP/serious crime requirement. As noted by barrister Kennedy Talbot QC, the ruling therefore ‘has the capacity seriously to derail the utility of UWOs in cases where they are most needed’.¹²⁰

In general, the most salient feature of the UK’s UWOs is their dual nature. They compel the respondent to provide information, and the sanction for the respondent’s failure to do so is to create the presumption that the respondent’s property is recoverable. In other words, they combine elements of a disclosure order with the sanction of a reversed burden of proof.

The wisdom of this combination is open to question. On the one hand, UWOs enable enforcement authorities to compel the disclosure of information in the absence of an open investigation. But the complexity of requirements surrounding the issuance of a UWO is conducive to expensive litigation, as *NCA v Baker* demonstrated. To make things worse, the publicity and media attention surrounding UWOs creates ample incentive for respondents to fight their issuance. Coupled with the direction in the Code of Practice to only use UWOs if other information gathering avenues are not available, their utility as an efficacious investigative tool must be in doubt.

The possibility that the issuance of a UWO will lead to a reversal in the burden of proof does little to alter that conclusion. Only if the respondent does not even purport to comply with the order is the burden of proof reversed. It stands to reason that a respondent wishing to retain the property is likely to provide an ostensibly legitimate explanation that the enforcement agency would then have

¹¹⁶ Ibid, para. 99.

¹¹⁷ The authors have seen Carr LJ’s order refusing permission to appeal of 17 June 2020.

¹¹⁸ Reuters, ‘Ex-Kazakh president’s grandson, others seek 1.5 million pound costs after UK wealth order failure’ 22 June 2020 <<https://uk.reuters.com/article/uk-britain-kazakhstan/ex-kazakh-presidents-grandson-seeks-15-million-pound-costs-after-failure-of-uk-wealth-order-idUKKBN24012X>>.

¹¹⁹ Home Office, ‘Criminal Finances Act – Overarching Impact Assessment’, 20 June 2017, p. 14, para. 25.

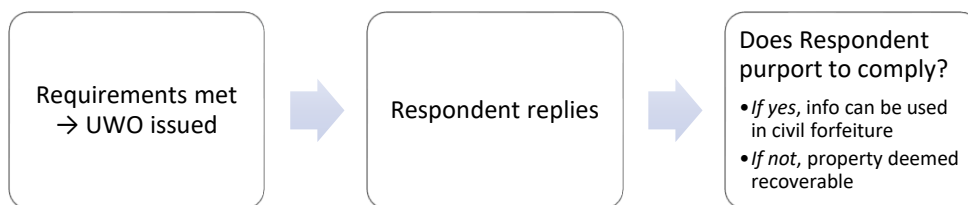
¹²⁰ Kennedy Talbot QC, ‘Proceeds of Crime and the Professional Trustee: The End of the Unexplained Wealth Order?’, 30 April 2020 <<https://www.33knowledge.com/current-awareness/proceeds-of-crime-and-the-professional-trustee-the-end-of-the-unexplained-wealth-order>>.

to disprove to succeed in civil recovery. That, in turn, is reliant on overcoming the challenges in civil recovery that the introduction of UWOs was supposed to alleviate in the first place.

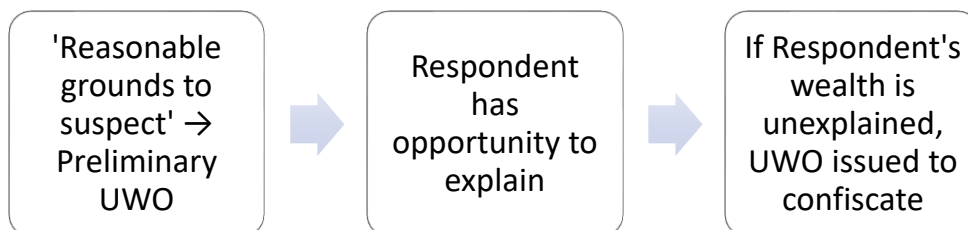
In some cases, however, it is possible that the obligation to explain the origins of one's wealth will place the respondent under the pressure they will aim to avoid at all costs. As *NCA v Hussain* demonstrates, better outcomes can be achieved in using UWOs against organised crime groups that make use of less complex corporate structures and do not hide behind the same veneer of respectability as their more sophisticated counterparts. They could be more willing to simply walk away from the asset than comply with the order and thus reveal a wider picture of criminality or fight its issuance.

With that in mind, it would be premature to write off the utility of UWOs, but for now one must conclude that their complexity compares unfavourably to the simpler legislative scheme used in countries such as Ireland and Australia, whose experience is explored in the following sections.

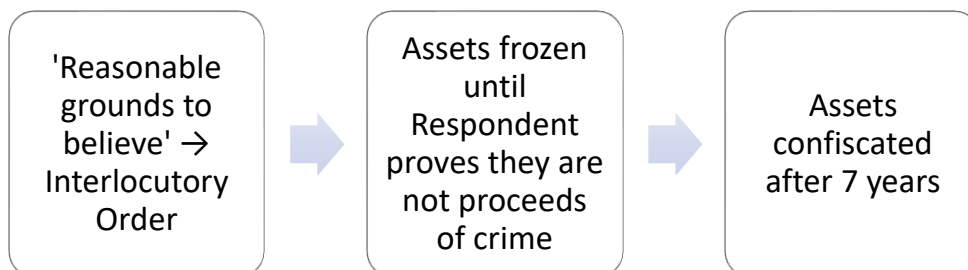
UWOs (UK)



UWOs under POCA 2002 (Australia)



Orders under Section 3 POCA 1996 (Ireland)



5. Other Countries' Use of Unexplained Wealth Provisions

The introduction of UWOs in the UK was informed by prior overseas experimentation with what can be described as unexplained wealth provisions. Unexplained wealth is not a term that has the same meaning – or, indeed, any meaning at all – across jurisdictions, but it is useful shorthand. The voluminous study prepared by Booz Allen Hamilton in 2012, which has become a standard point of

reference for later discussions,¹²¹ describes as UWO laws any legislation that creates a presumption that a person's property constitute proceeds of crime and thus, in effect, compels that person to explain the lawful provenance of their wealth.¹²²

This is the same approach as that embodied in Article 31(8) of the UNCAC, which speaks of 'requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation'. Notwithstanding the UK's terminology, implementing such a provision need not involve the issuance of any order (or, for that matter, a declaration – the term used in some Australian states and territories, such as Western Australia). The same effect could be achieved, for instance, by establishing a presumption in law that in certain circumstances property is presumed to be criminally obtained unless proven otherwise.

5.1. Examples of Countries with Unexplained Wealth Provisions

There are no up-to-date and comprehensive statistics on countries that have introduced unexplained wealth provisions. But there are a few, typically those that feel they are faced with a particularly serious threat from organised or financial crime. One example is Italy, which introduced a presumption as early as 1956 that the property of individuals suspected of belonging to a mafia-type organisation was criminally obtained. This Italian legislation withstood challenges before the ECtHR on the basis that 'the interference with the applicant's right to peaceful enjoyment of his possessions was not disproportionate to the legitimate aim pursued', nor was it adjudged to amount to the determination of a criminal charge that would trigger the presumption of innocence.¹²³ This legislation continued to be in force as of 2014.¹²⁴

Georgia is another country with a similar legislative scheme in place, as became apparent from a challenge that it survived before the ECtHR:

Although a criminal conviction was not a necessary precondition, administrative confiscation could only be initiated if an official had first been charged with offences (including corruption) committed during his or her term in office against the interests of the public service, the enterprise or organisation concerned, or of one of the following offences: money laundering, extortion, misappropriation, embezzlement, tax evasion or violations of custom regulations, regardless of whether the official in question was still in office or not.

Thus, if the public official in question was accused of one or more of the above-mentioned offences, and the public prosecutor in charge of the investigation had a reasonable suspicion that the property in the possession of that public official and/or of his or her family members, close persons and "connected persons" might have been acquired wrongfully, the prosecutor could file "a civil action" (სარჩული) with the court under Article 37 § 1 CCP, demanding the confiscation of the "ill-gotten" property and unexplained wealth.

Once a public prosecutor had filed a civil action for confiscation, which had to be substantiated with sufficient documentary evidence, the burden of proof would then shift onto the respondent. If the latter failed to refute the public prosecutor's claim by producing documents proving that the property (or the financial resources for the purchase of the

¹²¹ Including the paper that catalysed the adoption of UWOs in the UK: Transparency International UK, 'Empowering the UK to Recover Corrupt Assets' (fn 45 above) p. 24.

¹²² Booz Allen Hamilton (fn 53 above) p. 2.

¹²³ *Arcuri et al v Italy*, ECtHR, App no 52024/99, Judgment of 5 July 2001.

¹²⁴ UN Office on Drugs and Crime, 'The Italian experience in the management, use and disposal of frozen, seized and confiscated assets', September 2014, pp. 4-5.

property) had been lawfully acquired or that taxes on the property had been duly paid, the court, after having ensured that the prosecutor's claim was properly substantiated, would order the confiscation of the property in question (Article 21 § 6 of the CAP).¹²⁵

The ECtHR dismissed the challenge brought against this legislation based on essentially the same reasons as in the case of Italy. Other EU countries that enable a reverse burden of proof in civil forfeiture¹²⁶ proceedings include Bulgaria, Latvia and Romania.¹²⁷

Outside the EU, analogous provisions are reportedly in place in Albania.¹²⁸ In Colombia, the Constitutional Court ruled against the reversed burden of proof as regards unexplained wealth in civil forfeiture cases.¹²⁹ In Ukraine, once the state proves that (a) certain property belongs to a public official and (b) that official's wealth exceeds his or her lawful income, the burden is on the official to prove that the property does not constitute proceeds of crime.¹³⁰

The legal, cultural and linguistic diversity of countries that have implemented some sort of unexplained wealth provisions means that identifying all such countries is neither feasible nor helpful. In English-speaking countries, most of the comparative discussion surrounding unexplained wealth and civil forfeiture has revolved around the experience of Ireland and Australia,¹³¹ first highlighted in this context in Booz Allen Hamilton's study in 2012.¹³²

As will be seen, the characterisation of Ireland as a country with unexplained wealth provisions is not without its difficulties. Broadly speaking, however, both Ireland and Australia follow the same pattern as Italy, Georgia and Ukraine in reversing the burden of proof once the state meets a certain initial threshold. In that they differ from the UK, where the reversal is predicated on the respondent's failure to comply with a court order (the UWO). Thus, the European Commission correctly notes that the UK's UWO provisions do *not* follow the same model as Bulgaria, Ireland, Italy, Latvia and Romania.¹³³

5.2. Republic of Ireland

The Republic of Ireland is frequently held out as a jurisdiction that has used a reversed burden of proof in civil forfeiture to great effect.¹³⁴ Relevant provisions are contained in the Proceeds of Crime

¹²⁵ *Gogitidze et al v Georgia*, ECtHR, App No 36862/05, Judgment of 12 May 2015, pp. 51-53.

¹²⁶ Or, in the case of Romania, administrative confiscation.

¹²⁷ European Commission, 'Analysis of Non-Conviction Based Confiscation Measures in the European Union: Commission Staff Working Document', SWD(2019) 1050 final, 12 April 2019, pp. 7, 15, 16.

¹²⁸ Albana Rexha, 'Confiscation of Illicit Wealth in Kosovo: Time to think for a new policy?', October 2015, p. 11.

¹²⁹ Conference of the States Parties to the United Nations Convention against Corruption, 'Review of implementation of the United Nations Convention against Corruption: Colombia', CAC/COSP/IRG/I/2/1/Add.27, 15 October 2014, p. 6.

¹³⁰ Article 81(2) of the Code of Civil Procedure of Ukraine <<https://zakon.rada.gov.ua/laws/show/1618-15>>.

¹³¹ See, e.g., Natasha Reurts, 'Unexplained Wealth Laws: The Overseas Experience' in 'Unexplained Wealth Orders: thoughts on scope and effect in the UK', The White Collar Crime Centre, January 2017, pp. 15-18; Florence Keen, 'Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation', RUSI Occasional Paper, September 2017, pp. 8-13.

¹³² Booz Allen Hamilton (fn 53 above) pp. 65-150.

¹³³ European Commission, 'Analysis of Non-Conviction Based Confiscation Measures in the European Union: Commission Staff Working Document', SWD(2019) 1050 final, 12 April 2019, p. 17.

¹³⁴ See, e.g., Francis H. Cassidy, 'Targeting the Proceeds of Crime: An Irish Perspective' in Theodore S. Greenberg et al, *Stolen Asset Recovery: A Good Practice Guide for Non-Conviction Based Asset Forfeiture*, Stolen Asset Recovery Initiative, 2009, pp. 154 (noting the reversed burden of proof), 162 (arguing that the significant amount of international interest in the Irish model bears testimony to its effectiveness); Liz

Act 1996. Under the Act, if a court satisfies itself that ‘there are reasonable grounds for the belief’ that certain property constitutes proceeds of crime, it can freeze the property by means of an interlocutory order.¹³⁵ The order remains in force unless it is proven to the court, on the balance of probabilities, that the property does not constitute the proceeds of crime or costs less than £10,000.¹³⁶ Once the order has been in force for seven years, the court can direct the confiscation of the property in question.¹³⁷

The burden on the state to demonstrate reasonable grounds for the belief that *specific property* constitutes the proceeds of crime distinguishes the Irish scheme from the approach taken in the UK. In Ireland, the state itself has to venture some degree of explanation as to how the property was likely acquired – that is, from the proceeds of crime – in order for the burden of proof to shift onto its owner.

In the UK, by contrast, the requirements for the issuance of a UWO are focused mostly on the person holding the property. And, in another key difference from Ireland, the UK’s UWO only leads to a presumption that the property is recoverable if the respondent fails to comply with the order. The outcome of a UWO in the UK is therefore more likely to be the submission of additional information by the respondent than the reversal of the burden of proof.

Overall, Ireland’s asset recovery system often wins plaudits from commentators. A key facet of that system is a well-resourced, fusion centre-style enforcement agency, the Criminal Assets Bureau that brings together seconded experts from the Garda Síochána (police), Revenue and Social Welfare.¹³⁸ Interviews conducted by Booz Allen Hamilton in 2012 painted the picture of an agency with a ‘stellar reputation’,¹³⁹ and this assessment is mirrored in the review of Ireland by the Conference of State Parties to the UNCAC, which identified the country’s approach to civil forfeiture as best practice.¹⁴⁰

5.3. Australia

In Australia, UWOs exist at both commonwealth and state/territory level, which are considered in turn below and followed by a brief discussion of their effectiveness.

5.3.1. Commonwealth

Under the Proceeds of Crime Act 2002 (Commonwealth), a court can issue an order, known as preliminary UWO, requiring a person to appear before the court to enable the court to decide whether a UWO should be made. To issue a preliminary UWO, the court need only be satisfied that there are ‘reasonable grounds to suspect that the person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired’.¹⁴¹

Campbell, 'The Recovery of 'Criminal' Assets in New Zealand, Ireland and England: Fighting Organised Crime in the Civil Realm' (2010) 41(1) Victoria University of Wellington Law Review 15, fn 101.

¹³⁵ Sections 3 and 8(1)(a) POCA 1996 (Ireland).

¹³⁶ Section 3(1)(b)(i) POCA 1996 (Ireland).

¹³⁷ Section 4(1) POCA 1996 (Ireland).

¹³⁸ Section 8(1)(a) of the Criminal Assets Bureau Act 1996 (Ireland).

¹³⁹ Booz Allen Hamilton (fn 53 above) p. 137.

¹⁴⁰ UNODC, 'Country Review of Ireland: Review by Brunei Darussalam and Luxembourg of the implementation by Ireland of articles 15 - 42 of Chapter III. "Criminalization and law enforcement" and articles 44 - 50 of Chapter IV. "International cooperation" of the United Nations Convention against Corruption for the review cycle 2010 – 2015', 2015, p. 80.

¹⁴¹ Section 179B(1)(b) POCA 2002 (Cth).

In principle, this threshold does not require demonstrating any suspicion of criminality nor the link of any specific property to criminal activity. However, unlawfully acquired wealth is limited to (a) wealth acquired in breach of Commonwealth criminal law, (b) foreign indictable offences and (c) state offences with a federal aspect – in other words, offences against the laws of Australian states or territories are in general not captured.¹⁴²

The court *must* make the preliminary UWO if the conditions for its issuance are met, but may revoke it on respondent's application for several reasons, including it being in the public interest or in the interests of justice to do so.¹⁴³

If the respondent does not make an application within 28 days showing why a UWO should not be issued and the court sees no other reasons not to do so, a UWO will be issued whereby the court directs the person to pay the amount the court identifies to be the difference between the person's total wealth and the amount of that wealth that is *not* derived from crime.¹⁴⁴ In Australian terminology, a UWO is therefore akin to a confiscation order.

5.3.2. States and Territories

There are subtle variations in approach at the state/territory level:

- Like the commonwealth legislation, Western Australia, Northern Territory and Tasmania follow the approach of obliging the court to reverse the burden of proof on the state's application 'if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth'.¹⁴⁵ In a review published in 2019, former Chief Justice of Western Australia Wayne Martin AC QC dismissed the suggestion that 'an applicant for an unexplained wealth declaration should carry the onus of proving that there are reasonable grounds for suspecting that the unexplained wealth derived from some form of criminal activity' on the basis that the 'policy [of confiscating ill-gotten gains] would be substantially undermined'.¹⁴⁶
- In South Australia, the state must show it 'reasonably suspects that a person has wealth that has not been lawfully acquired' for a UWO to be issued.¹⁴⁷ The court is not obliged to issue the order in these circumstances and may have regard to whether 'it would be manifestly unjust to make such an order'.¹⁴⁸
- In New South Wales, Queensland and Victoria, for a UWO to be issued it is necessary to show a 'reasonable suspicion' that the respondent has either engaged in serious crime or purchased criminally obtained property.¹⁴⁹

¹⁴² Section 179E(1) POCA 2002 (Cth).

¹⁴³ Sections 179B(1) and 179C(5) POCA 2002 (Cth).

¹⁴⁴ Section 179E POCA 2002 (Cth).

¹⁴⁵ Section 12 of the Criminal Property Confiscation Act 2000 (Western Australia). The wording of respective provisions in Northern Territory and Tasmania is almost identical: Section 71(1) of the Criminal Property Confiscation Act 2002 (Northern Territory) and Section 142(2) of the Crime (Confiscation of Profits) Act 1993 (Tasmania).

¹⁴⁶ Wayne Martin AC QC, 'Review of the Criminal Property Confiscation Act 2000 (WA)', May 2019, pp. 35-36.

¹⁴⁷ Section 9(1) of the Serious and Organised Crime (Unexplained Wealth) Act 2009 (South Australia).

¹⁴⁸ *Ibid*, Section 9(3).

¹⁴⁹ Section 28A(2) of the Criminal Assets Recovery Act 1990 (New South Wales); Section 86G(1) of the Criminal Proceeds Confiscation Act 2002 (Queensland); Section 40I(2) of the Confiscation Act 1977 (Victoria).

It is of interest that under both South Australian and Tasmanian legislation a person's wealth includes property under that person's 'effective control' even if the person is not its legal owner.¹⁵⁰ Like under the UK's POCA 2002, a UWO can therefore be directed at a trustee, but the coherence of the South Australian and Tasmanian approach is *not* compromised by stipulating further requirements that cannot easily apply to anyone other than the beneficial owner.

5.3.3. Effectiveness

This seemingly conducive regime for the issuance of UWOs in Australia has not invariably led to success either at the commonwealth or at the state/territory level. In 2018/2019, Australian Federal Police (AFP) noted in its annual report that it was not pursuing any investigations that could lead to UWOs but 'continue[d] to actively litigate three unexplained wealth matters'.¹⁵¹ No mention of UWOs was made in the annual report of the Commonwealth Director of Public Prosecutions, the other agency empowered to apply for UWOs at the commonwealth level.¹⁵²

Interviews conducted by RUSI in 2017 identified two possible reasons for the limited practical use of commonwealth UWOs in Australia, namely the (a) overall lack of expertise in civil recovery and forensic accounting in some of the relevant agencies; and (b) to the extent that criminally acquired assets are confiscated, this is often done using other legislation, including rules on taxation of criminal income.¹⁵³

As regards the implementation of UWOs by states, Wayne Martin observed in his 2019 review that respective provisions in Western Australia had been underused:

[T]here has been no confiscation of property on the basis of an unexplained wealth declaration obtained by the DPP since 2012. It appears that 4 declarations were made in 2010-2011, and a total of 16 declarations on this particular ground had led to confiscation between 2000 and 2009-2010.¹⁵⁴

One of Martin's recommendations was to consider the creation of a cross-agency group to pursue unexplained wealth, such as 'a task force comprising prosecutors, police and [Corruption and Crime Commission] officials, along the lines of the Commonwealth model'.¹⁵⁵ In 2018, Western Australia's Corruption and Crime Commission acquired the authority to apply for UWOs, in addition to Police Force and the Office of the Director of Public Prosecutions, who had already had those powers. Since then, the Commission received 41 referrals of potential unexplained wealth matters and 'generated six potential unexplained wealth targets, resulting in a total of 47 potential unexplained wealth matters'.¹⁵⁶

A review of Tasmania's UWO regime by Damian Bugg AM QC, former Commonwealth Director of Public Prosecutions, produced mixed results in 2017. On the one hand, he was of the view that the results achieved to date demonstrated the effectiveness of the Criminal Assets Recovery Unit in the

¹⁵⁰ Sections 3(1) and 4 of the Serious and Organised Crime (Unexplained Wealth) Act 2009 (South Australia); Section 138(1)(b) of the Crime (Confiscation of Profits) Act 1993 (Tasmania).

¹⁵¹ AFP, 'Annual Report 2018-19', October 2019, p. 203.

¹⁵² CDPP, 'Annual Report 2018-19', September 2019.

¹⁵³ Keen (fn 131 above) p. 12.

¹⁵⁴ Wayne Martin AC QC, 'Review of the Criminal Property Confiscation Act 2000 (WA)', May 2019, p. 34.

¹⁵⁵ *Ibid*, p. 35.

¹⁵⁶ Corruption and Crime Commission (Western Australia), 'Annual Report 2018-19', September 2019, p. 53.

first 18 months of its operation, but many of the provisions in respective legislation had not been used and none of the UWOs obtained had yet been challenged judicially.¹⁵⁷

Conversely, according to the 2018/2019 Annual Report by Victoria's Office of Public Prosecutor, approximately one quarter of that year's proceeds of crime confiscation was due to the use of UWOs, which may be an indicator of relative success.¹⁵⁸

With this mixed picture across the commonwealth, states and territories in mind, there has been a push towards consistent rules and enforcement across the country. As early as 2012, Australia's Parliamentary Joint Committee on Law Enforcement summarised differences in approach to UWOs between various Australian jurisdictions and called for harmonisation.¹⁵⁹ A step in this direction was made in 2018 with the creation of the national cooperative scheme on unexplained wealth, which enables AFP to obtain UWOs on the basis of commonwealth rules with respect to property acquired in breach of the criminal laws of participating states and territories, although not all states and territories take part.¹⁶⁰ It remains to be seen what results this approach will yield.

6. Lessons from UK and International Experience

Reversing the burden of proof in relation to unexplained wealth is a method of targeting the assets of organised crime and corrupt officials. States that resort to this approach typically do so because of the perceived prevalence of money laundering activities they wish to stem. The most intuitive way of doing so is reversing the burden of proof once some initial threshold is reached. Provisions of this nature are currently in force in five EU member states¹⁶¹ and several other countries around the world, where they constitute part of the respective country's non-conviction based confiscation framework.

6.1.1. Key Parameters of UWO Legislation

In designing unexplained wealth provisions, states face several key choices, which are examined in this section. For consistency, this discussion assumes that the burden of proof is reversed by means of issuing a court order (UWO), but there is no reason why countries must adopt this procedure, and one might speak more accurately of unexplained wealth provisions.

- **Need to demonstrate a suspicion or belief of criminality.** The first of these choices is identifying the initial threshold that the state needs to satisfy in order for the burden of proof to be reversed. The approach that grants the state the greatest latitude is to enable a UWO to be issued in respect of anyone whose wealth exceeds his or her lawful income, as is the case in Australia at the commonwealth level. An alternative is to impose stricter requirements that the state must discharge, such as demonstrating reasonable grounds for the belief that certain property represents proceeds of crime, as is the rule in Ireland. The competing values are the protection of property on the one hand – and, arguably, the reputation of the person concerned – and the ease of confiscating criminally obtained assets on the other hand.

¹⁵⁷ Damian Bugg AM QC, 'Independent Review of Part 9 Crime (Confiscation of Profits) Act 1993', June 2017, pp. 17 and 3 respectively.

¹⁵⁸ Office of Public Prosecutions of Victoria, 'Annual Report 18/19', August 2019, p. 14.

¹⁵⁹ Parliamentary Joint Committee on Law Enforcement, 'Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements', March 2012, pp. 71-80.

¹⁶⁰ Unexplained Wealth Legislation Amendment Act 2018.

¹⁶¹ Bulgaria, Ireland, Italy, Latvia and Romania.

- **Application of the initial threshold to persons or property.** States also need to choose whether the initial threshold applies to the specific property, as in Ireland, or the person who owns or holds it, as in Australia’s commonwealth legislation. It may be easier to establish a person’s engagement in crime than link that crime to particular property, but equally there may be benefit for law enforcement of being able to go after a property purchased out of criminal proceeds even if no longer owned by the criminal. (In case an Ireland-style approach is chosen, the state will have to proffer some explanation why it believes the property has been criminally acquired, by which point the term ‘unexplained wealth’ is arguably a misnomer.)
- **Discretion to issue a UWO.** Once the initial threshold is satisfied, the court can either have the discretion to make a UWO or be obliged to do so. The obligation can be modified by the option to abstain from making the order if doing so would result in a serious risk of injustice, which is the proviso in the Irish legislation.¹⁶² As the Australian experience demonstrates, one should be careful not to conflate the absence of judicial discretion over the issuance of a UWO with the guarantee of the effectiveness of the regime, which is largely dependent on the contextual factors, as discussed below.

Depending on the country’s constitutional and legal arrangements, these parameters may determine the resilience of UWO provisions against legal challenges. There is no international consensus on whether the introduction of UWOs is desirable from the standpoint of striking the right balance between crime prevention and human rights protection. In Europe,¹⁶³ UWO provisions are compatible with the European Convention on Human Rights insofar as the forfeiture of unexplained wealth of public officials and alleged mafia associates is concerned.¹⁶⁴ Those judgments appear to place weight on the tailored nature of the legislation at hand and the gravity of the problem it sought to address, which is why some argue that they should not be treated as a blanket approval of reversing the burden of proof in civil recovery proceedings.¹⁶⁵

6.1.2. Key Contextual Factors

Beyond the framing of UWO legislation as such, contextual factors within which law enforcement agencies operate continue to play an indispensable role in determining the effectiveness of the UWO regime. These factors include:

- **Resourcing and expertise.** Both the success of the Irish regime and the lingering uncertainty over the effectiveness of Australian UWO provisions speak to the importance of ensuring that the agencies tasked with applying for UWOs are equipped to use them to the best possible effect. For instance, without appropriate forensic accountancy expertise even UWO provisions that are in principle well-suited to law enforcement purposes may remain underutilised.
- **Understanding by policymakers of investigatory needs.** It is likewise important to ensure that UWOs do not become the proverbial solution in search of a problem. For instance, the UK’s UWOs are in essence an investigative tool, but the precise nature of the improvement they offer over other available mechanisms, such as disclosure orders, is open to question.

¹⁶² Section 3(1)(b) POCA 1996 (Ireland).

¹⁶³ All European states except Belarus are parties to the European Convention on Human Rights.

¹⁶⁴ *Arcuri et al v Italy*, ECtHR, App no 52024/99, Judgment of 5 July 2001; *Gogitidze et al v Georgia*, ECtHR, App No 36862/05, Judgment of 12 May 2015.

¹⁶⁵ Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing 2017) p. 229.

This further underscores the need for consultation with law enforcement agencies to identify existing needs, of which the introduction of UWO legislation may or may not be a key one.¹⁶⁶

- **Cost management.** The relative ease of applying for a UWO does not wholly alleviate the risk of incurring significant costs in litigation against wealthy and powerful individuals. This means that law enforcement agencies' management litigation costs may need to be appraised in conjunction with introducing legislation that heightens social expectations of high-profile asset recovery litigation. One possible approach is allocating part of civil recovery proceeds to a contingency fund that can be drawn on to support such law enforcement action.¹⁶⁷

6.1.3. UK's Experience

As is evident from the preceding discussion, the UK has opted for an idiosyncratic approach that differs from that taken in countries such as Australia, Ireland, Italy, Georgia or Ukraine. The UK's UWO is a tool that compels the respondent to disclose certain information, and the sanction for a failure to comply is the presumption that the property is recoverable.

The UK's legislative scheme is without doubt reflective of an intention to minimise unjustified intrusion on property rights. But due to the opprobrium that UWOs cast on respondents in the court of public opinion, respondents have the incentive to contest their issuance. The drafting of the UWO legislation and its interpretation by the High Court in *NCA v Baker* provide fertile ground for such challenges in cases where complex corporate structures are involved and the UWOs are issued against nominees or trustees. These limitations of UWOs may be one reason why they have only been used by the NCA and by none of the other enforcement authorities so far.

On the other hand, UWOs may be effective in collecting information when respondents do not use complex corporate structures or are less sensitive about protecting their reputation, which could potentially be the case with organised crime UWOs as opposed to grand corruption ones. The £10 million settlement in *NCA v Hussain* following the successful issuance of a UWO may be a sign of that.

But given the centrality of concerns about grand corruption and high-end money laundering to the adoption of UWOs, neither the current operation of the UK's UWOs nor the concept of a UWO as an investigative tool appear to be the best model to emulate. If the objective is to collect information on unexplained wealth, the state may be best served by adjusting its existing disclosure orders or similar tools. Conversely, if a policy decision is taken to facilitate the forfeiture of wealth of unknown provenance, a simpler system such as that used in Ireland or Australia could be preferable.

Finally, and leaving aside the considerations of UWOs' effectiveness, in grand corruption cases UK law enforcement agencies appear to face the dilemma between addressing impunity and pursuing cases with strong evidence. In *NCA v Hajjeva*, the NCA went after the assets of a woman whose husband had been convicted of a crime in their home country. *NCA v Baker* was more complicated in that the NCA believed the properties in question to be connected to a politician who had likewise fallen from grace in his country and faced prosecution before his death, but they turned out to belong to his well-connected ex-wife. Taking up cases against the property of those who have already been targeted by law enforcement in their home countries has obvious benefits in terms of

¹⁶⁶ For the avoidance of doubt, we note that the UK government and parliament did consult extensively with law enforcement agencies in advance of the adoption of UWO legislation.

¹⁶⁷ Wood (fn 24 above) p. 17.

the availability of evidence and lesser potential for causing a diplomatic rift. That, however, is a less ambitious approach than going after the assets of corrupt officials who continue to benefit from power and patronage in their home jurisdictions.