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Unexplained Wealth Orders and the Right Not To Self-Incriminate

Dr Marnie Lovejoy[1]

Introduction

In April 2016, shortly after the Panama Papers exposed the dubious dealings of the offshore finance industry and its links to the UK[2], the government released the Action Plan for anti-money laundering and counter-terrorist finance.[3] The Action Plan announced the need to create:

> *"aggressive new legal powers (...) to enable the relentless disruption of criminals and terrorists".*[4]

These aggressive legal powers include Unexplained Wealth Orders (UWOs), which were introduced to the Proceeds of Crime Act 2002 through the Criminal Finances Act 2017.[5] The aim of UWOs is to facilitate the recovery of illicit assets, where the authorities are unable to use other freezing or recovery tools because of their inability to obtain evidence.[6] UWOs are an instrument of compulsion. They compel a person to provide information about the origin of targeted assets, in cases where the court suspects the value of the assets to be disproportionate to the person's known legitimate income.[7] To lie or to give misleading statements under this compulsion is a criminal offence[8] and non-compliance results in the legal presumption that the assets are recoverable in civil proceedings.[9] The design of this new legal instrument follows an international trend to target criminal assets *in rem* rather than prosecute criminal conduct *in personam*.[10] However, such instruments are controversial. They are intrusive and circumvent procedural safeguards commonly applicable in criminal proceedings.[11] The common argument that such safeguards should not apply to these modern

* Principal Lecturer, Associate Head, Portsmouth Law School, University of Portsmouth.

[2] International Consortium of Investigative Journalists, 'The Panama Papers: Exposing the Rogue Offshore Finance Industry' < https://www.icij.org/investigations/panama-papers/> accessed 17 August 2020.

[3] Home Office and HM Treasury, 'Action Plan for anti-money laundering and counter-terrorist finance' (Home Office/HM Treasury 2016).

[4] ibid, 3.

[5] Proceeds of Crime Act, ss 362A-326I (England, Wales and Norther Ireland); Proceeds of Crime Act (investigations: Scotland), ss 326A-326I (Scotland).

[6] Explanatory Notes to the Criminal Finances Act, paras 12-13.

[7] Proceeds of Crime Act 2002, s 362B(3).

[8] ibid, s 362E.

[9] ibid, s 362C(2); civil recovery proceedings are covered in Part 5 of the Proceeds of Crime Act 2002 and are based on the fact that assets originate from unlawful conduct.

[10] For example: Open-ended Intergovernmental Working Group on Asset Recovery, 'Model Provisions on In Rem Forfeiture' (24 August 2011); Swiss Federal Law on freezing and recovering illicit assets of politically exposed persons, SR 161.1.; European Commission, 'Commission staff working document, Analysis of non-conviction based confiscation measures in the European Union' (12 April 2019).

[11] J Hendry and C King, 'How far is too far? Theorising non-conviction-based asset forfeiture' 11 (2015) IJLC 396, 406; C King, 'Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture' 16 (2012) IJEP 337 f.

instruments because they are tools of administrative or civil law, is not entirely convincing considering the criminal law connotation of the issue as well as the severe potential consequences for the affected person.[12] The design and application of UWOs appears, at least *prima facie*, to infringe several fair trial guarantees: the presumption of innocence, the principle of legality, the principle of equality of arms and as an instrument of coercive compulsion certainly the right not to self-incriminate.[13]

This chapter will focus on last principle of the above. The right not to self-incriminate, if indeed applicable in UWO proceedings, could be violated at various stages. Firstly, the fact that a person is compelled under threat of a fine or imprisonment to provide potentially incriminating information is *per se* problematic. Secondly, questions will arise in relation to the use of information obtained in this manner, either in criminal[14] or civil proceedings, but also in relation to potential negative inferences drawn from a refusal to answer an UWO.[15] Because of the limited scope of a book chapter, the following analysis will mainly focus on problems regarding the right not to self-incriminate at the investigation stage and will not discuss the problems in relation to the use of coercively obtained information or negative inferences drawn from non-compliance to such an order at a later trial stage.

In domestic courts, the application of the privilege against self-incrimination[16] in UWO proceedings has been discussed to a limited extent in the *Hajiyeva* case.[17] However, the judicial assessment in this case did not extend to a detailed analysis of Strasbourg case law on the principle deriving from Article 6 of the European Convention on Human Rights. In order to evaluate the future success of UWOs as a truly innovative legal tool, such an analysis is crucial. Only if the use of UWOs can withstand legal challenges before the European Court of Human Rights, will these new investigatory powers ultimately be able to serve their purpose of facilitating the fight against financial crime.

Functioning of Unexplained Wealth Orders under sections 396A to 396I Proceeds of Crime Act 2002

The Criminal Finances Act 2017 introduced UWOs as new investigatory powers by amending Chapter 2 of Part 8 of the Proceeds of Crime Act 2002. In an *ex parte* hearing[18], without notice to the respondent, the High Court can issue an UWO on application of a law enforcement authority[19] if the following requirements are met[20]: Firstly, the person holding the targeted assets is either a politically exposed person (PEP) from a non-EEA country[21] or there are reasonable grounds for suspecting that the person is or was involved in serious crime[22]. Secondly, the value of the targeted assets is above the threshold

[12] Home Office and HM Treasury (n 3), 22.
[13] H D Lodge, *Criminal Finances Act 2017, A Guide to the New Law* (The Law Society 2017), 55.
[14] S 362F Proceeds of Crime Act 2002 offers a 'use immunity', e.g. statements gathered through an UWO cannot be used in criminal proceedings. The value of this provision in relation to the right not to self-incriminate is discussed below.
[15] For problems relating to negative inferences see *Murray v United Kingdom* (1996) 22 EHRR 29.
[16] The discussion was, however, limited to the civil procedure privilege under s 14 of the Civil Evidence Act 1968. Although there are overlaps between s 14 Civil Evidence Act 1968 and the principle under Article 6 European Convention of Human Rights, the guarantees are not identical, see *Gold Nuts Ltd v Revenue and Customs Commissioner* [2016] UKFTT 82 (TC), [2016] S.T.I 1342.
[17] *National Crime Agency v Hajiyeva* [2018] EWHC 2534 (Admin), 1 WLR 5887; *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108, 1 WLR 3209.
[18] Lodge submits that the fact that UWOs are issued in *ex parte* hearings might to be challenged in the future, see Lodge (n 13), 45 and 55.
[19] The National Crime Agency; Her Majesty's Revenue and Customs; The Financial Conduct Authority; the Director of the Serious Fraud Office; the Director of Public Prosecutions, see Proceeds of Crime Act 2002, s 362A(7).
[20] Proceeds of Crime Act 2002, s 362B.
[21] ibid, ss 362B(4)(a) and 396B(7).
[22] ibid, s 362B(4)(b); serious crime is defined under s 362B(9).

of £50,000[23] and the court is satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purpose of enabling the respondent to obtain the property.[24] This is a surprisingly low evidential threshold, particularly since the respondent does not have the opportunity to challenge the evidence prior to the issuing of the UWO.[25] The person targeted by an UWO will receive notice that an UWO was issued only *ex post* and will be given a period to respond to the request.[26] The order will request the respondent to set out the nature and extent of their interest in the property, how they obtained the property, details of the settlement, if property is held by the trustees of a settlement and any other information in connection with the property.[27]

To give false or misleading statements to an UWO, either knowingly or recklessly, is a criminal offence.[28]. Non-compliance to an UWO has the effect that the targeted property is presumed to be recoverable under Part 5 of the Proceeds of Crime Act 2002.[29] What heightens the concerns in relation to the right not to self-incriminate at the investigation stage is that the first UWO was issued with a penal warning attached to it. Although such a consequence is not set out in the statutory provisions covering UWOs, under the current use of this legal instrument, a compelled person can be held in contempt of court for disobeying an UWO and can face a fine or imprisonment. The following penal notice was attached to the UWO against *Zamira Hajiyeva*:

> *"If you disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized."*[30]

This warning is further specified under the important notes to the order:

> *"Further or alternatively, any person who disobeys the Unexplained Wealth Order, or knows of either order and does anything which helps or permits another to breach the terms of the same, may be held to be in contempt of court and may be imprisoned, fined or have their assets seized."*[31]

The consequences set out in the statutory provisions together with the practice of attaching a penal notice to a UWO have therefore a twofold impact on a respondent who refuses to provide information about the targeted assets because it might be incriminatory. Firstly, they can be held in contempt of court and face a fine or imprisonment in committal proceedings and secondly, their targeted assets are presumed be recoverable in civil proceedings. Especially the threat of penal sanctions for disobedience to an UWO seems to encroach on the right not to self-incriminate. It allows authorities to obtain potentially incriminating evidence from a suspect through coercion, whilst they themselves are either not willing or unable to obtain the evidence in a different way.[32] It could be argued that the purpose of UWOs is not to gather evidence for future criminal or civil actions against a person, but to

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[23] ibid, s 362B(1)(b).
[24] ibid, ss 326(3) and 326(6); criticism to this central test in Lodge (n 13), 46-48.
[25] Lodge (n 13), 46-47.
[26] Proceeds of Crime Act 2002, s 362A(6).
[27] ibid, s 362A(3).
[28] ibid, s 362E.
[29] ibid, s 362C.
[30] National Crime Agency v Hajiyeva (n 17) [89].
[31] ibid [90].
[32] Explanatory Notes to the Criminal Finances Act, para 12; the right not to self-incriminate might also be engaged if information obtained through a UWO is later used in criminal proceedings or if negative inference is drawn from the refusal to answer a UWO, but this is outside of the scope of this book chapter.

start purely *in rem* recovery proceedings of specific assets.[33] However, the following analysis will show that this argument might be flawed. It fails to take into consideration the strong criminal law connotation of UWOs and it could lead to a situation where high profile criminals are being offered a *de facto* immunity for their crimes.

The woman who infamously spent £16.3 million in Harrods in ten years

On the 27 February 2018 the National Crime Agency (NCA) obtained the first ever UWO, which targeted a Knightsbridge property that was bought for £11.5 million by Vicksburg Global Inc, a British Virgin Island company, controlled by *Zamira Hajiyeva*.[34] *Hajiyeva*, who infamously spent £16.3 million in the department store Harrods in ten years,[35] is the wife of *Jahangir Hajiyev*.[36] He was the former chairman of the state-owned International Bank of Azerbaijan and was sentenced to 15 years in prison in Azerbaijan in 2016 for charges of fraud, embezzlement, and misappropriation of public funds. In 2016, *Hajiyeva* herself was apparently arrested *in absentia* by Azeri authorities and was briefly detained in 2018 in the UK, based on a request for extradition.[37] In September 2019, the Magistrates' Court blocked her extradition on the grounds that she would not receive a fair trial in Azerbaijan.[38]

The UWO against *Hajiyeva* was based on the assumption that her husband is a PEP within the definition of the law and that there are reasonable grounds for suspecting that *Hajiyev's* lawful income from his role as chairman of the bank would have been insufficient to obtain the targeted property. According to the NCA, *Hajiyeva* herself did not have any independent income either and mainly relied on her husband's provision. [39] An interesting fact that was not mentioned in the judgement is that the Home Office granted *Zamira Hajiyeva* a Tier 1 investor visa in return for a seven-figure investment in UK bonds and shares in 2010.[40] Apparently, the origin of the funds available to this couple were not suspicious to the authorities at that time, even though *Hajiyev* was the chairman of the International Bank of Azerbaijan and therefore a PEP.

In July 2018*, Hajiyeva* applied to the High Court to have the UWO against her discharged on eight grounds: According to *Hajiyeva's* submissions, Mr *Hajiyev* was not a PEP within the meaning of the law; the NCA had mischaracterised the respondent's role when persuading the court that the income requirement in the act was met; the NCA had been wrong to place reliance on Mr *Hajiyev's* conviction in a non-EEA country; the NCA had not established the income requirement to the relevant standard; the order ought to be discharged by virtue of the penal warning wrongly attached to it; the order offended the respondent's right to peaceful enjoyment of her possessions under article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms; the order offended the privilege against self-incrimination and spousal privilege under s 14 Civil Evidence Act 1968; and given all the circumstances of the case, the court ought not to have exercised its discretion to make the order.[41]

[33] Home Office and HM Treasury (n 3), 22.
[34] *National Crime Agency v Hajiyeva* (n 17) [10-20].
[35] ibid [83].
[36] ibid [11].
[37] ibid [17-20]; *Hajiyeva v National Crime Agency* (n 17) [9].
[38] *Hajiyeva v National Crime Agency* (n 17) [9].
[39] *National Crime Agency v Hajiyeva* (n 17) [57].
[40] Sean O'Neill, 'Attracting the megarich while keeping out illicit money' *The Times* (London, 11 October 2018).
[41] *Hajiyeva v National Crime Agency* (n 17).

Of particular interest here is *Hajiyeva's* argument that the order violated her privilege against self-incrimination under s 14 Civil Evidence Act 1968.[42] The High Court as well as the Court of Appeal dismissed this ground firmly, but their arguments were limited to the civil guarantee under this provision and did not take into account Strasbourg case law on Article 6 of the European Convention on Human Rights. The High Court held that the UWO did not violate the privilege against self-incrimination,[43] because this privilege only applies as regards to criminal offences under the law of any part of the UK.[44] According to *Supperstone J*, there was no real and appreciable risk in the present case that *Hajiyeva* or her husband would be prosecuted for such offences in the UK.[45] The court further submitted that if they were prosecuted in the UK, the offences would comprise qualifying offences under the Fraud Act 2006 for which the privilege against self-incrimination has been excluded by s 13(1) Fraud Act 2006.[46] The court also stated that with the creation of UWOs, Parliament effectively abrogated the privilege against self-incrimination to that extent.[47] In December 2019, the Court of Appeal dismissed an appeal by *Hajiyeva* and reiterated *Supperstone J's* submissions in relation to the privilege under s14 CEA 1968.[48]

Hajiyeva has not been granted leave to bring the case to the Supreme Court and at the time of writing it is not known if *Hajiyeva* intends to bring this case to the Human Rights Court in Strasbourg.[49] Since the issuing of this first UWO, this new legal instrument has been used a number of times again with variable success.[50] The legal issue of a potential infringement of the right not to self-incriminate has, however, not yet been raised again. The following analysis is therefore a first attempt to examine whether UWOs at the investigation stage are reconcilable with the guarantees under the criminal limb of Article 6 of the European Convention on Human Rights.

The right not to self-incriminate under Strasbourg case law

The right not to self-incriminate, although generally acknowledged to lie at the heart of the notion of a fair trial, is not expressly set out in the European Convention on Human Rights.[51] The Court describes the principle and its rationale in the case of *Saunders v UK* as follows:

> *"Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (…). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or*

[42] ibid (n 17) [45-56]; the following discussion is limited to the right not to self-incriminate and does not take into consideration potential spousal privileges.
[43] Civil Evidence Act 1968, s 14.
[44] *National Crime Agency v Hajiyeva* (n 17) [107].
[45] ibid [108].
[46] ibid [113]; this argument is flawed, as *Hajiyeva* is more likely to be prosecuted for money laundering offences in the UK than for fraud offence, see below.
[47] ibid [110-112].
[48] *Hajiyeva v National Crime Agency* (n 17) [45-56].
[49] J Ames, 'Zamira Hajiyeva: McMafia banker's wife could lose her £15m home after court defeat' *The Times* (London, 6 February 2020).
[50] *National Crime Agency v Hussain et al* [2020] EWHC 432 (Admin), [2020] 1 W.L.R. 2145; *National Crime Agency v Baker* [2020] EWHC 822 (Admin), [2020] 4 WLUK 113.
[51] European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights' (Updated on 30 April 2020) <https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf> accessed 25 August 2020, para 184.

> *oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention."*[52]

It is clear from this statement that the right not to self-incriminate applies within the realm of criminal law only and it seems to be the view of the domestic courts that UWO proceedings are located outside of the criminal law territory and therefore outside of the scope of this principle.[53] However, the extent of the application of the criminal limb of Article 6 of the Convention depends on the existence of a criminal charge in the autonomous sense of this term[54], not its formal domestic classification.[55] A review of Strasbourg case law on this issue is therefore pivotal and the following analysis shows that the High Court and the Court of Appeal might have set aside concerns in relation to the right not to self-incriminate too prematurely in the *Hajiyeva*-case.[56] *Funke v France*[57] is one of the key Strasbourg cases on the question whether a conviction for refusing to provide potentially incriminating information violates the right not to self-incriminate under the criminal limb of Article 6. It therefore offers a good starting point for this study.

The key case of Funke v France

Funke, was suspected of tax offences, but was never formally charged and tax proceedings against him were never opened. He was, however, compelled by French custom officers, under threat of fines and imprisonment, to produce statements of overseas bank accounts, which they suspected existed.[58] *Funke* refused to comply with this request and was later convicted in proceedings for disclosure of documents. *Funke* claimed that his criminal conviction for the refusal to comply with the compulsion violated his right to a fair trial.[59] The French government objected to this using the argument that no criminal proceedings had ever been opened against *Funke* and the criminal limb of Article 6 should therefore not apply.[60] The court dismissed this objection because *Funke* did not complain about the actual tax proceedings, but the disclosure of information proceedings in which he had been convicted for a refusal to produce potentially incriminating bank statements upon compulsion by custom officers. The court concluded the question of a potential infringement of *Funke's* right to remain silent as follows:

> *"The Court notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law (...) cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to*

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[52] *Saunders v United Kingdom* (1997) 23 EHRR 313 [68].
[53] *National Crime Agency v Hajiyeva* (n 17) [108].
[54] The ECtHR assesses the existence of a criminal charge according to the 'Engel criteria': the classification in domestic law, the nature of the offence and the severity of the penalty that the person concerned risks incurring, see *Engel et al v the Netherlands* (1979-80) EHRR 706.
[55] Although the classification in domestic law is the starting point, this criterion is not decisive unless an offence is classified as criminal, see European Court of Human Rights (n 51) para 19.
[56] *National Crime Agency v Hajiyeva* (n 17) [104-116]; *Hajiyeva v National Crime Agency* (n 17) [45-56].
[57] *Funke v France* (1993) 16 EHRR 297.
[58] ibid.
[59] ibid [38].
[60] ibid [39].

> *contribute to incriminating himself. There has accordingly been a breach of Article 6 para. 1 (art. 6-1).''*[61]

A comparison of the situation in *Funke* to the UWO proceedings reveals interesting parallels. As mentioned above, a respondent to an UWO who disobeys the order, e.g. remains silent, faces a fine or imprisonment in committal proceedings because UWOs are issued with a penal warning attached to them.[62] A person targeted by an UWO is, therefore, compelled under the threat of penal sanctions to provide potentially incriminating evidence.[63] The crucial point, however, is that *Funke* was considered to be charged with a criminal offence in the autonomous meaning of the expression, whilst, at least in the case of *Hajiyeva*, the domestic courts did not consider that criminal proceedings in the UK were anticipated. *Supperstone J* clearly stated that:

> *''(...) I do not consider that the evidence discloses a real and appreciable risk that Mrs Hajiyeva or her husband will be prosecuted for offences in the UK. (...) Accordingly the threshold test for the privileges to apply has not been satisfied.''*[64]

According to the Convention jurisprudence, the existence of a criminal charge is assessed autonomously and can be defined as the official notification given to an individual by the competent authority of an allegation that the affected person has committed a criminal offence. This is the case if the situation of the suspect has been substantially affected by actions taken by the authorities as a result of a suspicion against them.[65] The European Court of Human Rights has held in previous cases that a charge exists in the autonomous sense, not only when a person is arrested or formally charged with an offence, but already when a person is questioned about their involvement in a criminal offence, even if they are treated as a mere witness.[66]

In the case of *Hajiyeva,* the High Court used the threshold test for the application of the privilege in civil procedures,[67] e.g. whether there was a real and appreciable risk that *Hajiyeva* or her husband would be prosecuted for offences in the UK and concluded that this threshold had not been reached. In other words, the court implied that *Hajiyeva* was, at the time of issue of the UWO, not charged with an offence because neither were criminal proceedings at that time pending, nor were they anticipated.[68] This argument might be formally correct because no criminal proceedings had ever been opened against *Hajiyeva* in the UK. However, substantially this situation does not seem to be as clear. The strong criminal law connotation of UWOs has to be taken into consideration when assessing this issue.[69] It cannot be ignored that UWOs are based on the suspicion that the known lawful sources of the respondent's income have been insufficient to acquire the targeted property. In other words, the authorities suspect that the targeted property has been acquired unlawfully. A respondent to an UWO is, therefore, suspected of holding criminal property. What seems to have been overlooked is that this constitutes in itself a criminal offence in the UK. Under s 329 of the Proceeds of Crime Act 2002 a person commits an offence if they acquire, use or possess criminal property. It would therefore not

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[61] ibid [44].
[62] *National Crime Agency v Hajiyeva* (n 17) [89-90].
[63] Either statements or documents can be requested through UWOs.
[64] ibid [115].
[65] *Deweer v Belgium* App no 6903/75 (ECtHR, 27 February 1980) [42-46].
[66] *Heaney and McGuinness v Ireland* (2000) 22 EHRR 12; *Kalēja v Latvia* App no 22059/08 (ECtHR, 5 October 2017).
[67] *National Crime Agency v Hajiyeva* (n 17) [108].
[68] ibid.
[69] E.g. *Bendenoun v France* App no 12547/86 (ECtHR, 24 February 1994) [47].

be fanciful to describe UWO proceedings as proceedings in which a person is questioned about their suspected involvement in a criminal offence – namely money laundering. Even though the questioning does not take place in the usual criminal justice setting, but in proceedings that are at least formally classified to be civil in nature. In front of this background, it would not be surprising either if the European Court of Human Rights would come to the conclusion that a person affected by a UWO could in certain circumstances, at least substantially, be considered as charged with a criminal offence.

The argument against such a conclusion would be that UWOs are purely *in rem* instruments; they are intended to target property and not persons and they were not designed to imply guilt. This argument is sustainable in situations where UWOs are used to target 'abandoned' illicit assets, acquired or held by criminals that are not currently within the jurisdiction of the UK and that are for whatever reason not available for prosecution in the UK.[70] However, the design of UWOs is much broader. UWOs can be used if the holder of the targeted property is in the UK. It is even possible that UWOs are issued against illicit assets that stem from crimes that were committed entirely in the UK.[71] It is difficult to support the view that UWOs only target property and not the holder of property in situations, where a respondent to an UWO effectively holds criminal property in the UK and is physically 'available' to prosecution authorities. This person is under suspicion of having committed a criminal offence as described above, otherwise an UWO would be baseless. It is not realistic in such a scenario to treat the respondent to an UWO as a mere third party as they themselves will have likely committed an offence.[72]

The High Court submitted in the *Hajiyeva* case that neither *Hajiyeva* nor her husband were facing criminal proceedings in the UK,[73] but it cannot be argued that a respondent to an UWO would never face criminal prosecution in the UK. Such an assumption would indeed lead to highly undesirable consequences. It would mean that a respondent to an UWO enjoys *de facto* immunity from criminal prosecution for money laundering offences committed in the UK because they were targeted by an UWO before proceedings were opened. The use of UWO proceedings would allow them, to relinquish their property to the authorities and therewith buy themselves out of criminal responsibility. Surely, this cannot be within the spirit this new legal instrument and it is surely not within the public interest that large scale financial crimes are not being prosecuted and criminals are not being held criminally accountable. UWOs should be a measure of last resort where orthodox prosecution would fail, but not an alternative settlement that allows high profile criminals to escape justice.

For these reasons, there seems to be a realistic prospect that the European Court of Human Rights could rely on its findings in *Funke v France*[74] and conclude that under certain circumstances a person affected by a UWO has to be considered charged with a criminal offence even though no formal prosecution has yet been opened. In certain circumstances, criminal proceedings must be anticipated. Otherwise, UWOs would offer a blank *de facto* immunity to all respondents. This means that UWOs could fall under the scope of the criminal limb of Article 6 of the European Convention on Human Rights and the right not to self-incriminate would apply.

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[70] For example because the person is in a country with which mutual legal assistance or extradition is doomed to fail or the person is dead.

[71] E.g. in relation to a respondent that has been involved in serious crime, Proceeds of Crime Act 2002, s 362B(4)(b)(i): "*the respondent is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere)".*

[72] E.g. Acquiring, using or possessing criminal property under s 329 Proceeds of Crime Act 2002.

[73] *National Crime Agency v Hajiyeva* (n 17) [108].

[74] *Funke v France* (n 57).

Post-Funke cases

There are several other cases that followed the *Funke* judgement[75] and concluded that Respondent States have violated the applicant's right not to self-incriminate in prosecutions for failure to provide information, even though the applicant was not formally charged with a criminal offence and it seems reasonable to assume that the *Funke* judgement[76] would influence a judicial assessment of UWO proceedings as well. In *Heaney and McGuinness v Ireland*[77], the applicants were arrested in relation to terrorist offences and compelled under threat of penal sanctions to provide a full account of their movements. Even though they were not formally charged with a criminal offence, the fact that they were arrested and questioned in relation to an IRA bombing meant for the Strasbourg Court that they were at least suspected of having been involved in a criminal offence and therefore substantially charged in the autonomous sense of the term.[78] In *Marttinen v Finland*[79], the applicant refused to provide information about his assets in a debt enforcement enquiry relying on his right not to self-incriminate. The applicant was subject to correlating pre-trial investigations for debtor's fraud, which were frozen at the time of the compulsion. The Finish Supreme Court argued in this case that:

> *''The purpose of the powers of enforcement authorities to oblige the debtor to provide an account of his property, and of the coercive means available to ensure compliance with this obligation, is to make enforcement more efficient. Although it is possible to impose a threat of a fine to secure compliance with the obligation to give the information requested in connection with the enforcement inquiry, and a sentence may be ordered on a person concealing information or giving false information, the debtor is not, when complying with his or her obligation to give information on his or her property for the purposes of enforcement, a person charged with a criminal offence within the meaning of Article 6 of the Convention, to whom the rights of the accused would apply.''*[80]

The European Court of Human Rights did not agree with this submission and held that *Marttinen*, should be considered charged in the autonomous sense of the expression. According to the Strasbourg Court it is not a requirement for the application of the principle that the allegedly incriminating evidence obtained through coercion was actually used in a criminal trial.[81]

There are however cases with a similar set of facts in which the Strasbourg Court has denied the application of the right not to self-incriminate in investigation procedures because it considered the applicant not to be charged with a criminal offence. Although these cases seem to contradict *Funke prima facie*, they can be distinguished based on their facts. In *Weh v Austria*[82], *Weh's* car was caught by a speed camera exceeding the speed limit and proceedings against an unknown driver were opened. *Weh* was required by the state authorities to provide the identity of the driver at the time of the speeding incident. *Weh* inaccurately stated that the driver was a person living in the state of Texas in the USA. He was later fined for providing inaccurate information.[83] The Strasbourg Court held in this

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[75] ibid.
[76] ibid.
[77] *Heaney and McGuinness v Ireland* (n 66).
[78] ibid [41-59].
[79] *Marttinen v Finland* App no 19235/03 (ECtHR, 21 July 2009).
[80] ibid [21].
[81] ibid [58-66].
[82] *Weh v Austria* (2005) 40 EHRR 37.
[83] ibid [11-23].

case that the right not to self-incriminate had not been violated. The case was, according to the Court, distinguishable from cases like *Funke*[84] or *Heaney and McGuinness*[85] because the criminal proceedings against the applicant were less likely:

> *"In Funke and in Heaney and McGuinness (...) criminal proceedings were anticipated, though they had not been formally opened, at the time the respective applicants were required to give potentially incriminating information. In Funke the customs authorities had a specific suspicion against the applicant, in Heaney and McGuinness the applicants had been arrested on suspicion of terrorist offences. In the present case the proceedings for speeding were conducted against unknown offenders, when the authorities requested the applicant under section 103 § 2 of the Motor Vehicles Act to disclose who had been driving his car on 5 March 1995. There were clearly no proceedings for speeding pending against the applicant and it cannot even be said that they were anticipated as the authorities did not have any element of suspicion against him."*[86]

Later cases in relation to the procurement of a driver's identity by compulsion show that the distinguishing characteristics from *Funke v France*[87] in these cases are not so much, as suggested in *Weh*[88], the degree of likelihood of the criminal proceedings, but the degree of the compulsion used. In *O'Halloran and Francis v UK*[89], the Strasbourg Court set out, citing *Brown v Stott*[90], that the compulsion in such cases flowed from the fact that all who own or drive motor cars know that by doing so they subject themselves to a regulatory regime to protect public safety and they therefore accept certain responsibilities including the present compulsion.[91] The court further set out that the compulsion in this case was narrow, because it only required the affected person to provide the authorities with the identity of the driver. Interesting for the assessment of UWOs is the following statement of the court in this case:

> *"The information is thus markedly more restricted than in previous cases, in which applicants have been subjected to statutory powers requiring production of "papers and documents of any kind relating to operations of interest to [the] department" (see Funke, cited above, § 30), or of "documents, etc., which might be relevant for the assessment of taxes" (see J.B. v. Switzerland, cited above, § 39)."*[92]

It seems likely from this statement that the Strasbourg Court would consider the compulsion used in UWO proceedings to be less restricted than the one in *Weh* or *O'Halloran and Francis*.[93] As mentioned above, UWOs require the respondent to provide extensive information about the targeted assets: namely, to set out the nature and extent of their interest in the property, how they obtained the property, details of the settlement, if property is held by the trustees of a settlement and any other

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[84] *Funke v France* (n 57).
[85] *Heaney and McGuinness v Ireland* (n 66).
[86] Weh v Austria (n 83) [52-53].
[87] *Funke v France* (n 57).
[88] *Weh v Austria* (n 83).
[89] *O'Halloran and Francis v United Kingdom* (2008) 46 EHRR 21.
[90] *Brown v Stott* [2001] 2 WLR 817.
[91] *O'Halloran and Francis v United Kingdom* (n 90) [57].
[92] ibid [58].
[93] *O'Halloran and Francis v United Kingdom* (n 90).

information in connection with the property.[94] This is not comparable with the procurement of the identity of the driver of ones car at a specific moment in time and the compulsion does not derive from a regulatory framework that supports public safety, but from a suspicion that money laundering offences have been committed.

In the case of *Fayed v UK*[95], administrative investigation proceedings by inspectors of the Department for Trade and Industry (DTI)[96] were considered to be outside of the application of the criminal limb of Article 6. The Court described these proceedings as follows:

> *"[Their] purpose (…) was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities - prosecuting, regulatory, disciplinary or even legislative (…).*[97]

> *"Acceptance of the applicants' argument would entail that a body carrying out preparatory investigations at the instance of regulatory or other authorities should always be subject to the guarantees of a judicial procedure set forth in Article 6(1) by reason of the fact that publication of its findings is liable to damage the reputation of the individuals whose conduct is being investigated. Such an interpretation of Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities. In the Court's view, investigative proceedings of the kind in issue in the present case fall outside the ambit and intendment of Article 6(1) (…).*[98]

This raises the questions whether, the Strasbourg Court could *per analogiam* consider that UWO proceedings are also fact finding procedures or preparatory proceedings outside of the scope of the criminal procedure guarantees of Article 6. However, some characteristics of UWOs make such an analogy difficult. UWOs are not used to investigate complex corporate or financial issues. They, in fact, do not require any investigatory work as such. UWOs simply compel the respondent, under threat of a fine or imprisonment, to explain how they have obtained the targeted property. [99] It is not because of the complexity of the issue that UWOs are used, but because enforcement agencies are unwilling or unable to obtain this information, or evidence relating to this information, themselves.[100] A second point that cannot be neglected is that DTI investigations are used to establish a set of facts. These facts might well be just descriptive and neutral in value. This is different with UWOs – if a respondent does not have the right to remain silent to an UWO, their answer will inevitably either be exculpatory or incriminating.[101]

The above shows that it is reasonable to believe that because of the strong criminal law connotation of UWOs and the degree and nature of the compulsion used, the Strasbourg Court could find that under certain circumstances a respondent to a UWO should be considered charged with a criminal offence in the autonomous meaning of the term. This would mean that UWOs, if they are issued with

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[94] Proceeds of Crime Act 2002, s 362A(3).
[95] *Fayed v United Kingdom* (1994) 18 EHRR 393; the same reasoning was later followed in *Saunders v United Kingdom* (n 52).
[96] Based on s 432(2) Companies Act 1985.
[97] *Fayed v United Kingdom* (n 96) [61].
[98] ibid [62].
[99] Proceeds of Crime Act 2002, s362A(3).
[100] Explanatory Notes to the Criminal Finances Act, paras 12.
[101] Because the compulsion through UWOs is not used to assess a person's tax liability, it can also not be compared to the case of *Allen v United Kingdom* (2002) 35 EHRR CD289.

a penal warning attached to them, might violate the right not to self-incriminate under the criminal limb of Article 6 of the Convention. This would, however, not the case if Parliament lawfully abrogated the right not to self-incriminate, as the High Court submitted in the *Hajiyeva* case.[102]

Valid abrogation of the right not to self-incriminate in UWOs proceedings

According to the High Court, Parliament abrogated the privilege against self-incrimination by creating the legal instrument of UWOs.[103] Whether such an abrogation is compatible with the Convention, depends firstly on whether the right not to self-incriminate is an absolute or a qualified right and secondly, if the right is qualified, whether the infringement is justified. The Strasbourg Court did not find it necessary in the case of *Saunders v the United Kingdom* to decide whether the right not to self-incriminate was absolute or not.[104] However, the Court stated that it did not accept the Respondent State's argument that the public interest in the investigation and punishment of corporate fraud could justify a marked departure of the basic principle of fair procedure.[105] Post-*Saunders*, the Court's position seems to have shifted not only in terms of the definition of the right not to self-incriminate, but also on the issue whether it can be balanced against public interest grounds. In other words, the Court seems to accept that in certain circumstances the legislator can validly abrogate the right not to self-incriminate.[106]

The case of *Jalloh v Germany* was concerned with a person being forced to produce real evidence. Through forceful administration of an emetic substances, the applicant regurgitated a small bag of cocaine.[107] The Court clearly distinguished this case from cases such as *Funke v France*[108] or *JB v Switzerland*[109], where the right not to self-incriminate was violated in the sense that a suspect was compelled to produce a potentially incriminating documents rather than other forms of real evidence that are usually not covered by the principle.[110] However, the Court also set out to what extent an infringement could be considered lawful. Interestingly, and seemingly in departure from its statement in *Saunders*[111], the Court engages in a balancing test between public interest factors and the violated right:

> *"In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put."*[112]

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[102] *National Crime Agency v Hajiyeva* (n 17) [110-112].
[103] ibid [110-112].
[104] *Saunders v United Kingdom* (n 52) [74].
[105] ibid.
[106] For a detailed discussion of this shift, see A L-T Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart 2013), 62 f.
[107] *Jalloh v Germany* (2007) 44 EHRR 32.
[108] *Funke v France* (n 57).
[109] *JB v Switzerland* App no 31827/96 (ECtHR, 3 May 2001).
[110] *Jalloh v Germany* (n 108) [113].
[111] *Saunders v United Kingdom* (n 52).
[112] *Jalloh v Germany* (n 108) [117].

In the following case of *O'Halloran and Francis v the United Kingdom*[113], in which the applicants were compelled to reveal the identity of the driver of their car, the Court reiterated these factors, but dropped the public interest element once again:

> *"In the light of the principles contained in its Jalloh judgment, and in order to determine whether the essence of the applicants' right to remain silent and privilege against self-incrimination was infringed, the Court will focus on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put."*[114]

In light of these cases it seems evident that the right not to self-incriminate is not an absolute right. However the Court's assessment of when an infringement is justified and whether public interest factors are decisive is inconsistent. It is therefore difficult to assess at this point whether the Strasbourg Court would accept that Parliament has lawfully abrogated the right not to self-incriminate by creating UWOs. Clearly the investigation of financial crimes and the recovery of illicit funds are in the public interest. However, the degree of compulsion exercised through UWOs is, as discussed above, undeniably high.[115]

Statutory 'use immunity' and potential infringements of the right not to self-incriminate

UWOs can only be used under the statutory safeguard that statements in response to such order cannot be used in evidence against the respondent in criminal proceedings.[116] This 'use immunity' is a feature that the legislator has often attached to statutory compulsion powers after the Strasbourg decision of *Saunders v UK*[117] and it will clearly give some weight in the Court's assessment whether UWOs infringe on the very essence of the right not to self-incriminate.[118] However, whether this 'use immunity' is capable of curing all of the discussed concerns in relation to the right not to self-incriminate is doubtful. It should not be overlooked that the European Court of Human Rights made it clear that it is not a requirement for a violation of the right not to self-incriminate that the evidence obtained has actually been used in criminal proceedings:

> *"The Court points out that in previous cases it has expressly found that there is no requirement for allegedly incriminating evidence obtained by coercion to be actually used in criminal proceedings before the right not to incriminate oneself applies. In particular, in the case of Heaney and McGuinness v. Ireland (no. 34720/97, §§ 43-46, ECHR 2000-XII) it found that the applicants could rely on Article 6 §§ 1 and 2 in respect of their conviction and imprisonment for failing to reply to questions, even though they were subsequently acquitted of the underlying offence. Indeed, in the case of Funke v. France (cited above, §§ 39-40), the Court found a violation of the right not to incriminate oneself even though no underlying proceedings were brought, and by the time of the Strasbourg proceedings none could be."*[119]

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[113] *O'Halloran and Francis v UK* (n 90).
[114] ibid [55].
[115] See above, discussion of UWO in light of *Funke v France* (n 57).
[116] Proceeds of Crime Act 2002, s 362F.
[117] *Saunders v United Kingdom* (n 52).
[118] Choo (n 107), 34 f.
[119] *Marttinen v Finland* (n 80) [64].

Academics have also raised concerns to what extent 'use immunity' could cure potential problems that compulsion powers create in relation to the right not to self-incriminate. *Choo* concluded that the availability of 'use immunity' would protect the privilege against self-incrimination at least to the extent of the immunity granted, but he seems sceptical about whether 'use immunity' will dissipate concerns deriving from the actual use of compulsion powers rather than the use of evidence obtain by compulsion:

> *"The availability of 'use immunity' to a person would mean (...) that, to the extent to which immunity is guaranteed, the provision of information by him or her can no longer 'reasonably lead to, or increase the likelihood of, the prosecution of that person for a criminal offence'. Thus the privilege against self-incrimination would, by definition, be protected to that extent. It would be naïve, however, to believe that any concerns generated by legal compulsion to provide potentially self-incriminatory information will dissipate to the extent to which 'use immunity' is available to protect the privilege. After all, it might be considered undignified for a person to be compelled, on pain of a criminal sanction, to provide information revealing criminal wrongdoing even though there is no possibility of this being used against him or her in a subsequent trial. Such compulsion might be regarded as objectionable in itself and, as a practical matter, might well produce information that proves to be of indirect assistance to the authorities."*[120]

The discussion above has shown that UWOs might potentially violate the right not to-self incriminate at an investigation stage already, if the Strasbourg Court comes to the conclusion that a respondent to an UWO is charged in the autonomous sense of the expression. The concern raised in this chapter relates to the compulsion itself rather than the use of evidence obtained through it. It is not unreasonable to think that the Strasbourg Court could draw on the parallels to the *Funke*[121] case and conclude that UWOs, independent of the use of the gathered evidence, violate the right not to self-incriminate in its very essence. This violation would not be cured by the availability of a use immunity.

Concluding thoughts and recommendations

According to the above analysis, there is a reasonable possibility that the European Court of Human Rights could find that UWOs in their investigation stage do violate the right not to self-incriminate because a person affected by such an order could, in certain circumstances, be considered charged with a criminal offence under the autonomous meaning of the expression. It is difficult to predict whether the Court would accept that Parliament has abrogated the right not to self-incriminate to a lawful extent by creating UWOs or whether the available 'use immunity' granted is a sufficient safeguard to dissipate concerns in relation to this right.

The two main problems of UWOs are the following: firstly, they are issued with a penal warning attached to them, which means that a respondent could face criminal sanctions for a refusal to provide potentially incriminating information and secondly, that because of their design, their scope is broad and seems to overshoot the original target. UWOs should be measures of *ultima ratio* that step in where orthodox prosecution fails, but they cannot be used as an alternative settlement for high profile money laundering cases. Otherwise, authorities would grant a *de facto* immunity to respondents to UWO, which cannot be in the public interest. The following recommendation would limit the scope of

[120] Choo (n 107), 35.
[121] *Funke v France* (n 57).

UWOs to more reasonable range and would not only address the issues mentioned in relation to the right not to self-incriminate but bring the legal instrument back in line with its initial rationale.

The concerns in relation to the right not to self-incriminate are heightened by the fact that the order, in practice, is issued with a penal warning. It seems that Parliament did not intend such a consequence. According to the statutory provisions, the only consequence for non-compliance to an UWO is that the targeted property is presumed to be recoverable in civil recovery proceedings.[122] To extend the consequences for non-compliance does not only seem unnecessary, but it potentially undermines the future success of this innovative legal instrument be creating potentially defeating issues in relation to the right not to self-incriminate.

Secondly, UWOs were designed to step in where orthodox prosecution fails, not for mere convenience of enforcement agencies. Their use is justified, for example, where criminal property is in the UK, but the holders are outside of the jurisdiction, potentially in a country with which mutual legal assistance proceedings are doomed to fail because of political of factual reasons. However, the statutory provisions do not include such a *caveat*. UWOs can be issued if the respondent is in the UK. There is no reason why in these circumstance criminals should not face orthodox prosecution. UWOs should not have the perverted effect of allowing criminals to avoid criminal responsibility simply by relinquishing property targeted by UWOs. This cannot be within the spirit of this legal tool. The legislator should therefore add as a legal requirement for issuing UWOs that the holder of the targeted property is outside of the jurisdiction of the UK and that mutual legal assistance and extradition will not be successful because of political or factual reasons or that the respondent is not available for prosecution for other reasons.

Finally, there seems to be a desperate need for a cultural change in relation to illicitly acquired assets of high net worth individuals that are invested in UK property. What is frankly disturbing in the case of *Zamira Hajiyeva* is that ten years ago, she was granted a Tier 1 investor visa by the Home Office in return for a seven figure investment in UK bonds and shares. How is it possible that politically exposed persons with extraordinary wealth are being courted by government in this way? How is it possible that the legal professionals involved in the conveyance of the property, later targeted by an UWO, did not suspect that the funds used were illicit? How is it possible that the bank granting a mortgage to the *Hadjiyev's* had no reservations to do so? It seems that draconian measures, such as unexplained wealth orders, would not be necessary if there was a genuine commitment not to allow the UK to become a safe haven for illicit funds.

[122] Proceeds of Crime Act 2002, s 362C.