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The Guernsey anti-money laundering regime through the lens of human rights caselaw

APRIL 2025

Background

The starting point, in Guernsey, is that every person is entitled to the peaceful enjoyment of their property[1]. This right is not absolute but any infringement by the State must be proportionate and for a lawful reason.

The Disclosure Law[2] requires an institution which knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering or that certain property is or is derived from the proceeds of any person's criminal conduct to make a disclosure to the Guernsey Financial Intelligence Unit (**FIU**).

In raising a suspicion with the FIU, the institution is then at risk of committing a money laundering offence under the Proceeds of Crime Law[3] if it takes any actions relating to any assets associated with the disclosure. The institution must first obtain consent from the FIU for any act and if consent is not forthcoming, the institution is then left unable to undertake the act. The assets are then, as a result of the institution's suspicion and the FIU's lack of consent, subject to an informal freeze.

Any person, whose assets are subject to an informal freeze, is then left with three options:

1. Engage with the institution, so that the institution can negate its suspicion;
2. Wait for the FIU to grant consent; or
3. Seek declaratory relief from the Royal Court of Guernsey.

The latter is a bespoke regime developed by the Guernsey Courts, to enable those captured by Guernsey's anti-money laws a means by which to try and gain access to their property once more.

Two-stage test

A private law action of this nature requires what has become known as 'the two-stage test'; firstly the institution to demonstrate that its suspicion, on the balance of probabilities was a reasonable one and secondly, the person bringing the action to evidence that the assets are not the proceeds of any person's criminal conduct.

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Failure to bring a successful private law action could result in the assets being informally frozen for years or even decades.

In the case of *Jakob*[4], the two-stage test did seem to suggest that the person bringing the action was addressing the suspicion identified by the reporting institution. This interpretation was supported by the judgment in *Liang,* when the Court identified that:

'A plaintiff will establish a prima facie case to have the instruction or request made to the institution complied with. A defendant will raise an impediment to being in a position to comply, which will be the combination of the suspicion held and the absence of law enforcement consent. In order to overcome that impediment, the plaintiff will have to prove that the position is that the ***suspicion is unfounded*** *because the source of the funds is not tainted in the manner believed or suspected.'*

This interpretation was further supported by the judgment in *Credit Suisse*[5], which recognised that the plaintiff in a private law action can either trace backwards *'proving affirmatively what the source of the funds actually was and that it was innocent '* or identify the proceeds of the relevant criminal conduct and prove that *'such proceeds could not reasonably be taken to be now 'represented ' by funds in the relevant bank account.'*

This interpretation of the test, as set down by the Guernsey caselaw, is aligned with the relevant human rights caselaw.

The bringing of a private law action requires the owner of the property to satisfy the Court, on the balance of probabilities, that the property is not or does not represent any person's proceeds of criminal conduct. This requirement, for the owner of the property to evidence the negative, is akin to the civil forfeiture regimes in a small number of jurisdictions, including Guernsey. Such regimes require the owner of the property to evidence to the civil standard the legitimacy of the property, in order to avoid the forfeiture of the property.

The challenges

These civil forfeiture regimes have not been without criticism, with the European Court of Human Rights (**ECtHR**) identifying the difficulties that individuals faced with this task face.

In *Yordanov* the ECtHR considered the compatibility with Article 1 of Protocol No. 1 of the European Convention of Human Rights of provisions of the Bulgarian Forfeiture of Unlawfully Acquired Assets Act 2012 ('**the 2012 Act**'), which provided for the confiscation of assets unless a reverse burden of proof concerning the lawful origin of the assets could be satisfied. The Court noted features of the 2012 Act which operated to the disadvantage of those seeking to oppose the making of a forfeiture order, these included:

1. The list of predicate offences under the 2012 Act was very wide;

2. It provided for a period of ten years for which defendants had to establish the lawfulness of their income and expenses;

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3. The 2012 Act was applicable even where the predicate offences had been committed years before its entry into force;

4. It was *'reasonable to assume'* that these factors *'rendered the task of proving the lawful income source or the lawful provenance of any assets difficult for the applicants'*;

5. These difficulties were compounded by the fact that *'the burden of providing the lawful provenance of their assets'* was placed on the applicants; and

6. The Court was *'not convinced that the 'lawfulness' of the sources of income was an easy matter to prove'* since witness testimony (without documents) might not be sufficient in itself to discharge the burden of proof.

In order to combat these disadvantages, the ECHR highlighted that, *'to render any forfeiture under the 2012 Act compliant with the requirements and guarantees of Article 1 of Protocol No. 1, the national authorities had to establish some criminal activity or administrative offences alleged to have led to the acquisition of the assets subject to forfeiture, and a link between such activity and the assets at issue.'*

On the facts, the Court found that Mr Yordanov's rights had been violated because the Courts were entitled to conclude that the assets should be confiscated as unlawfully acquired *'only because the applicant had failed to prove any lawful income to justify their acquisition'.*

Any person seeking to bring a private law action in Guernsey, to overcome an informal freeze under the Guernsey anti-money laundering regime will face similar difficulties to those identified by the ECHR in *Yordanov.*

These difficulties were identified by Lt Bailiff Marshall KC's post script in *Credit Suisse*, when she commented on *'..the likely or apparent difficulties which such a plaintiff may be facing, in endeavouring to gather evidence from persons over which he or she has no control, who may have no incentive to assist, and which evidence may well, in any event have been lost with the passage of time and the destruction or loss of record.'*

Of note it would appear that the Guernsey Royal Court may be applying a wider interpretation of the test in private law actions as previously identifed, requiring the person bringing the action to not only address the institution's suspicion but also evidence that the informally frozen assets cannot be or be derived from any person's criminal conduct.

In the recent case of Loero v Credit Suisse[6] the Deputy Bailiff *'directed the Jurats to consider whether, on the balance of probabilities, they were satisfied that the funds are not the proceeds of criminal conduct in any way, even if not raised in the SAR',* therefore requiring the owner of the property to prove the lawfulness of the funds or the funds that justified the property's acquisition.

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Such a requirement was found to be a contravention of a person's rights under A1P1 in the context of Guernsey civil forfeiture proceedings in the recent first instance decision in His Majesty's Comptroller v Fidelity Management Limited.[7]

In *Fidelity*, Lt Bailiff Marshall KC found that notwithstanding a statutory reverse burden of proof, it was nevertheless necessary for the HMC to specify, at least to the minimum level of being arguable, the unlawful conduct which is said to have a causal nexus with the property sought to be forfeited. On the fairly singular facts in that case, the Lt Bailiff found that HMC had failed to do so and the forfeiture application failed.[8]

This judgment has been appealed by HMC and it will be interesting to see where the Court of Appeal lands when it hears the case later this year.

Conclusion

Global efforts to combat money laundering continue apace, not least in offshore finance centres. Inevitably anti-money laundering measures raise difficult questions of mediating the collective interests of the State with the rights of individuals.

In Guernsey, and other European jurisdictions which have adopted the ECHR, there exists a body of authority to guide legislators and the Courts in striking the appropriate balance.

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[1] Article 1 of Protocol No. 1 of the European Convention of Human Rights

[2] Section 2 of the Disclosure (Bailiwick of Guernsey) Law, 2007

[3]Sections 38 to 40 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999

[4] Jakob International Inc. v HSBC Private Bank (C.I.) Limited Guernsey Judgment 26/2016

[5] L and Others v Credit Suisse AG, (Guernsey Branch) [2023] GRC 026

[6] [2024]GRC075

[7][2025]GRC004

[8] The Lt Bailiff went on to find that even if she were wrong on this point, Fidelity had discharged the reverse burden on the facts in any event.

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