

UPDATE

## Presumed Innocent

Update prepared by Justin Harvey-Hills (Partner, Jersey) and Mathew Cook (Counsel, Jersey)

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Justin Harvey-Hills (Partner, Jersey), Mathew Cook (Counsel, Jersey) and Michael Edwards (Trainee, Jersey) have recently succeeded in the rare feat of obtaining leave to apply for judicial review of a production notice (the Notice) issued by HM Attorney General (the AG) under the Investigation of Fraud (Jersey) Law 1991 (the 1991 Law). The case raises important issues under Articles 6 and 8 of the European Convention on Human Rights (the ECHR) relating to the presumption of innocence following an acquittal.

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On 18 March 2019, the Royal Court granted the Applicant leave to apply for judicial review against the Notice, which had been issued under the 1991 Law in support of a criminal investigation ([2019] JRC 040). This is thought to be the first successful application to obtain leave to challenge such a notice, the Court always having been reluctant to allow a suspect to challenge the right of the authorities to conduct an investigation. However, in this case it found that it was clearly arguable that the Notice infringed the Applicant's rights under Articles 6 and 8 of the Convention.

The facts were unusual. The Applicant was convicted of tax evasion and other related matters in Norway in 2013. The principal reason for this conclusion was that his alleged ownership of certain companies administered from Jersey was greater than had been declared, on the basis that certain other shareholders were "strawmen" who acted as nominees for him.

In preparation for his appeal, the Applicant's legal team sought certain documents from the Jersey service provider, which refused to provide them. The AG issued the Notice to the Jersey service provider. It refused to provide the documents by claiming privilege against self-incrimination (this is currently the subject of a separate appeal to the Judicial Committee of the Privy Council).

In August 2016, the Norwegian Court of Appeal acquitted the Applicant of all charges, finding that there was no basis at all for the finding that the other shareholders were "strawmen". However, the AG did not withdraw the Notice. In October 2018, the Applicant discovered that the AG had in January 2017 decided to maintain the Notice for the purposes of an investigation into the Jersey service provider. This was notwithstanding that the Notice had originally been issued at the request of the Applicant's defence team and that it named the Applicant as the person under investigation. The Applicant had not been informed of the AG's decision.

The Applicant sought leave to apply for judicial review on the basis that the maintenance of the Notice infringed his Article 6 and Article 8 rights. The application was resisted on two main grounds. The first was that the Applicant had failed to act promptly and had delayed in bringing his application, such applications normally having to be brought within three months of the date of the decision about which complaint was made. The second was that the grounds were not properly arguable.

The Court found that there was good reason for any delay. The Applicant had not been informed of the decision to maintain the Notice for a different purpose. The Court did not accept that it must have been obvious to the Applicant that such a decision had been made. The Court also held that there was merit in

the Applicant's submission that the AG's failure to withdraw the Notice was an ongoing or continuing breach of the Applicant's Article 6 rights. In such a case, time would not start running against the Applicant until that state of affairs had ended.

The Court noted the rather unusual position that, now and at the date of enforcement, the Notice:

- stated that the Applicant was under investigation, which was not the case;
- necessarily implied that the Applicant was suspected of involvement in serious fraud, whereas he had in fact been acquitted;
- required the Jersey service provider to produce extensive information in relation to the Applicant who was not under investigation and had been acquitted.

The Court found that it was arguable that the Notice breached the Applicant's Article 6 and Article 8 rights, breach of which would be unlawful under Article 7 of the Human Rights (Jersey) Law 2000. The arguable grounds were as follows:

- Under Article 6(2) of the Convention, the Applicant enjoyed a presumption of innocence which protects individuals who have been acquitted of a criminal charge from being treated by a public authority as if they were guilty. It was arguable that this applied to the Notice;
- The Notice was a public document which named the Applicant as the person under investigation in relation to a suspected offence involving serious fraud. It was arguable that the maintenance of the Notice ran contrary to Article 6;
- The Notice attacked the Applicant's reputation and therefore engaged his Article 8 rights;
- The Notice was issued as a consequence of the criminal proceedings in Norway and concerned the same crimes of which the Applicant had been acquitted. There was a direct link between the criminal proceedings and the issuing of the Notice. The failure to withdraw the Notice was to question the correctness of the acquittal.

The Court granted leave on all grounds, including that it was arguable that it was unlawful to use a notice for a different purpose from that for which it was issued.

Although the Court has only so far determined that the application is arguable, the case raises important issues in relation to powers of investigation and the presumption of innocence and the scope of Articles 6 and 8 of the Convention. The Jersey court will be determining these issues for the first time.

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