

JERSEY / JUDGMENT

Useni v AG and Anor [2022]

JCA 197 (23 September 2022)

[2022] JCA 197

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Court of Appeal 23 September 2022 Before : Clare Montgomery KC, President; Jonathan Crow KC., and James Wolffe KC Between Jeremiah Timbut Useni Appellant And His Majesty's Attorney General First Respondent And Standard Chartered Bank Jersey Second Respondent Advocate H. B. Mistry for the Appellant Crown Advocate S. C. Brown for the First Respondent Advocate J. Harvey-Hills for the Second Respondent

JUDGEMENT

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Introduction

1. This appeal arises from forfeiture proceedings brought by the Attorney General under Articles 10 and 11 of the Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018 ("the 2018 Law"). The proceedings are directed at funds in four accounts held by the Appellant with the Standard Chartered Bank, Jersey ("the Bank"). The accounts contain, in aggregate, the equivalent of around £1.9 million. 2. The Royal Court pronounced a forfeiture order in respect of those funds. The Appellant appeals against: (i) two interlocutory decisions, in which the Royal Court refused applications directed to securing release of funds from the accounts to pay the Appellant's legal expenses; and (ii) the forfeiture order itself. The Respondents in the appeals are, respectively, the Attorney General and the Bank. The Bank has adopted an essentially neutral position in these proceedings. 3. This is the judgment of the Court to which we have all contributed. The statutory regime 4. The statutory provisions relevant for the purposes of this appeal are: (i) Articles 30-32 of the Proceeds of Crime (Jersey) Law ("the 1999 Law"); (ii) Part 3 of the 2018 Law; and (iii) the relevant provisions of the Human Rights (Jersey) Law 2000 ("the 2000 Law"). The 1999 Law 5. Articles 30 and 31 of the 1999 Law prescribe money laundering offences. It is an offence under Article 30 to acquire, use, or have possession or control of, criminal property. For these purposes, "criminal property" includes (Article 29): "(a) any property derived from or obtained, in whole or in part, directly or indirectly, through criminal conduct, if the alleged offender knows or suspects that the property is derived from or obtained, directly or indirectly, through criminal conduct; and (b) any property that is used in, or intended to be used in,

criminal conduct, if the alleged offender knows or suspects that the property is used in, or is intended to be used in, criminal conduct." 6. Article 32 of the 1999 Law provides: "(1) Paragraphs

- (2) and (3) apply where a person makes a disclosure to a police officer - (a) of a suspicion or belief that any property constitutes or represents proceeds of criminal conduct or property used in or intended to be used in criminal conduct and of any matter on which such suspicion or belief is based; or (b) of information, for the purposes of a criminal investigation or criminal proceedings in Jersey. (2) The disclosure - (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by any enactment or contract or otherwise; and (b) shall not involve the person making it in liability of any kind. (3) Where the person making the disclosure does any act or deals with the property in any way which apart from this provision would amount to the commission of an offence under Article 30 or 31, the person shall not be guilty of such an offence if the conditions set out in paragraph (4) are fulfilled. (4) The conditions mentioned in paragraph (3) are that the disclosure is made in good faith and either - (a) if the disclosure is made before the person does the act in question, the act is done with the consent of a police officer; or (b) if the disclosure is made after the person does the act in question, it is made on the person's own initiative and as soon as reasonably practicable after the person has done the act in question." 7. In *States Police v. Minwalla*

[2007] JLR 409, the Deputy Bailiff (Birt) observed (paragraph 17) that these provisions have "the effect of achieving an 'informal' freezing of assets without the need for a court order". He explained the position in the following passage: "18. ... if a bank forms a suspicion that its customer may be engaged in criminal conduct, it files a suspicious transaction report ("STR") [which may also be called a "suspicious activity report" or "SAR"] with the police. If the police then consent to the bank thereafter complying with its customer's instructions to pay out the money, all well and good; the bank is protected. But if the police do not consent, the bank is on the horns of a dilemma. On the one hand, it has its customer demanding that it make payment in accordance with the mandate. On the other hand, it has a suspicion that its customer has been engaged in criminal conduct and, if it makes the payment, it will clearly facilitate the retention or control of the money by its customer. Accordingly, if it were subsequently to transpire that the money in the account was in fact the proceeds of the customer's criminal conduct, the bank would have committed the criminal offence of money laundering under Article 32. As the bank does not know, at that stage, whether the money in the account is in fact the proceeds of criminal conduct, it invariably errs on the side of caution and refuses to make the payment. The result is that the account is informally frozen for so long as the bank has the relevant suspicion and the police do not consent.

19. This is clearly capable of causing great hardship and unfairness. There may never be a prosecution, yet the bank may retain its suspicion. The result may be that a person, against whom no criminal charges have been brought and where there lies only a suspicion, finds

his assets informally frozen without there ever having been a court order to achieve this. Furthermore, the freezing of the account may continue for an indefinite period." 8. The Deputy Bailiff contrasted this situation with "the carefully structured protections" provided in Article 15 of the 1999 Law in respect of a *saisie judiciaire* over a defendant's property in anticipation of criminal proceedings for which a confiscation order could be made. The statutory provisions provide for the discharge of the order if proceedings have not been raised within such time as the court considers reasonable. The Deputy Bailiff also observed that the equivalent legislation in the United Kingdom had been amended to require the police to respond to a SAR within seven days. Under the UK legislation, if no response is given, the police are deemed to have consented to the bank dealing with the funds in question. If the police decline to consent, they have a further 31 days within which to apply for a restraint order; if at the end of 31 days they have taken no such action, the bank may safely proceed. 9. In *Chief Officer, Customs & Excise, Immigration & Nationality Service v. Garnet Investments Ltd* GCA 19/2011, Montgomery JA, giving the judgment of the Court of Appeal of Guernsey, pointed out, whilst an "informal freeze" may be the practical effect of the regime, it would be wrong to characterise the consent provisions of the legislation as a species of informal restraint. The reason why the bank will not deal, or permit dealing, with the funds (and therefore, for practical purposes, "freezes" the accounts) is the statutory money laundering offence, and the consequent risk of criminal prosecution. The consent provisions exist not to enable the police to "freeze" assets, but to allow the police to give an exemption from criminal liability by consent, where that would be in the interests of law enforcement. 10. Both the Deputy Bailiff in *Minwalla* and Montgomery JA in *Garnet* identified two remedies which are available to a banking customer who cannot, following a SAR, obtain access to funds in an account. The customer may seek to judicially review the decision of the police not to consent to any payment. In judicial review proceedings, the customer would face the "high threshold of showing that the decision of the police was one to which they could not reasonably have come" (or, one might add, of establishing some other relevant ground for review). Alternatively, the customer may institute an ordinary action against the bank seeking an order that it comply with the mandate and pay the money out as instructed. In the event of the court finding, on a balance of probabilities, that the funds were not the proceeds of crime, the court would order the money to be paid out. 11. In *Minwalla*, the Deputy Bailiff recommended that consideration should be given to reforms with a view to introducing appropriate controls and limits on the effective freezing of assets which occurs if, following a SAR, the police decline consent to dealing with funds in an account. He reiterated that recommendation in *Gichuru v. Walbrook Trustees (Jersey) Ltd and Others*

[2008] JRC 068, paragraph 38. This recommendation has not been taken up by the legislature. The 2018 Law 12. The 2018 Law reinforced the Jersey regime for tackling criminality through the seizure and forfeiture of assets suspected to be property originating, or intended to be used, in unlawful conduct. Part 3 of the 2018 Law (Articles 10 to

- 17) provides for the forfeiture of "tainted property". Article 2 defines "tainted property" for the purposes of the 2018 Law. It is: "property ... which is or, by the Attorney General or any other officer on whom powers are conferred by this Law, is reasonably suspected to be or have been - (a) used in, or intended to be used in, unlawful conduct; or (b) obtained in the course of, from the proceeds of, or in connection with, unlawful conduct." Article 1 defines "unlawful conduct" to mean: "conduct - (a) constituting an offence against a law in Jersey; or (b) which, if it occurs or has occurred outside Jersey, would have constituted such an offence if occurring in Jersey". Article 2 contains ancillary provisions dealing with disposals of tainted property and the mixing of tainted property with other property. 13. Articles 10 and 11 of the 2018 Law provide: "10. Notice to be given of summary procedure (1) Where the conditions in paragraph (2) are fulfilled, a notice may be served in accordance with paragraph (4) by the Attorney General upon the holder of an account held at a bank in Jersey. (2) The conditions mentioned in paragraph (1) are that - (a) the Attorney General has reasonable grounds to believe that property held in the bank account is tainted property; (b) in relation to the bank account or any property in the bank account a consent request has been made to an authorized officer; (c) an authorized officer refused the consent requested; and (d) notification of the refusal was given to the person making the request at least 12 months before the date on which the notice is to be served. (3) For the purposes of paragraph (2)(b), a "consent request" means a request - (a) under Article 32 of the Proceeds of Crime (Jersey) Law 1999, for consent to do any act or to deal with property held in the bank account in any way which would, apart from paragraph (3) of that Article, amount to the commission of an offence under Article 30 or 31 of that Law ... (4) A notice under this Article shall be a notice by way of representation and shall - (a) state the name of the holder of the bank account to whom it is addressed; (b) specify the details of the bank account and of the property or part of the property in the bank account which in the opinion of the Attorney General is tainted property; (c) state a date on which, and place and time at which, the holder of the bank account is required to attend a hearing of the Court to show cause why the property so specified is not tainted property and should not be forfeited; and (d) be served on - (i) the holder of the bank account, and (ii) the bank at which the account in question is held, ... 11. Forfeiture of tainted property: summary procedure (1) If the person on whom a notice under Article 10(4)(d)(i) is served (the "respondent") fails to attend the hearing as required by the notice, the Attorney General may apply forthwith for a forfeiture order, and the Court may make such an order, without further notice to the respondent. (2) If the respondent appears (whether in person or by a legal representative) at the hearing, the respondent may - (a) at the hearing, satisfy the Court that the property is not tainted property; or (b) request that the question of whether or not the property is tainted property be determined at such later date as the Court may order. (3) If the respondent makes a request under paragraph (2)(b), the respondent must provide an affidavit in answer to the notice within the period of 21 days beginning with the date on which the matter is placed on the list, satisfying the Court that the property is not tainted property. (4) Unless the respondent satisfies the Court that the property is not tainted property, the Court shall, upon the application of the Attorney General, make a forfeiture order in relation to the property

specified in the notice or any part of it. (5) Property which is forfeited pursuant to a forfeiture order under this Article shall be paid into the Criminal Offences Confiscations Fund established under Article 24 of the Proceeds of Crime (Jersey) Law 1999." 14. Article 26 of the 2018 Law states that forfeiture proceedings brought under the law "are civil proceedings and any issue in such proceedings shall be determined on the balance of probabilities". Article 16 provides for appeals against the making of a forfeiture order in the following terms: "(1) Any party (other than the Attorney General) to proceedings in which a forfeiture order is made ... may appeal to the Court of Appeal against the making of the order. (2) On appeal under paragraph (1) the Court of Appeal may order the release of so much of the property in question as it considers appropriate to enable the appellant to meet legal expenses in connection with the appeal. ... (4) On hearing an appeal under this Article the Court of Appeal may make such order and give such directions as it considers appropriate." In *Attorney General v. Ellis*

[2020] JCA 098, this Court confirmed that appeals against other orders which may be made in forfeiture proceedings under the 2018 Law - including any appeal by the Attorney General against a decision not to make a forfeiture order - proceed under the general civil appeal provisions of the Court of Appeal (Jersey) Law 1961. 15. It will be noted that Article 16(2) empowers this Court to order the release of "the property in question" to enable the appellant to meet legal expenses in connection with an appeal under that Article. Similarly: (a) Article 14(4) empowers the Bailiff or the Royal Court to order the release of property subject to a property restraint order to enable the applicant to meet legal expenses in connection with an application for variation or discharge of such an order; and (b) Article 15(4) empowers the Royal Court to order release of property subject to a cash detention order or a property restraint order to enable the person against whom such an order is proposed to be made to meet legal expenses in connection with an application by the Attorney General legal expenses in connection with an application by the Attorney under Article 15(1) for a forfeiture order. No like power is given to the Royal Court in respect of the summary procedure under Articles 10 and 11 of the 2018 Law. The contrast suggests that this is a deliberate feature of the statutory scheme. We observe also that the power granted to this Court in Article 16(2) applies only to appeals under Article 16 - ie appeals against a forfeiture order. No like statutory power is granted to this Court in connexion with other appeals which may arise from forfeiture proceedings, in particular any appeal by the Attorney General against refusal of a forfeiture order. The 2000 Law 16. These statutory provisions fall to be read and given effect in accordance with the provisions of the 2000 Law, which include the following: "4. Legislation (1) So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. ..." "Principal legislation", for these purposes, includes any Law: Article 1(1). Article 4 applies to principal legislation whenever enacted: Article 4(2). The 2018 Law is accordingly "principal legislation" for these purposes. "7. Public authorities and the States Assembly (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) In this

Article "public authority" includes - (a) court or tribunal ... (6) Paragraphs

- (1) and (4) do not apply if - (a) as the result of one or more provisions of principal legislation, the authority ... could not have acted differently; or (b) in the case of one or more provisions of, or made under, principal legislation which cannot be read or given effect in a way which is compatible with Convention rights, the authority ... was acting so as to give effect to or enforce those provisions. ... 8. Proceedings (1) A person who claims that- (i) a public authority has acted, or proposes to act, in a way which is made unlawful by paragraph 7(1) ... may - ... (b) rely on the Convention right in any legal proceedings, but only if the person is (or, in the case of proposed action by a public authority, would be) a victim of the unlawful act. ... Judicial acts (1) Proceedings under Article 8(1)(a) in respect of a judicial act may be brought only - (a) by exercising a right of appeal; (b) on an application for judicial review; or (c) in such other forum as may be prescribed by Rules of Court made by the Royal Court." 17. The Convention rights are set out in Schedule 1 to the 2000 Law. The Appellant relies on Article 6 (the right to a fair trial) and Article 1 of the First Protocol (which is concerned with the protection of property): "Article 6 Right to a fair trial 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ... 3. Everyone charged with a criminal offence has the following minimum rights - ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ..." "THE FIRST PROTOCOL Article 1 Protection of property Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." 18. This Court confirmed in *Attorney General v. Ellis*

[2020] JCA 098 that, by reason of Articles 4 and 7 of the 2000 Law, the 2018 Law must, so far as it is possible to do so, be read and given effect compatibly with Article 1 of the First Protocol. As Montgomery JA explained in *Chief Officer, Customs & Excise, Immigration & Nationality Service v. Garnet Investments Ltd* GCA 19/2011, a bank customer's right to payment of the amount standing to the customer's credit with the bank is a "possession" for the purposes of the Article. Article 1 of the First Protocol is clearly engaged by the forfeiture of property in the account, which extinguishes the customer's right to payment. Likewise: (i) the 2018 Law must, so far as it is possible to do so, be read and given effect compatibly with Article 6 of the Convention; and (ii) subject to Article 7(6) of the 2000 Law, it would be unlawful for the Royal Court, or indeed for this Court, in the context of forfeiture proceedings under the 2018 Law, to act incompatibly with Article 6. 19. No argument has been advanced in this case to the effect that the civil forfeiture regime contained in Articles 10 and 11 of the 2018 Act is itself incompatible with Article 1 of the

First Protocol. Nor has any argument been advanced that the contrasting position in different parts of the 2018 Law, as regards the powers of the Court to release funds to meet legal expenses, to which we have referred above, is incompatible with Article 14 of the Convention (non-discrimination) read with Article 6 and Article 1 of the First Protocol.

Factual background 20. The Appellant was formerly a high-ranking officer in the Nigerian army. In the course of his career, he held various public positions in Nigeria, including: (1) Director of Supply and Transport (1975-80); (2) Chairman of the Nigerian Railway Corporation (1977-81); (3) Governor of Bendel State (1983-85);

- (4) Minister of Transport and Aviation (1985-87); (5) Chief of Logistics, Defence Headquarters (1992-93); and (6) Minister of the Federal Capital Territory (1993-98). He is said to have been the second most senior officer in the Nigerian army during the regime of General Abacha, who ruled Nigeria from 1993 until his death in 1998. 21. The history of the accounts to which these proceedings relate can be taken from unchallenged findings made by the Royal Court. The first of the accounts, opened in 1986, was a numbered account opened ostensibly on behalf of a "Mr Tim Shani" by one Selcan Miner, an existing customer of the Bank. At that time, it was possible for an existing customer to provide a reference for a new customer, and (in marked contrast with the regime which would apply today) no further customer due diligence would be required. An applicant did not require to provide any identification documents, supporting evidence or source of wealth information. In these circumstances, the true identity of account-holders could easily be disguised. 22. It subsequently transpired that "Mr Tim Shani" did not exist and that the Appellant was the true holder of the accounts. Other information which had been provided to the Bank in 1986 about "Mr Tim Shani" was false or misleading. The available bank statements show substantial payments into and out of the accounts, including substantial payments from entities which, so far as the researches of the Jersey police disclose, appear to be active construction companies. The Appellant has never explained the source of these payments. The activity on the accounts substantially declined in the late 1990s, suggesting that the Appellant did not use these accounts as his main source of liquidity. 23. Most of the contacts which the Appellant had with the Bank prior to 2001 were in the form of handwritten requests which bore to be signed by "Mr Shani". In July 2001 the Bank wrote to the Appellant (believing him to be Mr Shani) to inform him that, in consequence of new money laundering legislation, a new banking application form was required, as well as a certified copy of his passport. In August 2001, the Bank wrote again to the Appellant, advising him that the numbered account facility was now required to be restyled as an account in the name of the account-holder. In January 2002, "Mr Shani" requested that the entire balance in the accounts be transferred to an account with another bank, held in the name of Lion Bank of Nigeria plc, a company in which the Appellant was a shareholder. The Bank refused to execute that instruction, on the basis that the information previously sought had not been provided. 24. On 20 February 2003 the Bank submitted a suspicious activity report (SAR) to the Joint Financial Crimes Unit ("the JFCU") regarding the accounts. The JFCU declined to consent to the operation of the accounts for the purposes of Article 32(4)(a) of the 1999 Law. The JFCU has maintained that position. The Appellant has

not, during the nineteen years since 2003, sought to challenge this state of affairs either by way of proceedings for judicial review of the JFCU's decision not to consent to the operation of the accounts or by bringing private law proceedings against the Bank. 25. In 2007, the Appellant's Nigerian lawyer contacted the Bank seeking to regularise the position as regards the accounts. The Appellant disclosed that he was the true owner of the accounts and completed a banking application in his own name. This application stated that the Appellant's main source of wealth was multiple business activities, including transportation, hotel hospitality, petrol stations, accumulated savings and property investment rental. The Appellant provided identification documents, but no vouching as regards the provenance of the funds in the accounts or the source of his wealth. 26. In 2008, the Appellant provided the Bank with information about the sources of his wealth as if he were opening a new account. This stated that he dealt in "property development where I sell some and put some on rent" and also owned a shopping centre, two petrol stations and a domestic gas station, a farm and a rice mill, as well as various investments. He provided no information about his sources of income in the 1980s and 1990s and did not explain how he had generated the significant payments into the accounts. There is no record of the Appellant referring to his bank accounts in the declarations made by public officials in Nigeria. In 2011 the Appellant expressly denied having any foreign bank account.

Procedural history

27. On 28 May 2021 the Attorney General served notice on the Appellant and the Bank invoking the summary procedure under Article 10 of the 2018 Law. The matter came before the Royal Court on 15 October 2021. The Appellant was represented at that hearing by Advocate Mistry. Pursuant to Article 11(2) of the 2018 Law, the Appellant applied for the matter to be dealt with at a later date. Following adjournments, the date for the Forfeiture Hearing was fixed for 25 and 26 April 2022. 28. On 3 February 2022 the Appellant issued a summons ("the First Funding Summons") seeking an order authorising the Bank to release funds from the sterling account to meet the Appellant's legal expenses in Jersey and Nigeria. The first paragraph of the application sought the following relief: "That pursuant to i) Article 6 of [the 2000 Law] being the right to a fair trial; and/or ii) Article 1 of the First Protocol of the [2000] Law, being the protection of property; and/or iii) on the grounds that the First Respondent [ie the Appellant in this appeal] has no other available assets (legally or beneficially owned) to apply towards pay [sic] his legal expenses; and/or iv) upon the Royal Court exercising its inherent jurisdiction the court grants permission to the Second Respondent to release property from the following Bank Account located at the Second Respondent: Account number ... to Mistry Law, upon receipt of its invoices and breakdowns to discharge the First Respondent's [ie the Appellant's] legal expenses." The expenses sought included the Appellant's Nigerian legal expenses. 29. At a directions hearing on 11 February 2022, at which the Appellant was again represented by Advocate Mistry, the Court (Commissioner JA Clyde-Smith, sitting alone) gave directions inter alia: (i) requiring the Appellant to file an affidavit in support of his application for funding; (ii) requiring Advocate Mistry to file a

position statement explaining why he could not accept any funds from the Appellant into his client account; (iii) granting leave to the Appellant to file further evidence in the forfeiture proceedings; and (iv) requiring the Appellant to attend the Forfeiture Hearing in person so that he could be cross-examined on his affidavits unless he had reasonable grounds for not attending. 30. Prior to the directions hearing, the Appellant had filed an affidavit which, for the most part, sought to place the onus on the Attorney General to satisfy the Court that the funds in the account were tainted. The Court's judgment following the directions hearing stated (paragraph 8) that: "the onus is not upon the Attorney General to do so. Having served the notice upon the [Appellant] pursuant to Article 10(1), the onus is now upon the [Appellant], not the Attorney General, to satisfy the Court that these monies are not tainted. It is, after all, the [Appellant] and not the Attorney General who must know the source of the funds. The [Appellant] needs to give careful consideration as to whether his First Affidavit properly addresses this." 31. A hearing was fixed for 3 March 2022 to address the First Funding Summons. In advance of that hearing the Appellant filed an affidavit in support and Advocate Mistry filed a position statement. The Appellant's affidavit contained the following statement: "Most of the assets that I have been living on since I retired after being denied access to my life savings in Jersey has, apart from my brief service in the Nigeria Senate, been via the sale (sometimes below market value) of my property/land in Nigeria and from the support of my family members who have continued to cater for my wellbeing." 32. Advocate Mistry's position statement narrated email correspondence with his bank. His initial approach to the bank had been in the following terms: "I have a query in respect of the operation of my bank account. I understand from Barclays' Terms of Business that I am not permitted to take funds from PEPs, however, I have a few queries about this, which I need your guidance on. The factual situation is as follows:

1. I am instructed by General Jerimiah (sic) Timbut Useni (Rt) (the "General"), who is a PEP. He is a retired General in the Nigerian military, where he served in various roles between 1966 to 1993. He then served as the Minister of the Federal Capital Territory between 1993-1998, under the rule of General Sani Abacha.
 2. On 27 February 2003, the Jersey Financial Crimes Unit (the "JFCU") issues a no consent to operate various bank accounts held by the General. On 5 December 2007, the JFCU continued the refusal of consent to operate the accounts.
 3. On 28 May 2021, HM Attorney General of Jersey issued proceedings for forfeiture under the Forfeiture of Assets (Civil Proceedings) (Jersey) Law
2018. These proceedings are extant and hearing has been set down for late March 2022. Form my understanding, given that the General is a PEP, and he is under criminal investigation with extant proceedings in Jersey, I will not be permitted to accept money from him, even if it is from an account that does not have a no consent over it. I am proposing to make an application to the Royal Court of Jersey for it to consent to releasing funds from one of the accounts operating under a no consent, to pay my legal fees. My question is thus twofold:

1. Is my interpretation of the terms of business correct, in that I am not permitted to take funds from the General, even it is was from an account that does not operate a no consent.
2. If the Royal Court ordered funds be released from one of the Jersey no consent accounts to pay my legal fees, would I be able to accept these funds?" 33. The exchanges culminated in a telephone conversation on 2 March 2022, which Advocate Mistry confirmed in an email stating: "Further to our conversation, I would like to clarify that the funds that you say that you will accept are funds that are ordered by the Court to be released from my client's funds held in the bank account of Standard Chartered bank, which are held under the no consent. You will also require a copy of the Court Order to confirm the release of funds. You also confirmed in our conversation that save for funds released by the Court, you will not accept funds from my client from any other source given the risk that this poses." 34. Advocate Mistry's bank responded on 2 March with an annotated copy of the email which included the following: "Further to our conversation, I would like to clarify that the funds that you say that you will accept are funds that are ordered by the Court to be released from my client's funds held in the bank account of Standard Chartered Bank, which are held under the no consent. You will also require a copy of the Court Order to confirm the release of funds. That is correct . You also confirmed in our conversation that save for funds released by the Court, you will not accept funds from my client from any other source given the risk that this poses. Funds remitted from a PEP connection from potentially high risk countries are unlikely to be accepted in to the office account as a result of the sophisticated screening systems the bank has in place ." 35. By judgment ("the Funding Judgment") dated 20 March 2022, the Court (Commissioner JA Clyde-Smith and Jurats Ramsden and Le Cornu) dismissed the Appellant's First Funding Summons. The judgment records the Appellant's position thus: (i) He does not have available assets to pay for his legal expenses in the proceedings. (ii) Even if he has available assets, Advocate Mistry's bank will not allow him to make payment to Advocate Mistry for his legal expenses because he is a "PEP" (politically exposed person) connected with a potentially high risk country. (iii) As [the Appellant] has no available assets and as his counsel cannot get paid from the assets belonging to him, it is incompatible with his Convention right to a fair trial for him not to have legal representation due to a lack of funding from the funds held in the bank accounts. 36. In the Funding Judgment, the Court dismissed the First Funding Summons. Its reasons may be summarised as follows. (i) The Court had grounds for suspicion, set out in the judgment, that the Appellant had not disclosed all that he could about his assets. Were the Court to apply the test articulated by the Court of Appeal of England & Wales in *SOCA v. Azam*

[2013] EWCA Civ 970, paragraph 66, it would resolve the doubt against the Appellant and find that he had not shown that it was just to permit him to use the funds in the accounts to pay his legal expenses. However, in the context of the summary procedure under the 2018 Forfeiture Law, and simply considering the evidence before the Court on the Appellant's application (in which the burden is upon him), the Appellant had not satisfied the Court that he did not have assets or resources beyond the bank accounts available to him to pay for his legal expenses. (ii) The Court did not accept that funds could not be produced from

a legitimate source to discharge Advocate Mistry's legal fees and the fees of the Appellant's Nigerian lawyers. The Appellant had disclosed ownership of very substantial assets in Nigeria in 2007/8 and now deposed to having family support. Advocate Mistry's correspondence with his bank commenced with a statement to the bank that the Appellant was under criminal investigation with extant proceedings in Jersey, which was incorrect. (iii) There was, in any event, no scope for the Appellant to seek the relief which he sought. Advocate Mistry's submissions in relation to the Appellant's Convention rights would come into play only if the Court was satisfied that the Appellant did not have available assets or resources to apply towards the payment of his legal fees. Having regard to Article 26 of the 2018 Forfeiture Law the argument that these were quasi-criminal proceedings for the purposes of Article 6 of the Convention fell to be rejected. Under the summary procedure provided for under the 2018 Forfeiture Law neither the Attorney General nor the Court play a part in denying the Appellant access to his bank accounts. The accounts do not vest in or come under the control of the Court until a forfeiture order is made. This contrasts with the position in *Azam*, *R v. Luckhurst*

[2020] EWCA Crim 1579 (see now

[2022] UKSC 23), *R v. Kenward* [2000/64] and *In re O'Brien*

[2003] JRC 001 : in each of those cases the property was under the control of the Court. The only way that the Appellant could access his bank accounts would be through the established remedies, ie a private law action against the Bank or a judicial review of the police decision to refuse consent. Summary proceedings under the 2018 Forfeiture Law are concerned with forfeiture of the funds in the accounts, not the ability to use them; the ability to use those funds raises no issue between the Attorney General and the Appellant. The Appellant's access to the accounts is governed by the relationship between the Bank's decision not to execute his mandate and the police refusal of consent for it to do so. The remedies available to the Appellant are those identified in *Chief Officer, Customs & Excise, Immigration & Nationality Service v. Garnet Investments Ltd* GCA 19/2011 and *Gichuru v. Walbrook Trustees (Jersey) Ltd*

[2008] JLR 131 . The Court declined to depart from this line of authority and "graft some new kind of remedy on to the" Appellant's Convention rights. 37. On 29 March 2022 the Appellant issued a second summons ("the Second Funding Summons") seeking orders: (i) vacating the Forfeiture Hearing; (ii) convening the Chief Officer of the States of Jersey Police to determine the issue of the Appellant's legal expenses for his appeal against the Funding Judgment; (iii) that the hearing of that question should take place before a differently constituted court; and (iv) that the Chief Officer consents to the Bank releasing funds from the sterling account to Advocate Mistry's firm, acting for the Appellant. 38. On 20 April 2022, Advocate Mistry wrote to the Court giving notice: (i) that the Appellant intended to seek leave to appeal the Funding Judgment; and (ii) that the Appellant had instructed Advocate Mistry not to attend the Forfeiture Hearing, if it were not vacated, "for no other reason than he believes he will not receive a fair trial as he has not been able to

fund his legal representation and defence. He does not have equality of arms". 39. At a hearing on 22 April 2022, at which the Appellant was again represented by Advocate Mistry, the Commissioner heard and dismissed the Second Funding Summons. The Forfeiture Hearing proceeded on 25 April before the Royal Court (Commissioner JA Clyde-Smith and Jurats Austin-Vautier and Averty). As had been intimated in the letter of 20 April 2022, the Appellant did not attend that hearing, nor was he represented. 40. On 19 May 2022 the Royal Court issued a judgment setting out the reasons why the Second Funding Summons had been dismissed and addressing the Attorney General's application for a forfeiture order. (i) The Court considered that the Second Funding Summons was an attempt to re-run the arguments which had been rejected in the Funding Judgment. The doctrine of chose jugée applied to estop the Appellant from doing this, albeit that the arguments were now configured against the Chief Officer. The Second Funding Summons sought an order requiring the Chief Officer to consent to dealing with funds in the accounts without any assessment of the underlying reasons for refusing consent. It was an attempt to sidestep the procedural and evidential obstacles which the Appellant would face if he were to seek a judicial review of the police decision. To allow the application to proceed would be contrary to the principle of finality in litigation. (ii) The Court granted the Attorney General's application for a forfeiture order. The Court considered the history of the accounts and the Appellant's affidavits. It concluded that the Attorney General had reasonable grounds for suspicion that the funds in the account were tainted property. The Court was not satisfied by the Appellant's affidavits that the property held in the bank accounts was not tainted property and decided to make a forfeiture order. 41. The Appellant has appealed against: (i) the Funding Judgment; (ii) the dismissal of the Second Funding Summons; and (iii) the Forfeiture Order. The appeal against the Forfeiture Order proceeds under Article 16 of the 2018 Forfeiture Law. The appeals against the Funding Judgment and against the dismissal of the Second Funding Summons proceed under Article 12 of the Court of Appeal (Jersey) Law 1961 and, as these are interlocutory decisions, require leave by virtue of Article 13 of that Law. Leave to appeal against the Funding Judgment was granted by the Bailiff, sitting as a judge of the Court of Appeal on 25 May 2022. No application for leave had been filed in respect of the dismissal of the Second Funding Summons, and at the hearing of the appeal Advocate Mistry invited us to grant leave to appeal that decision, albeit out of time. 42. The appeal against the Forfeiture Order is predicated on the contention that the Appellant did not receive a fair hearing compatible with Article 6 of the European Convention on Human Rights - a contention which was advanced on the basis that the Appellant required legal representation in order to be able to participate effectively in the proceedings. The appeal against the Forfeiture Order is accordingly dependent on success in the appeal against either the First Funding Summons or the Second Funding Summons. The arguments in the appeal focused on the appeal against the Funding Judgment. Appeal against the Funding Judgment 43. Advocate Mistry advanced the appeal against the Funding Judgment under reference to the Grounds of Appeal. He focused our attention on the following headline Grounds which we quote from the Notice of Appeal: (i) the Court "erred when it held that Article 6 of the ECHR was

not engaged in this case on the basis that the Court found that the Appellant could rely on legitimate sources of funds to make payment for legal expenses. Clear evidence was before the Court explaining why even in these circumstances, payment could not be made, which should have meant that Article 6 of the ECHR should have been engaged"; (ii) the Court "erred when it held that these proceedings were not considered to be quasi criminal, when looking not at form, but [at] the substance of the legislation that these proceedings were brought. Had the Court directed itself correctly; it would have found that Article 6 (3) of the ECHR was engaged"; and (iii) the Court "erred when it found that there were only two options for relief available to the Appellant in his application for legal expenses on these facts". 44. Advocate Mistry also advanced an attack on the regime of the 1999 Law itself, under reference, in particular, to *Leung v. Commissioner of Police*

[2021] HKCFI 3118, a decision of Coleman J in the High Court of the Hong Kong Special Administrative Region. In that case, Coleman J held that the "no consent" regime provided for in the Hong Kong Organised Serious Crimes Ordinance (a regime similar to the Jersey provisions in Article 32 of the 1999 Law), as operated by the Commissioner of Police, was *ultra vires*. The decision proceeded on the basis of the way that the Commissioner himself had characterised his purpose in issuing letters of non-consent. We do not consider that these arguments were open to the Appellant in these proceedings. Any similar challenge in Jersey to the way that the provisions of the 1999 Law have been applied would require to be pursued by way of a judicial review of a relevant decision of the police. 45. We accordingly now turn to address the three Grounds of Appeal which we have summarised above. Ground of Appeal (i) 46. Advocate Mistry submitted that the Royal Court erred in holding that Article 6 of the European Convention on Human Rights was not engaged in this case "on the basis that the Court found that the Appellant could rely on legitimate sources of funds to make payment for legal expenses". This does not appear to us to be a correct description of the Court's holding. At paragraph 17 the Court stated: "Advocate Mistry's submissions in relation to the [Appellant's] Convention rights would only come into play if the Court was satisfied that the [Appellant] does not have available assets or resources to apply towards the payment of his legal fees." As we understand it, Advocate Mistry's submissions before the Royal Court were to the effect that the Court should, in order to give effect to the Appellant's Convention rights, order release of funds from the accounts to pay legal expenses. The Court correctly recognised that this contention would only arise if the Appellant could not otherwise secure representation. That is not, it seems to us, a holding that Article 6 did not apply. We accordingly reject this Ground of Appeal. Ground of Appeal (ii) 47. Advocate Mistry further argued that Article 6(3) of the Convention was engaged. Article 6(3) confers certain minimum rights - including rights in relation to legal representation - on a person who is "charged with a criminal offence". The argument proceeded on the basis of a contention that, in substance, forfeiture proceedings under the 2018 Law are "quasi criminal". 48. We agree with the Royal Court that Article 6(3) does not apply to forfeiture proceedings under the 2018 Law. As the Royal Court observed, Article 26 of the 2018 Law states that these are civil proceedings. Whilst

not determinative, the characterisation of the proceedings for the purposes of domestic law is a material consideration in assessing whether proceedings involve the determination of a "criminal charge" for the purposes of Article 6. More fundamentally, forfeiture proceedings are not directed to establishing the guilt or innocence of the respondent on any specific allegation of criminality. Rather, they are concerned with the character of the property against which the proceedings are directed. 49. The object of the proceedings is not to punish the respondent, but to forfeit to public use property in Jersey which is tainted by unlawful conduct. Whilst the proceedings presuppose that the Attorney General has reasonable grounds for suspicion that the property is tainted by "unlawful conduct", it is not necessary for the Attorney General to identify the perpetrator of that "unlawful conduct". Nor does he need to establish that the respondent is guilty of any specific crime, let alone a crime which would be subject to the jurisdiction of the criminal courts in Jersey. 50. In these circumstances, the proceedings do not involve the determination of a criminal charge against the respondent so as to engage the provisions of Article 6(3) of the Convention. In reaching this conclusion we have had regard to the consistent line of authority in the United Kingdom and in the European Court of Human Rights holding that the confiscation of the proceeds of crime or their civil recovery are civil in nature for the purpose of Article 6: see *Serious Organised Crime Agency v. Gale*

- [2011] 1 WLR 2760 . Ground of Appeal (iii) 51. The Attorney General argues that the two legal remedies identified by the Deputy Bailiff in *Minwalla* are the only mechanisms by which a bank customer can obtain access to funds in an account which is subject to a de facto "freeze" by reference to the 1999 Law. He argues that the authorities which establish that these remedies are available to the customer exclude any third option, such as was sought by the Appellant in the First Funding Summons or the Second Funding Summons; and, in any event, that such an order is excluded by the absence of any relevant power in the 2018 Law. The Appellant, for his part, argues that where it is necessary to secure the respondent's right to a fair trial under Article 6, the Court can and should order or authorise release of such funds from the account as are necessary to meet the respondent's legal expenses; and that the Court should have made such an order in this case. 52. Advocate Mistry, correctly in our view, accepted that the question of whether the Court has power to make such an order would only arise as a practical question in the present case if such an order was necessary, in the circumstances of this case, to secure the Appellant's right to a fair trial under Article 6 of the Convention. He also accepted, again correctly in our view, that the contention that such an order was necessary for that purpose depended on whether he could successfully impugn the Royal Court's conclusions about the Appellant's ability to fund legal representation. 53. We have concluded: (i) that the Royal Court was entitled, on the information before it, to reject the Appellant's contention that he could not secure legal representation without an order releasing funds from the accounts; and (ii) that, in any event, the Appellant did not require legal representation in order to obtain a fair trial. In these circumstances, this Ground of Appeal falls to be refused. The Appellant's ability to fund legal representation 54. We address first, the

question of the Appellant's ability to fund legal representation. Before the Royal Court, Advocate Mistry submitted that the test which should be applied to determine whether the Appellant had available assets to pay for his legal expenses was that set out in the English Court of Appeal decision in *Serious Organised Crime Agency v. Azam*

[2013] EWCA Civ 970, paragraph 66. Azam concerned an application under section 245C of the Proceeds of Crime Act 2002, which empowers the Court to vary a property freezing order ("PFO") to allow the applicant to apply assets otherwise subject to the PFO to fund his legal representation. Lloyd LJ (with whom Moore-Bick LJ and McFarlane LJ agreed) stated: " i) It is for the applicant to show that, in all the circumstances, it is just to permit him to use funds which are subject to the PFO in order to pay his legal expenses. ii) If on the evidence the court is satisfied that there are other available assets which may be used for this purpose, to whomsoever they may belong, it will not allow the affected assets to be used. iii) If the court is not satisfied of that, the court has to come to a conclusion as to the likelihood that there are no other available assets on the basis of the evidence put before it. If the evidence leaves the court in doubt, but with specific grounds for suspicion that the applicant has not disclosed all that he could and should about his assets, then it may resolve that doubt against the applicant ... But if the evidence does not provide any such specific indications or grounds for suspicion then even if the court rejects the applicant's evidence as unreliable, it may not have any adequate basis for concluding that there are other available assets. In that case ... the court should not resolve the impasse against the applicant on the basis that it was for him to prove positively the absence of available assets. There may be no objective factors which cast light on the probabilities one way or the other ... But if there is nothing of that kind, and nothing which indicates the existence of unexplained or undisclosed available assets, then the fact that the applicant has previously concealed relevant assets is not sufficient by itself to show that he is still concealing such assets, and thereby to deprive him of the ability to use his own assets, despite the constraints of the PFO, to defray the cost of legal representation to defend himself in the proceedings. I would therefore reject the proposition that there is a specific burden of proof on the applicant which requires him to prove that there are no other available assets which could be used for the relevant purpose, such that if he does not discharge that burden, his application must fail." 55. The Royal Court took the view that, if it were required to follow *Azam* , it would have held that the Appellant had not shown that it would be just to permit him to use the funds in the account to pay his legal expenses. However, the Court noted that *Azam* was concerned with a statutory scheme which provided expressly for the application under consideration. It took the view that in the context of proceedings under Article 10 of the 2018 Law, the burden rested on the applicant seeking an order from the Court. The Appellant had not satisfied the Court that he did not have assets or resources beyond the bank accounts available to meet his legal expenses. 56. We observe at the outset that *Azam* involved the exercise of a specific statutory power to release funds from a PFO in order to meet legal expenses. By contrast, in the present case, the question about the Appellant's ability to meet legal expenses from

other sources arose in the context of considering whether the order sought in the First Funding Summons (assuming that such an order could competently be granted) was necessary in order to enable him to receive a fair trial compatible with Article 6. 57. We are content to proceed on the basis that the headline test articulated in paragraph 66(i) of Azam can appropriately be applied in the present context, provided it is kept in mind that the issue is, ultimately, whether or not the applicant requires funds to be released so that he can obtain a fair trial. If it is truly necessary to that end for funds to be released, it would no doubt be just (assuming the Court has power to do so) to make the order; if the order is not necessary for that purpose, the Court is no doubt likely to take the view that it is not just to make it. 58. We are not convinced that it is appropriate to proceed, in this context, on the basis that there is a specific burden of proof on the applicant, albeit that it will of course be for the applicant to satisfy the Court that the order which he seeks should be made. The Court itself has obligations in relation to the fairness of the proceedings before it, including its duties under Article 7 of the 2000 Law. The question, ultimately, would depend on whether the applicant has satisfied the Court, on the basis of the material available to it, that the order sought (assuming it is a competent order) is truly necessary to secure a fair trial. 59. That assessment may be conditioned by the factual context. As Lloyd LJ explained (paragraph 35), Azam concerned an order which affected all disclosed and known assets of the applicant, and it was in that context that he expressed the view that the Court should not resolve an impasse by imposing on the applicant the burden of proving positively the absence of available assets. The present case, by contrast, concerns the funds in four specific accounts to which the Appellant has not had access for many years. In this context, it would not be unreasonable, it seems to us, to proceed, in the absence of positive and acceptable information to the contrary, on the basis that the Appellant is likely to have access to other assets. 60. However, the likely availability to the Appellant of other assets does not exhaust the question of whether the Appellant could, in practice, apply those assets so as to secure legal representation before the Royal Court. As part of Jersey's anti-money laundering regime, banks in Jersey are required to undertake customer due diligence measures. The detail is set out in the Money Laundering (Jersey) Order 2008 , made pursuant to a duty imposed by Article 37 of the 1999 Law on the Minister for External Relations and Financial Services to prescribe measures for the purposes of detecting and preventing money laundering. That is the background to Advocate Mistry's exchanges with his bank, set out in the position statement which he filed with the Royal Court. 61. The critical information on this issue before the Royal Court was contained in the following passage in the annotated copy of Advocate Mistry's email to his bank: "You also confirmed in our conversation that save for funds released by the Court, you will not accept funds from my client from any other source given the risk that this poses. Funds remitted from a PEP connection from potentially high risk countries are unlikely to be accepted in to the office account as a result of the sophisticated screening systems the bank has in place ." Advocate Mistry argued that, even if the Appellant had access to resources in Nigeria, those could not, in practice, be used to secure legal representation in Jersey. The Royal Court rejected that

argument. We have concluded, for reasons which we explain below, that it was entitled to do so. 62. However, we do not endorse all of the Royal Court's reasoning. The Court noted that in his first email to his bank, Advocate Mistry had stated that the Appellant was under criminal investigation - something which was, in fact, incorrect. Reading the exchanges as a whole, we do not consider that this inaccuracy vitiates the bank's ultimately expressed position which we have quoted above. That position bears to rest simply on the view that the Appellant was a "PEP" (ie a politically exposed person) - a characterisation which he does not dispute - from a country which the bank considered to be "potentially high risk". 63. The Royal Court relied on the rejection of a similar argument in *Azam*. In that case, the appellant's second ground of appeal was that even if he had undisclosed assets, they could not in practice be used to meet legal expenses because no solicitor would accept payment from such a source. Lloyd LJ's comments on that ground appear at paragraph 68 of his judgment and are in the following terms: "The second of these [grounds of appeal] seems to me to be a bad point, since if there were concealed assets of the appellant it is quite likely that he could deal with them in such a way that they could be used for payment through a third party without the solicitor being put on notice of their source. Moreover, the availability of assets to meet the legal expenses does not ... necessarily depend on there being assets of the appellant. Mr Coppel touched on this second ground of appeal in his skeleton argument but not at all in his oral submissions. It seems to me that, in that respect, he was wise. I would refuse permission to appeal on the second ground." 64. In its judgment in the present case, the Royal Court observed: "The same point can be made The [Appellant] disclosed ownership of substantial assets in Nigeria in 2007/8 and now deposes as to having family support. We do not accept that funds cannot be produced from a legitimate source to discharge Advocate Mistry's legal fees, let alone the fees of the Nigerian lawyers". 65. We do not consider that the Court should, in a case such as this, proceed on the hypothesis that the legislative measures enacted to combat money laundering, and the practical steps taken by banks and others to detect and prevent money laundering, might be circumvented by the transmission of funds through a third party in such a way as to conceal their source from the bank and the lawyer. Rather, the Court should proceed from the starting point that those measures, which are an important feature of the regime which this jurisdiction has put in place to combat money laundering, will be applied by all those concerned effectively. 66. The Royal Court does not explain how, consistent with the bank's stated position apparently ruling out receipt of funds "remitted from a PEP connection from potentially high risk countries", it was relevant to the question of whether funds could in practice be applied to secure legal representation in Jersey, that the Appellant had previously disclosed substantial assets in Nigeria. Whilst that information would provide support for the conclusion, in the absence of any explanation as to how he had lost those assets, that the Appellant continued to have other assets in Nigeria, the bank's position would, on the face of it, appear to rule out his ability to use those assets to fund legal representation in Jersey. 67. There was, though, positive evidence before the Royal Court in an affidavit from the Appellant that he enjoyed family support. The information before the Court was silent as to how the bank would

view funds remitted by a member of the Appellant's family, particularly if the family member was able to satisfy the bank on an enhanced due diligence review that they were not the proceeds of crime. In these circumstances, the Royal Court was entitled to take the view that the order sought (assuming it had power to make it) was not necessary to secure a fair trial. 68. We have arrived at this decision on the basis that there was a gap in the information which was placed before the Royal Court about the way that the bank would deal with funds from family members. Effective customer due diligence measures may include scrutiny of transactions involving the family members, and other associates, of a PEP. Counsel for the Attorney General frankly accepted before us that a foreign PEP might well be unable, by reason of the proper application of the Money Laundering (Jersey) Order regime, to fund legal representation in Jersey. It may be that in another case the respondent in forfeiture proceedings would genuinely be unable legitimately to pay for legal representation in Jersey, either personally or through family or other associates. In such a case, if legal representation were truly necessary for the respondent to obtain a fair trial (a question to which we now turn), the Court would no doubt require to consider whether or not legal representation could be secured in some other way. Did the Appellant require legal representation before the Royal Court in order to obtain a fair trial? 69. In *Steel and Morris v. United Kingdom*, Application No. 68416/01, 15 May 2005, paragraph 59, the European Court of Human Rights observed that the right to a fair trial holds a "prominent place ... in a democratic society". As Advocate Harvey-Hills reminded us during the hearing of this appeal, the right to a fair trial is firmly embedded in the domestic legal traditions of the United Kingdom and of the Channel Islands. We address the question of whether the Appellant required legal representation in order to obtain a fair trial on the basis, as we have already held, that those proceedings involved the determination of his civil rights and obligations and not the determination of a criminal charge. 70. In *Steel and Morris* the European Court of Human Rights held that the Article 6 rights of the applicants, who were unrepresented litigants in person, had been breached. The applicants were activists involved in a campaign against McDonalds. McDonalds brought defamation proceedings against them in the High Court of England & Wales. Legal aid was not available for defamation proceedings. The applicants accordingly represented themselves throughout the trial and on appeal. The trial lasted for 313 court days, of which 40 were taken up with legal argument. It had been preceded by 28 interlocutory applications. The factual case was highly complex. There were about 40,000 pages of documentary evidence. 130 witnesses, including a number of experts dealing with various scientific questions, gave oral evidence. The applicants were found liable in damages. The hearing of their appeal lasted 23 days. 71. In their application to the European Court of Human Rights, the applicants' principal complaint was that they had been denied a fair trial because of the lack of legal aid. The Court made the following general observations: "59. ... It is central to the concept of a fair trial in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court ... and that he or she is able to enjoy equality of arms with the opposing side.

60. Article 6(1) leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure ...
61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively ...
62. ... it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, so long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary ..." The Court examined the circumstances of the case before it under reference to the factors which it had identified in paragraph 61 and held that, in those circumstances, there had been a breach of the applicants' rights under Article 6 by reason of the absence of legal aid. 72. The Court contrasted the circumstances of the applicants' case with those in *McVicar v. United Kingdom*, Application No. 46311/99. *McVicar* also concerned defamation proceedings in which, in the absence of legal aid, the defendant, Mr *McVicar*, had represented himself. In the proceedings, Mr *McVicar* required to prove the truth of a single, principal allegation. The trial, during which he had to scrutinise evidence submitted by the plaintiff and cross-examine the plaintiff's witnesses, lasted just over two weeks. Mr *McVicar* was a well-educated and experienced journalist and had been represented during pre-trial and appeal stages by a solicitor from whom he could have sought advice on any aspects of the law or procedure of which he was unaware. By contrast with the decision in *Steel and Morris*, the absence of legal aid (and the consequent absence of legal representation) was not, in these circumstances incompatible with Mr *McVicar*'s right to a fair trial. 73. Although the present case does not concern the provision of legal aid, it is implicit in the approach of the European Court of Human Rights in the legal aid cases that in proceedings involving the determination of civil rights and obligations, the absence of, or inability to fund, legal representation does not necessarily deprive a litigant of a fair trial. The question of whether the absence of legal representation breaches a litigant's right to a fair trial in such cases depends on the particular facts and circumstances of the case, and falls to be addressed in particular by reference to the factors identified by the European Court of Human Rights at paragraph 61 of *Steel and Morris*. 74. The Royal Court did not address this question. In light of its conclusions as to the Appellant's ability to fund legal representation, it did not need to do so. However, the argument before us focused the issue squarely; and it seems to us that the right approach for us to take is to address whether or not the absence of legal representation (or an inability to fund legal representation) deprived the Appellant of a fair hearing. For the following reasons, we do not consider that it did. (i) Advocate Mistry founded on the "quasi criminal" nature of the proceedings in support of his contention that, even if Article 6(3) was not engaged, the circumstances required the Appellant to have the

benefit of legal representation. We recognise that the Attorney General's grounds for suspecting that the funds in the accounts were linked with "unlawful conduct". However, fundamentally, this case is concerned solely with money. Whilst significant sums of money are at stake, the Appellant had not had access to those funds for a considerable period of time; nor had he taken any steps, at least since 2008, to obtain access to them. This is not the sort of case (such as may arise in certain types of family proceedings) where what is at stake may, in itself, make it particularly difficult for a litigant to participate effectively in proceedings without legal representation. (ii) Nor was the Appellant, so far as the information available discloses, a vulnerable individual who would find it difficult to participate in legal proceedings without legal representation. On the contrary, his career history suggests that he is an intelligent and sophisticated man. Whilst Advocate Mistry referred to the Appellant's age, there has been no suggestion that age has adversely affected his capacities. Nor has it been suggested that he is not fluent in the English language. Further, like Mr McVicar, the Appellant has, in fact, had the benefit of legal representation in Jersey at the hearings which dealt with the First Funding Summons and the Second Funding Summons, as well as during this appeal. The terms of the First Funding Summons suggest that he has also had the benefit of advice from Nigerian lawyers. (iii) As Advocate Mistry accepted in the course of the appeal, the issues at the Forfeiture Hearing were essentially issues of fact within a relatively narrow compass - concerning, as they did, a handful of very large transfers of funds into his accounts. The Appellant was well aware - because the judgment of the Royal Court following the directions hearing had told him so - that the onus rested on him to show the sources of the funds in the accounts such that the Court could conclude that these were not tainted funds. The sources of those funds were, or should have been, within his knowledge. In this case, the Attorney General did not call oral evidence. The Appellant accordingly would not have been required, had he attended the forfeiture hearing, to cross-examine witnesses. The Attorney General and the Court had obligations at common law and under the 2000 Law to secure that the proceedings (including any cross-examination of the Appellant) were conducted in a manner which was compatible with the Appellant's right to a fair trial. 75. We recognise that in summary proceedings under Articles 10 and 11 of the 2018 Law, legal questions may arise - in particular, as to whether conduct falls to be characterised as "unlawful conduct" as defined in Article 1 of the 2018 Law. Whilst Advocate Mistry made that point as a generality, he did not identify any legal question which, in fact, arose in this case. Had such an issue arisen at the forfeiture hearing, it would have been the Court's responsibility to apply the law correctly. As a Law Officer of the Crown and an officer of the court, the Attorney General could be expected to assist the Court in that regard. The Court's determination of any question of law would have been subject to an appeal to, and correction by, this Court. In an appeal under Article 16, it would be open to this Court to make an order under Article 16(2) ordering the release of forfeited property to meet legal expenses. In fact, the Appellant has had the benefit in this appeal of representation by Advocate Mistry. Was the Royal Court correct that it had no power to order release of funds to meet legal expenses? 76. In these circumstances, it is not necessary for us to determine whether the Royal Court had power to

make the order sought in either the First Funding Summons or the Second Funding Summons. However, in deference to the arguments which have been advanced before us, we make the following observations. 77. Although we have rejected the Appellant's appeal, it will be apparent from our reasoning that, in other circumstances, the inability of a respondent in forfeiture proceedings to secure legal representation could result in an unfair trial. The decision of the Court of Appeal in *Azam* proceeded on the basis that, in the circumstances of that case - which differed from those in the present case (see, in particular, paragraphs 5 and

- 6) - an order releasing funds to meet legal expenses would be necessary to enable the defendant to defend himself in a way compliant with Article 6: see paragraphs 26, 63. 78. Nevertheless, we agree with the Attorney General that the Royal Court has no power to make an order of the sort sought in the First Funding Summons in the context of forfeiture proceedings under Articles 10 and 11 of the 2018 Law even in a case where such an order would be the only way to ensure that the respondent could receive a fair trial. Whilst the Royal Court is obliged, so far as possible, to construe and give effect to the 2018 Law, and indeed its other powers, in a manner which respects Convention rights, we were pointed to no provision which gives the Royal Court power to make such an order in relation to such proceedings. Indeed, such an order would require the Bank to deal with funds in a manner which might be criminal under the 1999 Law. Advocate Mistry suggested that Article 16(2) might be construed so as to empower to the Court of Appeal to order the release of funds to meet legal expenses in the Royal Court. We reject that submission. It would require us not only to ignore the location of the provision in an Article concerned specifically with appeals, but to read out of the provision the words "in connection with the appeal" which clearly qualify "legal expenses". 79. The Attorney General founded strongly on the availability to a bank customer whose account is not operational following the submission of a SAR of the two remedies discussed in *Minwalla* and *Garnet*. We are not convinced that these remedies provide an answer to the difficulty which could arise from the absence of any statutory power to make an order enabling funds to be used to meet legal expenses. A respondent who genuinely cannot fund legal representation in Jersey, and who cannot participate effectively in forfeiture proceedings without such representation, is liable to face difficulties in pursuing those other remedies as well. In any event, the question which arises in this case - namely, whether the release of funds is necessary to enable the respondent to participate effectively so as to obtain a fair trial - would not be an issue in private law proceedings against the bank or a judicial review of the police decision not to consent to dealing. 80. Should a case come before the Courts in which the issue arises sharply - ie where the respondent truly cannot obtain legal representation necessary for a fair trial without access to funds which are the subject of the forfeiture proceedings

- a number of consequential issues would require to be addressed. It would be better for those to be considered in a case where they are live issues and have been fully ventilated. Appeal against dismissal of the Second Funding Summons 81. If we had held that the Appellant could not receive a fair trial without release of funds from the accounts, we would require to address whether it would have been open to the Royal Court to achieve that outcome (and, thereby, to avoid a breach of Convention rights)
- in the absence of any other power to do so - in the manner sought by the Second Funding Summons. In light of our conclusions in relation to the Funding Judgment, that issue does not arise. Given the grounds upon which we have upheld the Funding Judgment, we do not consider that the Royal Court can be criticised for dismissing the Second Funding Summons. We accordingly refuse leave to appeal that decision. Appeal against the Forfeiture Order 82. As we have explained above, the Appellant has not advanced any separate or additional issue in his appeal against the Forfeiture Order. We accordingly dismiss that appeal.

Conclusion

83. For these reasons: (i) we dismiss the appeal against the Funding Judgment; (ii) we refuse leave to appeal the Second Funding Summons; and (iii) we dismiss the appeal against the Forfeiture Order. Authorities Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018. Proceeds of Crime (Jersey) Law 1999. Human Rights (Jersey) Law 2000. States Police v. Minwalla

[2007] JLR 409 . Chief Officer, Customs & Excise, Immigration & Nationality Service v. Garnet Investments Ltd GCA 19/2011. Gichuru v. Walbrook Trustees (Jersey) Ltd and Others

[2008] JRC 068 . AG

v. Ellis

[2020] JCA 098 . SOCA v. Azam

[2013] EWCA Civ 970. R v. Luckhurst

[2020] EWCA Crim 1579 . R v Luckhurst

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