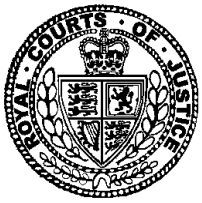

Neutral Citation Number: [2017] EWCA Civ 1584

Case No: A3/2014/3253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
The Hon Mrs Justice Rose
[2014] EWHC 3010 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2017

Before :

LADY JUSTICE ARDEN
LORD BRIGGS OF WESTBOURNE
and
MR JUSTICE GREEN

- -

Between :

Routier & Anr	**Appellants**
- and -	
The Commissioners for HM Revenue and Customs	**Respondents**

- -
- -

Richard Vallat and Rory Mullan (instructed by **Irwin Mitchell Solicitors**) for the **Appellants**
David Yates (instructed by **HMRC**) for the **Respondents**
Conrad McDonnell (instructed by **HM Attorney General for Jersey**) for the **Intervener**

Hearing dates : 21-22 June 2017

- -

Approved Judgment

LADY JUSTICE ARDEN :

1. ISSUES FOR DETERMINATION

1. INHERITANCE TAX, GIFTS TO CHARITIES AND FREEDOM OF CAPITAL

1. This adjourned appeal is about the restriction imposed by section 23 of the Inheritance Tax Act 1984 "IHTA", as interpreted by this Court on an earlier hearing of this appeal, on inheritance tax relief for legacies and gifts to charities, to legacies and gifts to UK charities which are subject to the supervision of the UK courts. The question now before this Court now is whether this restriction ("the Restriction") violates the EU law principle of freedom of movement of capital so as not to be enforceable in relation to a legacy of an estate with assets situate in the UK to a Jersey charity.

2. That raises three sub-issues: (1) whether Jersey is to be treated as part of the UK for the purposes of this question, so that EU law principles on freedom of movement of capital do not apply, or whether for these purposes it is to be treated as a third country (Issue 1); (2) whether the Restriction would be treated as justified in EU law on the grounds of effective fiscal supervision ("EFS") (Issue 2); and (3) whether, if the answer to Issue (2) is yes, IHTA, s23 could be interpreted in conformity with EU law (Issue 3). If the answers to Issues (1) and (2) are not clear, we are asked to refer questions to the Court of Justice of the European Union ("the CJEU") for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union ("TFEU"). (I use the term CJEU to include its predecessor, the European Court of Justice).

2. THE COULTER TRUST AND EARLIER HEARING OF THIS APPEAL

3. The late Ms Beryl Coulter died in Jersey on 9 October 2007 (before the coming into force of the Lisbon Treaty), leaving her residuary estate in the UK on trust ("the Coulter Trust") for the purpose of building homes for the care of elderly people resident in St Ouen in Jersey. There was a gift over in favour of Jersey Hospice Care. The Coulter Trust was established under and subject to Jersey law. The respondents, HMRC, determined that the appellant executors were liable to pay inheritance tax on the residuary gift to the Coulter Trust without being entitled to relief under IHTA, s 23 because that relief was not available unless the Coulter Trust was a charity for the purposes of the law of the United Kingdom, which it was not.

4. The amount of inheritance tax and interest payable, if the appeal is unsuccessful, as at the date of the hearing of this appeal was agreed at £591,724.

5. The Coulter Trust has now been registered as a charity under the law of England and Wales.

6. The executors appealed to the High Court (Rose J [2014] EWHC 3010 Ch) and this Court ([2016] EWCA Civ 938 Moore-Bick VP, Tomlinson and Kitchin LJJ). Both courts upheld HMRC's determination. The essential reasoning of this Court was that IHTA, s23 on its true interpretation contained two requirements (referred to together below as "the Restriction"): first, that the trust was established under UK law and, second that the UK courts would have jurisdiction over it (for that purpose there must be at least one trustee resident in the UK). The conclusion of this Court was largely based on the legislative history of the provisions.

7. This judgment addresses the outstanding questions of law raised by the appellants. This Court did not hear argument on these questions at the earlier hearing.

3. FREEDOM OF MOVEMENT OF CAPITAL: BRIEF INTRODUCTION

8. Article 56 of the EC Treaty ("Article 56 EC") (now Article 63 TFEU) reads:

> 1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
> 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

9. It is common ground that Article 56 EC applies to gifts to charities. Thus, in C-513/03 *Van Hilten-van der Heijden v Inspecteur van de Belastingdienst*, the CJEU held:

> It follows that an inheritance is a movement of capital within the meaning of Article 73b of the Treaty [later Article 56 EC] (see to that effect, also, Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 58), except in cases where its constituent elements are confined within a single Member State.

10. It is common ground that the limitation of tax relief to gifts to UK bodies restricts free movement of capital. Freedom of movement of capital reflects a policy of the liberalisation of capital movements within the EU and the promotion of economic efficiency. The imposition of a tax as in this case may affect the ability of a charitable trust from outside the UK to obtain gifts and legacies from the UK for the purposes of carrying out its activities.

4. EFFECTIVE FISCAL SUPERVISION AS JUSTIFICATION FOR BREACH (IN BRIEF)

11. A restriction on freedom of movement of capital can be justified where the aim of the restriction is to ensure the EFS. HMRC rely on this as justification for breach of the principle of freedom of movement of capital in this case.

12. In particular HMRC contend that they must have the right to verify any information about a person claiming relief on gifts about whether the donee is in reality a charity. They contend that the absence of the right to verify is one of the reasons why the principle of freedom of movement of capital does not apply and why this appeal must fail.

5. EU MEASURES FOR MUTUAL ASSISTANCE BETWEEN TAXING AUTHORITIES

13. Relevant to EFS and the avoidance of distortions in capital movements are the measures which the EU has adopted for cross-border co-operation between taxing authorities in the field of certain direct taxes. In 1977, the EU adopted Directive 1977/799/EEC. This was replaced in 2004 by Directive 2004/106/EEC. I will refer to these Directives below as the "mutual assistance directives". However, these did not apply to UK inheritance tax or its predecessor, capital transfer tax.

14. The EU has extended the measures for co-ordination between EU and EEA taxing authorities. In the Fourth Money-Laundering Directive ("4MLD") (Directive 2015/849/EEC) (not cited by counsel), as implemented in the UK by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, trustees of (among other bodies) charities must register particulars of the trust, including its trustees, beneficiaries, assets and advisers, with HMRC. A competent authority (as defined) from another EU or EEA state may request information shown on that register and HMRC has reciprocal rights in other EU and EEA states.

6. SUBSEQUENT CHANGE IN STATUTORY MEANING OF CHARITY FOR INHERITANCE TAX PURPOSES

15. Subsequent to Ms Coulter's death, and following the CJEU in C-318/07 *Persche v Finazamt Lűdenscheid* [2009] STC 586 (see paragraphs 51, 52 and 57 below), Parliament changed the law so that it is sufficient for inheritance tax relief if the charity is regulated by the courts of one of the member states of the EU, Norway, Iceland or Liechtenstein: Finance Act 2010, schedule 6, paragraph 1 and Taxes (Definition of Charity) (Relevant "Territories" (Amendment) Regulations 2014. This change was achieved by amendment to the definition of charity with effect from March 2012, subject to transitional provisions. The same change to the definition was made in respect of donations by UK taxpayers in other ways (see, for example, Corporation Taxes Act 2010, Part 6), and to charitable payments by charities to charities abroad under the Income Taxes Act 2007 ("ITA"), s547.

ISSUE 1: IS JERSEY PART OF THE UK FOR FREEDOM OF MOVEMENT OF CAPITAL PURPOSES?

1. INTRODUCTION

16. Jersey is one of the territories which the EC Treaty, and now the TFEU, treat as a special case, and this issue requires this Court to consider the effect of the provisions which have that effect, in so far as that is a question of EU law. It is convenient to set out the relevant provisions before summarising the submissions.

17. Article 299(6) of the EC Treaty (now Article 355(5) of the TFEU) provides that:

> (6) Notwithstanding the preceding paragraphs: (a) this Treaty shall not apply to the Faeroe Islands; (b) this Treaty shall not apply to the sovereign base areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus; (c) this Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972 ["the Accession Treaty"]. (definition added)

18. Protocol No 3 to the Accession Treaty (as defined in Article 299(6)) concerns the Channel Islands and the Isle of Man. It provides that customs rules apply to them as they do to the UK (Article 1); that Channel Islanders and Manxmen living in the UK could not benefit from freedom of movement (Article 2); that the provisions of the Euratom Treaty

applied to them (Article 3); that there would be no discrimination by the authorities of the Channel Islands and the Isle of Man against EU citizens (Article 4); and that the Commission would propose safeguard measures if there were difficulties in implementing Protocol No 3 (Article 5). The final Article, Article 6, defines Channel Islanders and Manxmen.

19. The CJEU considered the effect of Protocol No 3 in C-293/02 *Jersey Produce Marketing Organisation Ltd v States of Jersey* [2006] 1 CMLR 29 ("the *Jersey Potatoes* case"). The issue in this case was whether the Channel Islands could be regarded as part of the UK for the purposes of freedom of movement of goods and customs duties.

20. In answering that question, the CJEU relied on the explanation provided to it by the Royal Court of Jersey as to the constitutional status of Jersey in relation to the UK, and it found that Jersey does not form part of the UK:

> 42 The referring court explained in the context of a previous case that Jersey is a semi-autonomous dependency of the British Crown, which is represented on Jersey by the Lieutenant Governor. The United Kingdom Government, on behalf of the Crown, is responsible for defence and international relations (see, in that regard, Case C-171/96 *Pereira Roque* [1998] ECR I-4607, paragraph 11).
> 43 Jersey does not form part of the United Kingdom. It is, for the purposes of Article 299(4) EC, a territory for whose external relations that Member State is responsible.

21. The CJEU noted that under Article 299(6)(c) the EC Treaty was to apply to the Channel Islands and the Isle of Man for the purposes of applying the provisions dealing with customs duties, quantitative restrictions and freedom of movement of goods, namely Articles 23, 25, 28 and 29 of the EC Treaty. The CJEU held that the UK, the Channel Islands and the Isle of Man were thus to be treated as part of the same member state for the purposes of those provisions. It held:

> 54 It is clear from all the preceding points that, for the purposes of the application of Articles 23 EC, 25 EC, 28 EC and 29 EC, the Channel Islands, the Isle of Man and the United Kingdom must be treated as one Member State.

2. SUBMISSIONS ON ISSUE 1

Appellants

22. Mr Rory Mullan, for the appellant executors, submits that the jurisprudence of the CJEU establishes that Jersey is part of the UK for the purposes of the customs code of the EU, but not freedom of movement of capital. Thus, the principle of freedom of movement of capital can apply (see *Van Hilten*, above). He relies on the provisions of the EC Treaty applying to Jersey and the decision of the CJEU in the *Jersey Potatoes* case, which I have already summarised above.

23. Mr Mullan distinguishes a number of cases concerning overseas countries or territories ("OCTs"), for which the EC Treaty made different provision. I refer to these cases below.

HM Attorney General for Jersey

24. The Attorney General of the States of Jersey has intervened in these proceedings with the permission of this Court on this Issue, and I am grateful for his submissions.

25. On the constitutional position of Jersey, Mr Conrad McDonnell, for the Attorney General, supports HMRC's submissions.

26. On the question whether under the EC Treaty Jersey is to be treated as part of the UK or a third country, Mr McDonnell essentially supports Mr Mullan's position. He has three main propositions:

    i. for the purposes of Article 56 EC, every place must either be part of a member state or a third country. Treaties are always territorial and so a treaty has to have defined territorial limits.

    ii. in order to determine for these purposes whether a territory is part of a member state or is a third country, it is necessary to ask whether EU law applies to the territory or not.

    iii. Article 56 EC does not apply to Jersey. Therefore, it is a third country as regards to transfers to and from the UK.

27. Article 299(6) TFEU is a special provision applying to Jersey. In the context of freedom of movement of goods, Jersey has to be treated as a single state with the UK: see the *Jersey Potatoes* case, [43]-[54].

28. Other countries and territories may be subject to different provisions. For example, C-181/97 *Van Der Kooy v Staatsecretaris van Financien*, where the issue was whether or not the Netherlands Antilles was part of the Netherlands for the purposes of the EC Treaties. The CJEU held that it was not, and that the import of goods from the Netherlands Antilles into a member state had to be treated as an import into the EU and not an intra-EU transaction ([37]). Likewise, in C-30/01 *Commission v Spain* goods imported into Gibraltar, which is not part of the customs union, were not treated as goods within the Community.

29. It follows, submits Mr McDonnell, that capital movements to Jersey must be to a third country. Moreover, the EU Commission has in its decisions in other areas recognised Jersey as a third country: see, for example, the decision of the EC Commission of May 2008, OJ 2008 L138/21, which recognises Jersey as a third country providing equivalent safeguards for the purposes of Directive 95/46/EC on the protection of personal data.

HMRC

30. Mr David Yates, for HMRC, submits that this is the first time that Issue 1 has come before the courts, and HMRC therefore consider that it should be referred to the CJEU for a preliminary ruling. Mr Yates submits that Jersey is part of the UK for the purposes of

the EC Treaty, and that in relation to Jersey the principle of free movement of capital cannot be relied on as against the UK.

31. Mr Yates submits that Jersey is not itself a "country" as a matter of general law, by which I take him to mean that Jersey is not a sovereign state. The Crown is ultimately responsible for the good governance of Jersey and HM Government is responsible for Jersey's defence and international protection. In addition, the Crown exercises its responsibility for Jersey through a committee of the Privy Council charged with Channel Island affairs. It also makes appointments to certain judicial and other posts on each Island.

32. However, Mr Yates accepts that the question is not whether Jersey is a country but whether it is to be treated as such for the purposes of EU law. He submits that in C-384/09 *Prunus and Polonium SA v Directeur des services fiscaux* [2011] STC 1392 at [65] Advocate General Villalon recognised the possibility of territories not being third countries for the purposes of the EU treaties because they were not sovereign states. In reliance on the subsequent case of C-24/12 and C-27/12 *X BV v Staatssecretaris van Financien* [2014] STC 2394, he further submits that the question whether a territory, which is not a sovereign state, can for the purposes of EU law be a third country in relation to the state with which it is associated has not yet been decided. This particular question, he submits, was not decided in *X BV*, which concerned the Netherlands and the Netherlands Antilles.

33. Mr Yates also relies on the fact that Article 56 EC is not mentioned in Protocol No 3. He relies on *Jersey Potatoes* as authority for the proposition that Jersey is part of the UK for the purposed of the EC Treaty. The principle of freedom of movement of capital cannot apply because the relationship between Jersey and the UK is a purely internal one.

34. Finally, Mr Yates relies on the absence of reciprocity: Jersey is not bound by the principle of freedom of movement of capital and so should not be able to take the benefit of it.

3. MY CONCLUSIONS ON ISSUE 1

35. As explained, Issue 1 raises the question whether for the purposes of Article 56 EC Jersey falls to be treated as part of the UK. If it does, then the restrictions between the UK and Jersey are internal only and EU law principles do not apply. If this is not so, the question is then whether it must be treated as a third country for Article 56 EC purposes, which is one of the matters outside the special provisions applying to it.

36. The submissions which Mr Yates makes on the position of Jersey in domestic law appear to be common ground. For completeness Mr Mullan usefully adds the points that the UK conventionally does not legislate for the Channel Islands without their consent (see *R (Barclay) v Lord Chancellor* [2015] AC 276), and that UK legislation only applies to them if they are specifically mentioned. (This principle would, however, preclude a suggestion that he later made that the UK could legislate to require Jersey to exchange information on tax matters with the UK.)

37. In my judgment, the analysis of the CJEU in the *Jersey Potatoes* case is consistent only with the conclusions that Jersey (1) is not a part of the UK for the purposes of the constitutional arrangements of the UK (see [43] cited in paragraph 20 above), but (2) is to be is to be treated as part of the UK for the purposes of those Treaty provisions which are

applicable to it (see [54] cited in paragraph 21 above). In my judgment, it is clear that in relation to other Treaty provisions it is not to be treated as part of the UK (see [54]). Nothing further turns on the fact that Protocol No 3 makes no specific reference to freedom of movement of capital.

38. Is Jersey for those purposes a third country for Article 56 EC purposes? This point matters because the principle of freedom of movement of capital only applies between a member state and a third country and not between different parts of the same member state. HMRC submit that this is not clear and a question should be referred for a preliminary ruling to the CJEU. For this purpose, Mr Yates relies on *Prunus* and *X BV*.

39. *Prunus* concerned a taxpayer in the British Virgin Islands who wished to have the benefit of a tax advantage under French law for French taxpayers, who were exempted from an annual 3% property tax. The British Virgin Islands are an OCT for the purpose of the TFEU. The provisions of the Treaties do not in general apply to them (see, for example, Case C-181/97 *Van der Kooy* [37]). Their position in regard to the principle of freedom of movement of capital is governed not by Article 56 EC, but by Council Decision 2001/822/EC ("the OCT decision"). So when the taxpayer invoked freedom of movement of capital, the CJEU held that his rights were governed by the OCT decision. In my judgment, this decision is specific to OCTs and does not mean that Jersey is not entitled to freedom of movement of capital. The BVI's association with the EU is governed by very different provisions. Importantly the CJEU (in *Prunus*) held that, where there was no provision applying the treaties to the OCT, they were to be treated as non-member states:

> 31 It follows that OCTs benefit from the liberalisation of the movement of capital provided for in Article 63 TFEU in their capacity as non-Member States.

40. In other words, for the purposes of Article 56 EC an OCT is a third country. This must *a fortiori* be so in the case of Jersey which has a much looser relationship with the EU than an OCT (see the Opinion of AG Villalon at [65]). So, in *Prunus*, (subject to any question of justification) France would have to give BVI taxpayers the benefit of the exemption in question.

41. As Mr McDonnell observed, if HMRC is right in their submission about Jersey not being a separate country, the transaction in *Prunus* would have been a transaction between member states.

42. In *X BV* the CJEU dealt with the case of a transaction between a taxpayer in the Netherlands Antilles and the Netherlands. The CJEU did not consider whether the Netherlands Antilles was a third country for the simple reason that it was an OCT, to which the OCT decision and not the Treaty applies.

43. Therefore, *X BV* in my judgment throws no doubt on the proposition that Jersey is to be treated as a third country for the purposes of the principle of freedom of movement of capital. If Protocol No 3 or the Treaties had provided that freedom of movement of capital applied to apply to Jersey, it would have been treated as part of the UK, but that freedom is not mentioned in Protocol No 3 or the Treaties as applying to Jersey.

44. Jersey is in fact one of several countries or territories for which special provision is made in the EU treaties. These provisions are in different terms in many cases. The Treaty arrangements for the various territories which are affected by the EU Treaties, but which are not member states, inevitably vary because they depend on the outcome of negotiations. That outcome also reflects the history of the association between the territory and the member state. We were for instance taken to authorities relating to the position of territories other than OCTs and the Channel Islands. The arrangements for those Islands are, however, custom-made. I therefore derive limited assistance from the case law on Gibraltar: see, most recently, C-591/15 *R(o/a The Gibraltar Betting and Gambling Association Ltd) v HMRC* .

45. That brings me to the question of reciprocity. At the hearing HMRC expressly disclaimed any argument that, regardless of whether Jersey is a third country for Article 56 EC purposes, Jersey taxpayers cannot have the benefit of the principle of freedom of movement of capital because Jersey is not bound by it. If this argument were correct, no third country could ever take the benefit of the principle. We have not been shown any case in which reciprocity has succeeded.

46. In any event, however, the question of reciprocity was in my judgment disposed in C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel BetriebsgmbH v Finanzamt Linz* [2011] STC 917. In that case, so far as relevant, Austrian law provided that portfolio dividends from companies established in EEA member states, ie non-member states of the EU, were exempt from tax only if the recipient owned 10% of the share capital of the dividend-paying company although there was no such threshold for domestic companies. AG Kokott specifically rejected an argument about lack of reciprocity. The Austrian government had in particular argued that justification should extend to protecting the tax base which was undermined if a non-member state failed to accord the same tax advantages. AG Kokott's reasons were as follows:

> 129. Recognition of a reciprocity requirement in relations with non-member states may be tempting, but it runs counter to the wording and scheme of art 56 EC et seq. The member states have expressly resolved unilaterally to liberalise capital movements to and from non-member states and thus specifically renounced reciprocity. If a reciprocity requirement were now recognised at the level of justification, that would be difficult to reconcile with unilateral liberalisation. For that reason, the other arguments put forward by the Austrian government must also be rejected. With regard to the absence of an instrument for approximation of laws in relations with non-member states, it must also be pointed out that such an instrument does exist at European Union level, but that it has not been used thus far with regard to the taxation of portfolio holdings.

47. The CJEU accepted this conclusion:

> 127. As regards the lack of reciprocity in relations between member states and non-member states, it is to be remembered that, when the principle of free movement of capital was extended, pursuant to art 56(1) EC, now art 63(1) TFEU, to

> movement of capital between non-member states and the member states, the latter chose to enshrine that principle in the same article and in the same terms for movements of capital taking place within the European Union and those relating to relations with non-member states (*A* (para 31)).
> 128. That being so, a lack of reciprocity in relations between member states and non-member states other than states party to the EEA Agreement cannot justify a restriction on the movement of capital between member states and those non-member states.

48. Accordingly, in my judgment, the fact that Jersey does not have to comply with freedom of movement does not affect the obligation of the UK to treat Jersey as a third country for the purposes of those rules.

49. For these reasons, there is, in my judgment, no doubt about the answer to Issue 1. Therefore, in my judgment, we should not refer this issue to the CJEU for a preliminary ruling. Jersey should be treated as a third country for Article 56 EC purposes. This conclusion is supported by the decisions of the EU Commission on which Mr McDonnell relied.

ISSUE 2: IS THE RESTRICTION JUSTIFIED IN EU LAW ON THE GROUNDS OF EFS?

1. SUBMISSIONS OF THE PARTIES

Appellants

50. The appellants' case is that HMRC's submission goes beyond what EU jurisprudence on Article 56 EC requires. As I indicated above, HMRC wish to be able to check that the charity is carrying out charitable objects through official channels in the country where it is based. Such channels exist between the member states but not between the UK and Jersey in the form of mutual assistance agreements.

51. The appellants' core proposition is that, as a matter of EU law, if there is no mutual assistance agreement, a taxing authority must offer taxpayers an opportunity to provide information that the taxing authority considers necessary in order to satisfy themselves that the charity is entitled to relief on IHTA, s 23 and that they cannot simply rely on the absence of a mutual assistance agreement as a reason for refusing relief. The case law of the CJEU does not on their submission require there to be such an agreement in order for a non-UK charity to claim relief.

52. Mr Mullan relies on a large number of cases. Thus, in C-386/04 *Centro Musicologia Walter Stauffer v Finanzmt Műnchen fűr Kőrperschaften* [2008] STC 1439, the taxing authority of the member state resisted a claim for an exemption by a charitable body from another member state on the basis that it needed to obtain information about the body in question. The CJEU rejected the argument because it could have requested the information from the body in question or used the provisions of Directive 77/99/EEC (one of the mutual assistance directives). The CJEU held:

> 48. Thus, before granting a foundation a tax exemption, a Member State is authorised to apply measures enabling it to

> ascertain in a clear and precise manner whether the foundation meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report. Admittedly, where foundations are established in other Member States, it may prove more difficult to carry out the necessary checks. Nevertheless, these are disadvantages of a purely administrative nature which are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such foundations the same tax exemptions as are granted to foundations of the same kind, which, in principle, have unlimited tax liability in that State (see, to that effect, Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 29).
>
> 49 There is nothing to prevent the tax authorities concerned from requiring a charitable foundation claiming exemption from tax to provide relevant supporting evidence to enable those authorities to carry out the necessary checks. Further, national legislation which absolutely prevents the taxpayer from submitting such evidence cannot be justified in the name of effectiveness of fiscal supervision (see, to that effect, *Laboratoires Fournier*, paragraph 25).
>
> 50 Moreover, the tax authorities concerned may, pursuant to Council Directive 77/799/ EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004, call upon the authorities of another Member State in order to obtain all the information that may be necessary to effect a correct assessment of a taxpayer's liability to tax, including information as to whether that person may be granted a tax exemption (see, to that effect, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 26, and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 42).

53. In *Persche*, a German national made a charitable gift to a Portuguese charity. He was denied tax relief in Germany because the charity was not formed in Germany. The CJEU held that this breached Article 63 TFEU. There were similar holdings in C-25/10 *Missionswerk Werner Heukelbach v Belgium* [2011] STC 985 and Case 181/12 *Welte v Finanzamt Velbert* [201] CMLR 415, also cited by Mr Mullan.

54. In *Persche*, the CJEU's ruling did not say that there had to be a mutual assistance agreement in every case but that, if there was no such agreement with a third country, it could be a ground for refusing relief to a person in that country who claimed a tax advantage.

55. In *Welte* the CJEU held that Article 56 EC did not allow Germany to limit relief allowed from inheritance tax to a non-resident taxpayer in respect of land he inherited in Germany simply because that person was resident in a third country with which Germany had no

mutual assistance agreement. All the taxpayer had to produce was a death certificate. Germany could ask for this to be produced without needing a mutual assistance agreement.

56. Mr Mullan also relies on HMRC's practice under Income Taxes Act 2007, s 547 (see Annex ii to HMRC's *Detailed Guidance Notes for Charities*). This, he submits, shows that HMRC can monitor gifts to charities in a detailed way. For example, in relation to gifts of funds to enable an overseas hospital to buy medicine as an ongoing commitment, the donor must take steps to ensure that the funds are properly applied and produce evidence to HMRC. However, these conditions are additional to the Restriction (as now amended: see paragraph 13 above). They do not concern the type of information that a taxing authority would seek under a mutual assistance agreement.

HMRC

57. Mr Yates submits that HMRC are entitled to verify the information that they are given by a taxpayer claiming relief under IHTA, s23 and that they are entitled to have a reliable means of verifying that information in the form of mutual assistance agreements such as exist between member states of the EU for certain taxes. At first Mr Yates argued that there is a practical reason for this: unless one of the trustees is resident in the UK, HMRC cannot issue an information notice with which the claimant is bound to comply. However, he now accepts that it is likely that the Coulter Trust could have been issued with an information notice using the approach of the First-tier Tribunal in *A Taxpayer v HMRC* [2016] UKFTT 0361 (TC). On reflection, he submits that the real question is "one of enforceability [of] the co-operation of the Jersey authorities" (supplementary skeleton argument, [26]).

58. Mr Yates amplifies his submission that HMRC have no machinery for verifying the information about the Coulter Trust as follows. At the date of Ms Coulter's death there was a double tax agreement with powers for collecting information (UK/Jersey Double Tax Agreement 1952) but that did not apply to inheritance tax, and thus the information powers in it did not enable information obtained pursuant to it to be used for the purpose of inheritance tax. There was then no mutual assistance agreement with Jersey. The mutual assistance agreement made in 2009 did not apply retrospectively save for criminal matters (see Article 11). HMRC's own powers for compelling information applied only to income tax. The arrangements between member states entered into pursuant to the mutual assistance directives 77/799/EEC and directive 2011/16/EU did not at that date cover inheritance tax.

59. Because of the mutual assistance directive, there is, submits Mr Yates, a very clear distinction drawn between claims for exemption on charitable gifts where the body is in another member state and a claim where the body is in a third country. The CJEU made this point in *Persche* at [70]:

> 70. As regards charitable bodies in a non-member country, it must be added that it is, as a rule, legitimate for the member state of taxation to refuse to grant such a tax advantage if, in particular, because that non-member country is not under any international obligation to provide information, it proves impossible to obtain the necessary information from that country (see, to that effect, *A* (para 63)).

60. In addition, submits Mr Yates, there is no need for the taxing authority to consider claims for relief on a case by case basis. Thus, also in C-451/05 *Européenne et Luxembourgeoise d'investissements SA (ELISA) v Directeur général des impôts, Ministère public ("ELISA")*, the taxing authority had to make enquiries but only because the taxpayer was resident in another member state and there was a mutual assistance agreement between the taxing authorities of both states.

61. Mr Yates thus submits that CJEU jurisprudence is more limited than the appellants submit and that a member state is justified in refusing to accept a claim for relief from a resident of a non-member state where there is no mutual assistance agreement with that state.

62. Mr Yates further submits that none of the authorities relied on by Mr Mullan addresses the conclusion in C-72/09 *Établissements Rimbaud SA v Directeur général des impôts* that in the absence of a mutual assistance agreement a member state is justified in refusing relief to a charity from a third country because the taxing authority has no in-country means of verifying the information which it needs to assess whether the claimant is entitled to the tax advantage sought.

63. On Mr Yates' submission, the position is encapsulated in *Rimbaud* at [50]-[51]:

> 50. Although, therefore, that possibility is based on the existence of a general system for the exchange of information, as introduced by Directive 77/799, and accordingly dependent on such a system, the existence of a right of that kind cannot be recognised in the case of a taxpayer in circumstances such as those of the case before the referring court, which are characterised by the lack of any obligation on the tax authorities of the Principality of Liechtenstein to lend assistance.
> 51. In those circumstances, legislation such as that at issue in the main proceedings must be regarded as justified, vis-à-vis a country which is party to the EEA Agreement, for overriding reasons relating to the general interest in combating tax evasion and the need to safeguard the effectiveness of fiscal supervision, and as appropriate to ensuring the attainment of the objective pursued, without going beyond what is necessary to attain that objective.

64. He relies similarly on C-101/05 *Skatteverket v A* [2009] STC 405, where the Swedish authorities were held to be justified in declining to extend a relief to a Swiss company on the grounds that there was no mutual assistance agreement between Switzerland and Sweden. The crucial paragraph is [63], on which the CJEU relied in *Persche* (see paragraph 59, above):

> 63. It follows that, where the legislation of a member state makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that member state to refuse to grant that advantage if, in particular, because that third

> country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country.

65. Mr Yates further submits that the case of *Welte* does not have the significance which the appellants attach to it, and that *Persche* at [70] (set out at paragraph 59 above) supports his proposition that a third country charity cannot rely on EFS.

66. Mr Yates notes, however, that the CJEU appeared to go further in *Haribo* at [130]-[133] when it held:

> 130. It is to be remembered that the framework established by Directive 77/799 for co-operation between the competent authorities of the member states does not exist between those authorities and the competent authorities of a non-member state where that state has not entered into any undertaking of mutual assistance (see *EC Commission v Italy* (para 70), and É*tablissements Rimbaud* (para 41)).
>
> 131. It follows that, where legislation of a member state makes the grant of a tax advantage dependent on satisfying conditions compliance with which can be verified only by obtaining information from the competent authorities of a non-member state other than a state party to the EEA Agreement, it is in principle legitimate for the member state to refuse to grant that advantage if—in particular, because that non-member state is not bound under an agreement to provide information—it proves impossible to obtain the requisite information from it (see, by analogy, Établissements Rimbaud (para 44)).
>
> 132. However, the national legislation at issue in the main proceedings does not provide that any exemption of portfolio dividends received from a company established in a non-member state other than a state party to the EEA Agreement, or any credit for the tax paid in such a non-member state, is conditional upon the existence of an agreement for mutual assistance between the member state and the relevant non-member state. Under para 10 of the KStG, portfolio dividends from non-member states other than states party to the EEA Agreement are always subject to corporation tax in Austria and the national legislation at issue does not provide for any tax advantage for such dividends in order to prevent their economic double taxation.
>
> 133. In those circumstances, the difference which exists, as regards co-operation between tax authorities, between the situation obtaining, on the one hand, between member states within the European Union and, on the other hand, between member states and non-member states cannot justify a different tax treatment of nationally sourced portfolio dividends and

> portfolio dividends from non-member states other than states party to the EEA Agreement.

67. Mr Yates submits that it is unclear how far [133] goes and whether it applies in the circumstances of the present case where there is no mutual assistance agreement with a third country, notwithstanding that the member state may be satisfied that the charity does fulfil the substantive requirements of carrying on charitable objects and other matters. He submits that [132] to [133] would have been a short answer in two subsequent cases but that the CJEU did not refer to them: *Welte* or in *Emerging Markets Series of DFA Investment Trust Comnpany v Dyrektor Izby Skarbowel w Bydgoszczy.*

2. MY CONCLUSIONS ON ISSUE 2

68. HMRC's approach is that the absence of a mutual assistance agreement between the UK and Jersey at the date of Ms Coulter's death is conclusive in favour of HMRC's case on justification. They contend that there is a conflict between *Rimbaud, Haribo* and *Welte* which should be referred to the CJEU for a preliminary ruling. Both parties accept that such an agreement would give the UK the right to require the Jersey authorities to provide information about the Coulter Trust. I would add that HMRC are under no ongoing obligation to monitor the Coulter Trust or to see that it continues to operate as charity unless and until it has spent the gift in full.

69. In my judgment, there is no conflict between *Rimbaud, Haribo* and *Welte* as to the legal principles to be applied. In both cases, the critical issue was whether the member state could show that the measure which restricted freedom of movement of capital was proportionate. The law on proportionality is clear. As the CJEU held in *Rimbaud* ([23]), whenever a member state imposes a direct tax, it must do so in accordance with the principles of EU law. The same applies where the member state chooses to grant an exemption (see C-10/10 *EC Commission v Austria* [32]). Those principles include the principle of proportionality, which is a general principle of EU law (see *Persche,* [52]).

70. In *Rimbaud*, the CJEU explained what proportionality involved in these terms:

> 33. Concerning the justification based on the fight against tax evasion and the need to safeguard the effectiveness of fiscal supervision, it should be noted that a restriction on the free movement of capital is permissible on that ground only if it is appropriate to ensuring the attainment of the objective thus pursued and does not go beyond what is necessary to attain that objective (Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 35; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I--7995, paragraph 47; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 64; and Case C-101/05 *A* [2007] ECR I-11531, paragraph 55).

71. The facts of *Rimbaud, Haribo* and *Welte* show how the proportionality principle is applied on different facts. In *Rimbaud,* a Lichtenstein resident company sought an exemption from a French annual 3% property tax payable in respect of property which it owned in France. French law made the relief conditional on the person claiming the relief being resident in a country with which France had a mutual assistance agreement or an

international obligation not to discriminate against them. France had no mutual assistance agreement with Lichtenstein. The legislation set out when a third country national was entitled to claim the relief:

> Under Article 990E of the French Tax Code, (10) the tax provided for in Article 990D thereof is not applicable to the following:
>
> '...
>
> 2. … legal persons which, having their seat in a country or territory which has concluded with France a convention on administrative assistance to combat tax evasion and tax avoidance, declare each year, by 15 May at the latest, at the place established by the decree referred to in Article 990F, the location, description and value of the properties in their possession as at 1 January, the identity and the address of their members at the same date and the number of shares held by each of them; (Opinion of AG Jääskinen,[12])

72. The CJEU held that France was justified in refusing the relief for a non-resident in those circumstances. It did not hold that France had to make any attempt to obtain information from the taxpayer, which it could then consider.

73. As I have explained in paragraph 46 above, in *Haribo*, the facts, so far as relevant, were that Austrian law provided that portfolio dividends from companies established in EEA member states, i.e. non-member states of the EU, were exempt from tax only if the recipient owned 10% of the share capital of the dividend-paying company although there was no such threshold for domestic companies. The CJEU dealt with an argument that grant of a tax advantage to shareholders from third countries could be made conditional on the existence of a mutual assistance agreement. The CJEU rejected this justification in the passage cited at paragraph 66 above because the Austrian legislation was not dependent on the existence of any such agreement. As I read its judgment, the CJEU held that it would not be proportionate for the legislation to be justified on the basis suggested if in fact the legislation did not make the advantage dependent on there being any such agreement. This was simply, therefore, a conclusion about the absence of proportionality in the circumstances of that particular case. I can see no reason therefore to make a reference with regard to the differences between *Rimbaud* and *Haribo.*

74. On the face of it the conclusion of the CJEU in [132]-[133] (paragraph 6**6** above) applies here, because in this case Parliament has by the Restriction placed a limitation on inheritance tax relief for gifts to charities and the Restriction excludes any non-UK charity. It has made no attempt, therefore, in IHTA, s23 to extend the range of charities which might benefit in accordance with the principle of freedom of movement of capital. The appellants argue that Parliament in enacting IHTA, s 23 was not pursuing the aim of imposing a restriction that achieves EFS, and so a conforming interpretation is not available. I doubt whether it is correct to say that the Restriction was not aimed at preventing improper claims to the fiscal relief. But, in any event, I do not consider that paragraphs 132-133 establish the appellants' proposition, or that it would be an incorrect application of the jurisprudence to apply it in this case. In *Haribo* the member state imposed a 10% shareholding threshold which did not apply to domestically-sourced or

EU/EEA-sourced dividends. Without it, extra tax was payable. That condition is inconsistent with any need to verify information: it is simply a provision for extra tax on all externally-sourced dividends on smaller shareholdings (see the final sentence of [132] of *Haribo*). That offended the principle of freedom of movement of capital. It could not be justified. There is no similar provision here. My rejection of the appellants' analysis is supported by implication by *Emerging Markets* and C-464/14 *SECIL v Fazenda Publica*, the two post-*Haribo* cited by HMRC. The CJEU decided in both these that national legislation denied reliefs, i.e. (using the language of the CJEU in for example *Persche*) did not grant a tax advantage, for third country transactions.

75. As Mr Yates points out, *Welte* was decided after *Haribo*. In my judgment it is consistent with my analysis because the CJEU took the view (1) that there was no difficulty in the German authorities obtaining official verification of the transferor's death in Switzerland from the relevant authorities in Switzerland; (2) the information would be available under a double tax agreement; and (3) German law discriminated against heirs who were not resident in Germany if they inherited land in Germany from third country nationals who died resident in a third country. Therefore, it was therefore disproportionate for German law to require a mutual assistance arrangement with third country. This can be seen from the judgment of the CJEU:

> 63 According to the case law of the Court, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is in principle legitimate for the Member State to refuse to grant that advantage if—in particular, because that third country is not bound under an agreement to provide information—it proves impossible to obtain such information from that country (see *A [2009] 1 C.M.L.R. 35* at [63]; *Établissements Rimbaud SA v Directeur général des impôts (C-72/09) [2010] E.C.R. I-10659; [2011] 1 C.M.L.R. 47* at [44]; and *Veronsaajien oikeudenvalvontayksikkö v A Oy (C-48/11) [2012] 3 C.M.L.R. 53* at [36]).
>
> 64 However, as the A.G. has observed at points AG76 and AG77 of his Opinion, the information referred to by the German Government, which concerns in particular death certificates and other documents issued by civil registrars in the State where the succession takes place, can be forwarded by the heirs or, if necessary, by the tax authorities of that State as part of the application of a bilateral agreement for the avoidance of double taxation and does not, as a general rule, require a complex assessment.
>
> 65 In any event, in accordance with the national legislation, an heir residing in Germany receives the full tax-free allowance when he acquires by succession an immovable property located in that Member State from a person who was residing, at the moment of his death, in a third country.

> 66 However, such a succession also requires, like the succession at issue in the main proceedings, the inspection by the competent German authorities of the information concerning a deceased person residing in a third country.

76. Accordingly I reject the approaches of both parties in so far as they contend that (per the appellants) there is some blanket rule that where a member state must under Article 56 EC extend an exemption from tax to a taxpayer from a third country it may not make that exemption conditional on the existence of a mutual assistance agreement between the member state and the third country where the taxpayer can produce the desired information itself; or (per HMRC) that the taxing authority is always entitled to verify the information provided by the taxpayer from a third country. As I see it, it is always a question of proportionality: see *Rimbaud, Haribo, Welte* and other cases.

77. However, I would accept the argument in principle that a taxing authority should have the right to verify information provided about an overseas charity. That charity may be an obscure body, unknown to the taxing authority, and a taxing authority is entitled to check so far as it can whether that charity is acting lawfully or constitutes a cloak for some unlawful activity. We were not informed that there was any way, other than by invoking the provisions of a mutual assistance agreement, in which the taxing authority of a state could make checks on these matters. I would accept that, even if the taxpayer gives the taxing authority answers which appear to answer the queries raised by the taxing authority, that authority must have the means of double-checking the information if it considers it necessary to do so. As I see it, that meets the requirement of the CJEU, relied on by the appellants, that a mutual assistance arrangement is only necessary if that was the only way of verifying whether the conditions for a particular exemption have been satisfied. The requirement is expressed, for example, in the judgment of the CJEU in *Persche* [63], set out in paragraph 64 above. In other words, I am satisfied that if the power to verify information did not exist, IHTA, s 23 would be a fertile ground for abuse.

78. The potential difficulty for the Court is, however, that there is no such provision in IHTA, s 23 and HMRC has not filed any evidence as to what provision would be proportionate.

79. Whatever the reason for this may be, I do not consider that the lack of evidence is insuperable because, as explained above, Parliament has already addressed the question: see the cluster of subsequent legislative changes described in paragraph 15 above. As there stated, the change to the meaning of charity for inheritance tax purposes followed *Persche* in point of time, and appears to have been in response to it. *Persche* remains a foundational authority in the development of CJEU jurisprudence. In my judgment, we can infer from this legislation that Mr Yates is correct to submit that Parliament could with justification and therefore in conformity with Article 56 EC limit the relief to "where the relevant 'charity' both [satisfies] UK law requirements concerning a 'charity' and [is] based in (a) an EU country or (b) a third country which [has] an information exchange agreement with the UK."

80. It follows that I agree with the further points made in the judgment of Green J (see below) on this point.

81. Mr Mullan raises another argument under proportionality, namely that the principle meant that HMRC should grant relief in respect of the gift by Mrs Coulter's Will to the Coulter Trust because, at a date subsequent to death, it met the conditions needed to bring the gift within IHTA, s 23 as interpreted by this Court on the first hearing of this appeal. This was achieved by the registration of the Coulter Trust as a UK registered charity and the transfer of assets to it. (The transfers of assets were in November 2010 and January 2011 and the registration was completed on 13 February 2013). As the judgment of Rose J explains, the terms of Mrs Coulter's Will were varied after her death by deeds of variation but Rose J ruled that the deeds were not effective to vary the proper law of the trust from Jersey law to English law with effect from death. On the true interpretation of IHTA, the requirements of IHTA, s 23 must be met at the date of death. This limitation is not imposed as against testators from non-EU countries but as against all testators. It accordingly does not infringe the principle of freedom of movement of capital, but is an exercise of the member state's competence to tax. (There was a similar temporal restriction in *Welte*). Therefore, the principle of proportionality with which this appeal is concerned does not support this particular argument of Mr Mullan.

82. A similar answer applies to Mr Mullan's further submission that the rejection of the Coulter Trust's claim to relief was disproportionate because a UK charity was registered and the assets transferred to it before HMRC made its formal determination. This submission is based on *BT Pension Scheme Trustees* ["BTPS"] *v HMRC* [2013] STC 1781 (Warren J and Judge Herrington). In that case, the Upper Tribunal held that there was a infringement of the principle of freedom of movement of capital in relation to dividends sourced in third countries which could be verified under double tax treaties. The UT held that it was sufficient if there were sufficient treaty powers in force "at the time when HMRC comes to consider BTPS's claims" ([253]). This case is not of course fully analogous with this case since it concerned a claim for repayment of tax made many years after HMRC denied it and therefore there was no earlier point in time that could be taken for assessing the proportionality of the restriction. Leaving aside that point, and the point that in this case HMRC had completed its enquiries before the registration of the Coulter Trust as a UK charity, the answer to Mr Mullan's submission is that this is again an attempt to argue that the conditions in IHTA s 23 should be treated as met as at the time they are required to be met when it is clear that they were not then met. A crucial variation needed to be made to enable the Coulter Trust to meet those conditions was not effective as from the date of death (see per Rose J at [28]).

83. There is one further point to be addressed under justification. Mr Yates submits that this Court should refer to the CJEU the question whether Article 56 EC precludes national legislation which gives the taxing authority a right to verify information even in a case where it does not need to exercise that right. (This raises an aspect of proportionality. If it were a question of conforming interpretation, that would be likely to be a question of national law.)

84. The position in this case is that the taxing authority does not need to verify any information. HMRC do not seek any information from the appellants. HMRC accept that the objects of the Coulter Trust are charitable for the purposes of UK law. They do not suggest that the position was any different at the date of Ms Coulter's death. Likewise, HMRC do not suggest that the terms of the Coulter Trust would not be enforced in Jersey if there was any failure to apply the assets of the Coulter Trust for

charitable purposes or that the position was any different at the date of Ms Coulter's death.

85. In my judgment, the CJEU has already answered the question whether the taxing authority can successfully justify a restriction on the movement of capital based on the need for a power to verify even if it does not need that power in every case. It gave an answer in the affirmative in *Haribo*:

> 101. Since Directive 77/799 provides for the possibility for national tax authorities to request information which they cannot obtain themselves, the Court has stated that the use, in Article 2(1) of Directive 77/799, of the word 'may' indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons established in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State (Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 32, and *Persche*, paragraph 65).

86. In all the circumstances, in my judgment, it would not be appropriate to refer this question to the CJEU.

87. Finally, I would add an observation of my own about the CJEU jurisprudence. A restriction on freedom of movement of capital cannot be justified on the grounds of efficiency of the collection of taxes. The reason for freedom of movement of capital is to create an open-playing field between member states. This, among other matters, facilitates the single market. It is not consistent with that purpose that a member state should be able to grant an exemption simply in its own national interest, whether because of efficiency in the administration of the fisc or for any other reason.

88. I therefore conclude that IHTA s 23 cannot in conformity be limited by the Restriction but that it would be justified for IHTA, s 23 to contain a right for HMRC to verify information about an overseas charity by reference to a mutual assistance agreement. That means that the present appeal must fail because at the date of Ms Coulter's death there was no mutual assistance agreement between the UK and Jersey.

89. Accordingly, in my judgment, the question is whether IHTA, s 23 can be interpreted so that relief can be extended to other bodies which are charitable if UK law had applied to them so far as necessary to enable IHTA, s 23 to comply with EU law. That matter falls under Issue 3, to which I now turn.

ISSUE 3: CAN IHTA, S 23 BE READ IN CONFORMITY WITH EU LAW?

1. SUBMISSIONS

Appellants

90. The appellants make no submission as to the interpretation of IHTA s 23 in the event that, as I have held, they fail on Issue 2. Their case was that there can be no conforming interpretation. They argue (skeleton argument, paragraph 26) that the existing statutory scheme is not apt for the purpose of ensuring EFS and so the court cannot apply a conforming interpretation. They further submit that the way of giving effect to EU law is to read IHTA, s 23 as if it did not contain the Restriction and enabled HMRC to be satisfied that the donee was a charity in any way. Mr Mullan makes the point that the exemption for transfers to employee trusts in IHTA, s 28 does not contain an equivalent of the Restriction. That may be so, but I do not consider that the court is entitled to conclude that the two situations are directly comparable. That is a question of legislative policy.

HMRC

91. As already explained, HMRC contend that this Court should interpret IHTA, s 23 in conformity with EU law on EFS. HMRC accept that the interpretation which it earlier sought from this Court on the first hearing of this appeal violates the principle of freedom of movement of capital. HMRC submit that the principle means that IHTA, s 23 should be interpreted so that it permits relief to be given from inheritance tax "where the relevant 'charity' both satisfied UK law requirements concerning a 'charity' and was based in (a) an EU country or (b) a third country which had an information exchange agreement with the UK." By satisfying the UK requirements, I understand HMRC to mean that the purposes of the charity are charitable according to UK law and that the charity is subject to the supervision of the courts in the country in which it is based. In other words, the Restriction is simply extended to non-UK charities which are to be subject to the same conditions, mutatis mutandis, as UK charities. HMRC are not placed in the position of having to consider whether charities are charities under some local law.

92. Mr Yates points out that the Upper Tribunal adopted a conforming interpretation so as to permit a similar restriction in *BT Pension Scheme Trustees v HMRC* [244] to [246]. That decision was appealed to this Court, which referred the case to the CJEU for a preliminary ruling but this Court did not then consider the conforming interpretation which the Upper Tribunal had adopted: [2016] STC 66).

2. MY CONCLUSIONS ON ISSUE 3

93. Where a statute does not fulfil the requirements of EU law, the courts may interpret it so far as possible so that it complies with EU law (and no further: *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, [52]). This is the principle of conforming interpretation. This is an extensive power but it does not permit the court to reach an interpretation which goes against the grain of the legislation.

94. In my judgment, contrary to Mr Mullan's submission, the interpretation proposed by HMRC does not go against the grain of the legislation. The purpose of the Restriction was to ensure that the valuable relief from inheritance tax which IHTA, s23 confers was not abused, as it might be if it could be claimed by an entity whose credentials as a charity HMRC could not satisfactorily check. Given that the UK is obliged by the EU Treaties to comply with Article 56 EC, and thus to extend the relief given by IHTA s23 to charities from other member states and third countries, in my judgment the proposed interpretation is in accordance with the underlying objectives of the Restriction.

95. In the light of Article 56 EC, IHTA s 23 is in my judgment to be read as if it contained the qualification that it was subject to the principle of freedom of movement of capital. As the analysis in this judgment has shown, the proposed interpretation of HMRC goes no further than that principle requires.

96. In those circumstances, in my judgment, this Court, performing a conforming interpretation, should adopt HMRC's interpretation.

OVERALL CONCLUSION: TO DISMISS THE APPEAL

97. For the reasons given above, I would hold that Jersey is to be treated as a third country for the purposes of Article 56 EC (now Article 63 TFEU) (Issue 1); that HMRC is entitled to refuse to grant relief on gifts to non-UK charities unless there is a mutual assistance agreement between the UK and the country in which the charity is based (Issue 2). As explained above, I would not make any reference in view of my conclusion on Issues 1 or 2. I would adopt the conforming interpretation proposed by HMRC, which involves charities from other member states or third countries being governed by the law of that state or country and being subject to the jurisdiction of its courts, and which requires, in the case of third countries, the existence of a mutual assistance agreement between the UK and that country. Such agreements are already in place between the member states.

98. Accordingly, I would dismiss this appeal.

MR JUSTICE GREEN

99. I am in agreement with the Judgment of Lady Justice Arden. There is only one point I wish to address which concerns the fact that in seeking to justify the present law on grounds of proportionality HMRC has argued the case at the level of principle and abstraction, and not by reference to detailed factual or expert evidence. This is commented upon at paragraph [78] above. It is the conclusion of Lady Justice Arden (at paragraph [79]) that this is not an insuperable problem in this case. I agree with this conclusion. I consider that there are two reasons for this.

100. First, as is observed in the Judgment above (at paragraph [15]) it is possible to infer from the package of legislation adopted by Parliament on exemptions from IHT that it addressed itself to the existing case law of the CJEU and set out the criteria in the Finance Act 2010 which endeavoured to balance the respective interests of tax payers and the need for the state to be able properly to supervise the exemption.

101. Second, in my view one can take this analysis a step further. This is that the CJEU has, over a lengthy series of cases, addressed itself to the existence of mutual assistance treaties, conventions and agreements as the proper place to draw the proportionality line. As set out in the judgment of Lady Justice Arden there are issues of interpretation which arise in relation to those judgments but once those issues of law have been resolved and the correct position stated it is proper to conclude that the CJEU has addressed itself squarely to proportionality and has provided the solution.

102. It follows that on the facts of this case there was no need for HMRC to come to Court armed with detailed evidence to establish proportionality and it was entitled to argue the case by reference to the case law. To have demanded detailed evidence would have been to require reinvention of the wheel. The conclusion in this case that the legislation is

proportionate does not therefore indicate that in other cases where the state seeks to justify a measure as proportionate it may do so without up to date evidence. The extent to which evidence is required will always be context sensitive (see by way of illustration *R (Lumsdon et ors) v Legal Services Board* [2015] UKSC 41 at paragraphs [44] – [56]).

LORD BRIGGS OF WESTBOURNE

103. I agree with both judgments.