[2020] UKUT 101 (TCC)

Appeal number: UT/2019/0024

INHERITANCE TAX – exemption for gifts to political parties – s 24 Inheritance Tax Act 1984 – gift to UK Independence Party not within scope of exemption – whether breach of European Convention on Human Rights – whether breach of European Union law

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ARRON BANKS **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Mrs Justice Falk
Judge Timothy Herrington

Sitting in public at The Rolls Building, The Royal Courts of Justice, Fetter Lane, London EC4 on 18, 19 and 20 February 2020

Imran Afzal, Counsel, for the Appellant

Christopher Stone, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant ("Mr Banks") appeals against a decision by the First-tier Tribunal ("FTT") (Judge Ashley Greenbank) released on 15 October 2018 (the "Decision"). The FTT refused the appeal of Mr Banks against a notice of determination dated 15 February 2017 issued by the respondents ("HMRC") which assessed him to inheritance tax ("IHT") in the amount of £162,945.34 on donations that he or a company that he controlled made to the UK Independence Party ("UKIP") in the period from 7 October 2014 to 31 March 2015.

2. It is common ground that the donations constituted "transfers of value" within s 3 Inheritance Tax Act 1984 ("IHTA"). The parties also agree that the transfers of value comprising the donations made by a company controlled by Mr Banks can be treated as having been made by him under s 94 IHTA.

3. The only issue that arises on this appeal is whether or not the donations qualify for exemption from IHT under s 24 IHTA (gifts to political parties). So far as relevant, s 24 IHTA provides as follows:

> "(1) Transfers of value are exempt to the extent that the values transferred by them-
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> (a) are attributable to property which becomes the property of a political party qualifying for exemption under this section;
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> …
>
> (2) A political party qualifies for exemption under this section if, at the last general election preceding the transfer of value,-
>
> (a) two members of that party were elected to the House of Commons, or
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> (b) one member of that party was elected to the House of Commons and not less than 150,000 votes were given to candidates who were members of that party.…"

4. The definition of political parties that qualify for exemption is derived from a private Member's amendment to what became the Finance Act 1975, the Act which introduced capital transfer tax ("CTT"). It has remained unchanged since 1975.

5. The effect of UKIP's failure to have any of its candidates elected as MPs at the general election on 6 May 2010 – which was the general election preceding the date on which the donations were made by Mr Banks – was that the donations did not meet the conditions for exemption from IHT as set out in s 24.

6. Mr Banks accepts that, on its strict terms, s 24 IHTA does not apply to the donations made by him (or which are treated as having been made by him) because the conditions for exemption as set out in s 24 were not met. However, Mr Banks contends that the

application of s 24 IHTA in this way constitutes a breach of his human rights and a breach of EU law.

7. In particular, Mr Banks contends that the application of s 24 IHTA in this way involves:

(1) discrimination contrary to Article 14 of the European Convention on Human Rights ("ECHR") together with Article 1 of the First Protocol to the ECHR ("A1P1") (protection of property);

(2) discrimination contrary to Article 14 ECHR together with either Article 10 ECHR (freedom of expression) or Article 11 ECHR (freedom of assembly);

(3) a breach of Mr Banks's rights under Article 10 ECHR or under Article 11 ECHR; and

(4) a breach of UKIP's rights under the ECHR.

8. Insofar as the application of s 24 IHTA constitutes a breach of the ECHR, Mr Banks says that, pursuant to s 3 of the Human Rights Act 1998 ("HRA"), the Tribunal must, so far as it is possible to do so, read and give effect to s 24 IHTA in a way that is compatible with the ECHR rights, and that such a construction is possible in a way that would extend the exemption to the donations Mr Banks made.

9. Mr Banks also argues that the imposition of a tax charge on the donations involved a breach of the UK's obligations pursuant to Article 4(3) of the Treaty on European Union ("TEU"). Mr Banks contends that if there has been a breach of EU law, the Tribunal must either construe s 24 IHTA in a manner consistent with EU law or, if a conforming construction is not possible, disapply the offending provisions.

10. It was common ground before the FTT that s 24 IHTA gave rise, in 2014, to a difference in treatment between an individual who had donated to UKIP (which had not secured a Member of the House of Commons (an "MP") in the 2010 general election and so did not qualify under s 24 IHTA), as against an individual who had donated to a political party which had secured at least one MP and the requisite number of votes in the 2010 general election, and so did qualify. Against that background, the FTT decided:

(1) The difference in treatment between Mr Banks and an individual who did receive an exemption under s 24 IHTA in 2014, amounted to discrimination on the grounds of political opinion within Article 14 ECHR taken with A1P1.

(2) That difference in treatment was in pursuit of a legitimate aim, namely that the exemption under s 24 IHTA should be limited to prevent abuse of the relief by restricting donations to those political parties that play a meaningful role within national political debate.

(3) Nevertheless, the chosen means for addressing the legitimate aim was not proportionate because the concentration in s 24(2) IHTA on MPs elected at the previous general election under a first past the post system did not strike a fair balance in the context of the provision of tax relief for the funding of political

parties, whatever the advantages and disadvantages of that electoral system for the purposes of representative democracy.

(4) Accordingly, the differential treatment of Mr Banks's donations to UKIP could not be objectively justified by reference to the current conditions in s 24(2) IHTA.

(5) Section 24 IHTA could not be interpreted under s 3 HRA in a way that was compliant with Mr Banks's ECHR rights, essentially because the FTT said it was not equipped to choose between the possible options put forward by Mr Banks.

(6) Article 4(3) TEU did not give rise to any directly enforceable right.

11. Accordingly, as Issues (5) and (6) above were decided against Mr Banks the FTT dismissed his appeal. Mr Banks now pursues his appeal before this Tribunal with the permission of the FTT on the grounds that the FTT erred in law (1) in concluding that it was not able to re-write s 24 IHTA pursuant to s 3 HRA in a manner that is consistent with Mr Banks's ECHR rights and (2) in concluding that Article 4(3) TEU did not give rise to a directly enforceable right in this case which would entitle Mr Banks to a remedy for breach of EU law.

12. In their Respondent's Notice, HMRC contend that the FTT erred in its findings on Issues (1) and (3) above but reached the correct conclusion in respect of Issue (5). HMRC also contend that the FTT was correct that there is no relevant directly enforceable right under Article 4(3) TEU.

The Facts

13. The facts were not in dispute before the FTT, which adopted a joint statement of facts provided by the parties as its findings of fact.

14. In summary:

(1) Mr Banks and a company controlled by Mr Banks made donations to UKIP or its affiliated youth organization in the total amount of £976,781.38 between 7 October 2014 and 31 March 2015.

(2) At the UK general election preceding each of these donations (the general election of 6 May 2010), UKIP did not succeed in having any of its 558 candidates elected as an MP, although it did secure 919,471 votes (3.1% of the total votes cast) which exceeded the votes cast in favour of two other parties amongst the eight highest polling parties who obtained in excess of 150,000 votes and had at least one MP elected (the Scottish National Party and the Green Party).

(3) At the 2014 European Parliamentary Elections UKIP secured 4,376,635 votes (26.6% of the vote in the UK) and secured 24 European Parliamentary seats, which was more than any other party.

(4) In March 2014 Ofcom recognised UKIP as having "major party status" for the purpose of the UK Parliamentary election in May 2015.

(5) In October 2014 UKIP gained its first MP when Douglas Carswell won the seat of Clacton in a by-election. UKIP gained a second MP when Mark Reckless won Rochester and Strood in a by-election in November 2014.

(6) At the UK General Election which took place on 7th May 2015 UKIP secured 3,881,099 votes, which was 12.6% of the total in the UK and the third highest for any party. One MP was elected.

Relevant Law

ECHR provisions

15. Article 14 ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

16. A1P1 provides:

> "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."

17. Article 10 ECHR provides for freedom of expression and Article 11 ECHR provides for freedom of association. We set out the full text of those Articles when considering them later in this decision.

Provisions of the HRA

18. The provisions of the ECHR are given effect under the laws of all parts of the United Kingdom by the HRA. Section 1 HRA provides, so far as relevant:

> "(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in —
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> (a) Articles 2 to 12 and 14 of the Convention,
>
> (b) Articles 1 to 3 of the First Protocol, and
>
> (c) Article 1 of the Thirteenth Protocol,
>
> as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

…"

19. Rights under Articles 10, 11 and 14 ECHR and under A1P1 are therefore "Convention rights" for the purposes of the HRA.

20. Section 3 HRA governs the manner in which legislation is to be interpreted in accordance with the Convention rights. It provides:

"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section —

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

Relevant provisions of the TEU

21. Article 4(3) TEU provides:

"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

22. We were also referred to the following provisions of TEU:

"**Article 2**

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member

States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 10

1. The functioning of the Union shall be founded on representative democracy.

2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 13

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

- the European Parliament

…

Article 14

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

> The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.
>
> 3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.
>
> 4. The European Parliament shall elect its President and its officers from among its members."

The Decision

Article 14 ECHR and A1P1

23. Mr Banks's main argument is that the application of s 24 IHTA according to its strict terms involves discrimination contrary to Article 14 of the EHCR together with A1P1.The FTT dealt with this issue by adopting the approach set out by Lord Steyn in *R (S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196 in the form of five[1] questions (at [42]):

> "(1) Do the facts fall within the ambit of one or more of the Convention rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (3) If so, was the difference in treatment on one or more of the proscribed grounds under article 14? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?"

24. As regards Question (1), it was common ground that tax provisions in principle fall within A1P1 because they deprive the person concerned of a possession, namely the amount of money that must be paid. The parties also agree that any potential discrimination arising from the application of s 24(2) IHTA fell within the ambit of A1P1.

25. As regards Question (2), it was common ground that there was a difference in treatment in respect of the tax treatment of a gift made by Mr Banks to UKIP and a gift made by another person to a political party which met the conditions in s 24(2) IHTA.

26. Question (3) was disputed. The FTT held at [46] that the differential treatment of which Mr Banks complains – the taxation of his contributions to UKIP – was discrimination on the grounds of his political opinion within Article 14. The FTT said that it was not relevant that Mr Banks had an element of choice about whether or not he made a contribution to UKIP and that the protection offered by Article 14 to Mr Banks's political views also extended to the actions that he took as a direct consequence of them, including making a donation to a political party that shared his opinions.

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[1] This now more commonly takes the form of four questions, see for example *R (Stott) v Justice Secretary* [2018] 3 WLR 1831 at [207], but nothing turns on this.

27. The FTT also considered an alternative argument advanced by Mr Banks that he was discriminated against on the grounds of "other status" contrary to Article 14, the relevant status being that of a supporter of UKIP.

28. In that regard, relying on the decision of the European Court of Human Rights ("ECtHR") in *Clift v United Kingdom* Application No. 7205/07 (*"Clift ECtHR"*) the FTT at [54] said that "other status" should be given a wide meaning and should not be limited to innate personal characteristics. At [61], relying on the decision of the House of Lords in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 ("*R (RJM)*"), the FTT did not regard the fact that Mr Banks had a choice about whether or not to be a supporter of UKIP or whether or not to make a donation to UKIP to be of significance.

29. However, the FTT went on to consider whether the condition or characteristic in respect of which differential treatment is applied has to exist independently of the discrimination of which the person complains. Relying on what was said by the House of Lords in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, namely that a personal characteristic cannot be defined by the differential treatment of which a person complains, the FTT held at [68] that Mr Banks's status is derived from the very differential treatment which he complains. It said that the only relevant distinction between the political parties is that some met the conditions in s 24(2) IHTA and others (like UKIP at the time) did not. It therefore concluded that if the relevant ground of discrimination was not political opinion, Mr Banks did not have a relevant status for the purpose of Article 14.

30. Question (4) was not disputed. The FTT observed at [69] that for an issue to arise under Article 14, there must be a difference in treatment of persons in "analogous or relevant similar situations": see *Clift ECtHR* at [66]. It was common ground that Mr Banks was in an analogous position to others who did not suffer taxation on their political gifts, such as individuals who made gifts to the Labour Party or the Conservative Party (Decision at [70]).

31. The FTT identified at [71] that there were two parts to Question (5): (i) whether or not the differential treatment had a legitimate aim; and (ii) whether or not the differential treatment was reasonably proportionate to that aim.

32. As regards the first part, the FTT held that the aims of the legislature should be respected unless the differential treatment was manifestly without reasonable foundation. However, as regards the second part the question was whether the measure adopted achieved a "fair balance" between the public interest being promoted and the other interests involved: [85] and [101].

33. At [94] the FTT concluded that political opinion is a sensitive ground of discrimination and therefore cogent reasons were required for any differential treatment.

34. However, at [98] the FTT concluded that tax is an area in which due deference has to be shown to the legislature, as demonstrated by the second paragraph in A1P1. It

went on to say that the level of deference to be shown to the national legislature and executive has to be taken into account as part of the balance to be struck between the interests of the complainant and the interests of the community as a whole.

35. At [99] the FTT concluded that the discrimination in this case was indirect because the relevant provision was not specifically targeted at persons with a given political opinion or who support a particular political party, but it did have a particular effect on new political parties with broad national support.

36. At [109] the FTT concluded that the legislation had a legitimate aim, namely to promote private funding of political parties, and that the conditions in s 24 IHTA were designed to prevent abuse of the relief by restricting it to political parties that play a meaningful role within national political debate. At [110] the FTT concluded that it could not be said that those aims were manifestly without reasonable foundation.

37. At [111] to [117] the FTT applied the fair balance test and concluded that the differential treatment of Mr Banks's donations to UKIP could not be justified.

38. In the light of those conclusions, the FTT went on to consider whether it could give effect to the legislation in a manner that was consistent with Mr Banks's ECHR rights in accordance with s 3 HRA. In particular, the FTT considered whether it was possible for it to interpret or re-write s 24 IHTA in a manner which set conditions which were compliant with ECHR rights.

39. The FTT considered a number of suggestions made by Mr Banks as to how s 24 IHTA could be rewritten, including allowing relief to all registered political parties, or adding a reference to the European Parliament or to MPs elected at the next general election.

40. The FTT rejected all the suggestions made. It concluded that it was not able to re-write the legislation. Its reasoning was set out at [127] and [128] as follows:

> "127. I will deal briefly with [Counsel for Mr Banks's] suggestion that relief could be extended to donations to all parties that are registered under PPERA. On this point, I agree with [Counsel for HMRC]. If s24 was to be re-written in this way, it would not impose any real restriction at all. Such a change would "go against the grain" of the legislation and so would not be an appropriate use of power of the Tribunal under s3 HRA.
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> 128.As regards the other possibilities put forward by [Counsel for Mr Banks], it is clear that some of the changes that he puts forward or a combination of them could be used to make the legislation compliant with ECHR rights. However, the court or tribunal is in no position to make the choice as to which of the options should be chosen or, for example, to set the level, in terms of the number of representatives which a political party has in a particular parliament or the number of votes which a political party must achieve at any given elections, in order to qualify. It seems to me that these are matters for Parliament and not matters for

the Tribunal. In the words of Lord Nicholls[2], they are decisions which the tribunals "are not equipped to make" and Parliament could not have intended that the tribunals should make such decisions under s3 HRA."

Articles 10 and/or 11 ECHR

41. Mr Banks also argued before the FTT that there had been a breach of Article 14 taken together with Article 10 and/or Article 11 or a breach of Mr Banks's rights under Articles 10 and/or 11 alone.

42. The FTT did not find it necessary to deal with these arguments in detail because it held at [137] that for the reasons already given it was unable to provide a remedy under s 3 HRA. It did, however, say at [138] that it was not clear that Article 10 or Article 11 were engaged on the facts of this case, without deciding the point.

UKIP's rights under ECHR

43. Mr Banks argued that the conditions in s 24(2) IHTA breached UKIP's rights under the ECHR in two ways: (i) there had been a breach of Article 14 taken with Articles 10 and/or 11, or (ii) a breach of Articles 10 and/or 11 alone.

44. The FTT did not decide whether there had been a breach of UKIP's rights, or whether it was possible for Mr Banks to rely on a breach of UKIP's rights, because in any case the FTT considered that it was unable to give a remedy for breach of the ECHR: see [142] to [143] of the Decision.

EU law

45. Mr Banks's final argument was that s 24 IHTA is in breach of the UK's obligations pursuant to Article 4(3) of the TEU, and in particular the requirement for Member States to "refrain from any measure which could jeopardise the attainment of the [EU]'s objectives".

46. At [150] the FTT referred to the submission by counsel for Mr Banks that the differential tax treatment of donations made to parties that are successful in elections to the European Parliament as opposed to those that are successful in elections of the House of Commons jeopardises the functioning of the European Parliament and the EU's principles of democracy and equality. At [151] the FTT questioned whether or not the availability of tax relief on donations to UK political parties was too remote and any potential effect too indirect to be regarded as a breach of the UK's obligations under Article 4(3) TEU not to jeopardise the functioning of the European Parliament and the EU's principles of democracy and equality.

47. However, the FTT went on to say that it did not need to decide the point because at [152] it held that there were no relevant obligations owed by the UK under Article 4(3)

2 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [33].

TEU or under Article 4(3) TEU taken together with other provisions that are directly effective and enforceable in the FTT.

48. At [153] the FTT directed itself that the test for a treaty obligation to have direct effect is whether the obligation in question is sufficiently clear, precise and unconditional, relying on *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] CMLR 105 ("*van Gend en Loos*").

49. At [156] the FTT held that Article 4(3) TEU is simply an expression of the more general rule imposing on Member States and EU institutions mutual duties of cooperation and assistance in relation to the duties owed under relevant EU treaties.

50. At [159] the FTT said the following in relation to the other provisions of the TEU referred to by counsel for Mr Banks:

> "These obligations, values and objectives are not of an appropriate nature to give rise to directly effective rights: many are simply aspirational; others are designed to take effect between member states; those which refer to the creation and functioning of the European Parliament do not provide detailed rules on the treatment of funding of political parties under the tax systems of member states. The addition of Article 4(3) does not change their nature."

Grounds of Appeal and issues to be determined

51. Mr Banks has been given permission to appeal on the following two grounds:

> (1) the FTT erred in concluding that it was not able to re-write s 24 IHTA pursuant to s 3 HRA in a manner that is consistent with ECHR rights in order to give effect to the FTT's conclusion that Mr Banks had suffered discrimination contrary to Article 14 ECHR together with A1P1 which could not be objectively justified; and
>
> (2) the FTT erred in concluding that the relevant provisions of the TEU (Article 4(3) or Article 4(3) when read in conjunction with other relevant provisions) do not give rise to a directly enforceable right in this case which would entitle Mr Banks to a remedy for breach of EU law.

52. In their Respondents' Notice, HMRC support the FTT's findings as to its ability to re-write s 24 IHTA and on EU law, but challenge its findings on (i) whether the difference in treatment between Mr Banks and an individual who did receive an exemption under s 24 IHTA was on one of the grounds proscribed in Article 14 and (ii) whether HMRC's application of the statutory test in s 24 IHTA constituted a proportionate means of achieving the legitimate aim of placing some restrictions on tax relief on donations to political parties in order to prevent abuse.

53. In his Reply to the Respondents' Notice Mr Banks indicated that he wished to re-argue certain specific points in relation to the question whether there had been a breach of Article 14 taken with A1P1 which had not been accepted by the FTT, notwithstanding that it found for Mr Banks on the question of whether there had been

a breach of Article 14 taken with A1P1. Mr Banks also indicated that he wished to repeat his arguments on Articles 10 and 11 (taken alone and taken with Article 14) and the question of whether there had been a breach of UKIP's rights under the ECHR.

54. Accordingly, we heard argument from both parties in respect of the matters referred to at [52] and [53] above as well as the issues arising from the grounds of appeal. In summary, the issues raised for determination were as follows:

(1) Whether the difference in treatment between Mr Banks, and an individual who did receive an exemption under s 24 IHTA in 2014, amounted to discrimination proscribed by Article 14 ECHR taken with A1P1.

(2) Whether (i) any difference in treatment was in pursuit of a legitimate aim and (ii) whether the chosen means for addressing any legitimate aim identified was proportionate in the context of the differential treatment that it caused, and accordingly whether it can be objectively justified by reference to the current conditions in s 24(2) IHTA.

(3) Whether there has been a breach of Article 14 ECHR taken together with Article 10 and/or Article 11 ECHR or a breach of Mr Banks's rights under Articles 10 and/or 11 ECHR alone.

(4) Whether the current conditions in s 24(2) IHTA represent a breach of UKIP's rights under ECHR which can be relied upon by Mr Banks.

(5) Whether s 24 IHTA can be interpreted under s 3 HRA in a way that is compliant with Mr Banks's ECHR rights in relation to the possible choices put forward by Mr Banks.

(6) Whether the conditions in s 24(2) IHTA constitute a breach by the UK of its obligations under Article 4(3) TEU (taken alone or taken together with other provisions), and if so whether that provision (or provisions taken together) gives rise to any directly enforceable right.

(7) If so, whether s 24(2) IHTA can be construed in a manner which is consistent with EU law or must be disapplied on the basis that a conforming construction is not possible.

55. For the reasons set out below, we have resolved each of Issues (1) to (6) in favour of HMRC.

Discussion

Issue (1): Whether the difference in treatment between Mr Banks and an individual who did receive an exemption under s 24 IHTA in 2014 amounted to discrimination proscribed by Article 14 ECHR taken together with A1P1

Introduction

56. As we have mentioned above, it is common ground that there was a difference in treatment as between Mr Banks and another person who made gifts to a political party, such as the Labour Party or Conservative Party, which satisfied the conditions set out

in s 24 IHTA in 2014. It was also common ground that tax provisions in principle fall within A1P1 because they deprive the person concerned of a possession, namely the amount of money that must be paid in respect of the tax in question. The parties also agree that any potential discrimination arising from the application of s 24(2) IHTA fell within the ambit of A1P1.

57. As the FTT explained at [41] of the Decision, Mr Banks needs to go further and demonstrate that the differential treatment that he has suffered is based on one of the grounds proscribed by Article 14 ECHR (the "proscribed grounds").

58. Mr Banks contended before the FTT that he suffered differential treatment in his contributions to UKIP on one of two proscribed grounds: first, his political opinion, which is expressly referred to as a proscribed ground within Article 14, and second, an "other status", as referred to in Article 14, in this case his status as a supporter of UKIP.

59. In their Respondents' Notice, HMRC accepted that Mr Banks's decision to donate to UKIP was a manifestation of his political opinion, that is being a supporter of UKIP. Mr Christopher Stone, who appeared for HMRC, accepted that supporting UKIP amounts to holding a particular political opinion and (for the purposes of the appeal) that an individual's decision to donate to a particular political party is a manifestation of his political opinion. Accordingly, it is not necessary to consider whether there is a separate status of being a donor to a political party rather than a supporter of the party concerned. However, HMRC do not accept that s 24 IHTA discriminates on the basis of political opinion.

60. Mr Imran Afzal, who appeared for Mr Banks, submitted that the FTT was correct to have held that the difference in treatment amounted to discrimination on the grounds of political opinion. Mr Afzal submitted that the political party to which a person makes a donation will depend on his political opinion. Mr Banks's political opinion led him to donate to UKIP and in turn he was not entitled to tax relief. By contrast, if he had held a different political opinion and donated to, for example, the Labour Party, he would have qualified for tax relief. Consequently, Mr Afzal says that the difference in treatment is on the ground of political opinion.

61. As far as the "other status" is concerned, Mr Afzal suggested that as well as his status as a supporter of UKIP, Mr Banks had the status of a supporter of a "new party" or, alternatively, a supporter of a party which did not have an MP. Mr Afzal submitted that any of those statuses could amount to an "other status" for the purposes of Article 14 ECHR. Mr Afzal says that it is clear that UKIP is a "new party", in contrast to the established parties such as the Conservative Party or the Labour Party: the agreed statement of facts shows that UKIP was founded in 1991.

62. Mr Afzal submitted that being a supporter of UKIP is clearly a characteristic capable of being an "other status". He observed that the case law demonstrates that membership of a political party would seldom, if ever, be an acceptable ground for a difference in treatment.

63. HMRC accepted that being a supporter of UKIP is capable of being an "other status" but that "other status" is not relevantly different from having a political opinion in favour of UKIP. Mr Stone submitted that the position is the same as regards the alternative formulation of Mr Banks having the status of a supporter of a "new party". There was no evidence before the FTT that Mr Banks's political opinion was to support new parties; the only evidence available indicated that he was a supporter of UKIP. In any event, HMRC did not accept that UKIP was a "new party".

64. As regards the suggestion that Mr Banks had the status of a supporter of a party without any MPs, on the basis of the authorities discussed below, Mr Stone submitted that argument would be bound to fail on the basis that a status which is defined solely by the differential treatment of which the individual complains and has no independent existence outside of it is not an "other status" protected by Article 14 ECHR.

Discrimination on the basis of status as the holder of a particular political opinion or a supporter of UKIP

65. We shall deal first with the question as to whether the conditions in s 24 IHTA discriminate against Mr Banks on the basis of his status as the holder of a particular political opinion or a supporter of UKIP. We agree with HMRC that there is no relevant difference between the two. We deal later with the other possible statuses suggested by Mr Afzal as we need to give further consideration as to whether those alleged statuses amount to an "other status" for the purposes of Article 14.

66. Discrimination on a proscribed ground can either be direct or indirect.

67. The Supreme Court explained the distinction between direct discrimination and indirect discrimination in *Preddy v Bull* [2013] 1 WLR 3741. That was a case where the defendants, who owned and ran a private hotel, believed that it was sinful for persons, whether homosexual or heterosexual, to have sexual relations outside marriage and accordingly they operated a policy to restrict occupancy of double rooms in the hotel to married couples. They refused to honour a booking for a double room made by a homosexual couple in a civil partnership, who brought proceedings against the defendants alleging that they had suffered either direct or indirect discrimination on the grounds of sexual orientation.

68. Lady Hale referred to a number of previous authorities on the question of direct discrimination at [18] and [19] of her judgment as follows:

> "18. The Court of Appeal (in para 40 of the judgment of Rafferty LJ and para 61 of the judgment of Sir Andrew Morritt) based their finding of direct discrimination on the well-known, if controversial, case of *James v Eastleigh Borough Council* [1990] 2 AC 751. The Council allowed people who had reached state pension age free entry to its swimming pool. All women reached that age at 60 while all men reached it at 65. There was thus an exact correspondence between the criterion and the protected characteristic of sex. Hence their lordships decided, albeit by a majority of three to two, that this was direct discrimination on grounds of sex and could not be justified whatever the laudable motives of the Council in fixing on retirement age as the criterion for free entry.

19. Had it been available to them, their lordships might well have cited the words of Advocate General Sharpston twenty years later, in *Bressol v Gouvernement de la Commaunité Française* (Case C-73/08) [2010] 3 CMLR 559, para 56:

> "I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification."

In this she was building on the opinion of Advocate General Jacobs in Schnorbus v Land Hessen (Case C-79/99) [2000] ECR I-10997, para 33:

> "The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected." "

69. At [20] Lady Hale said that if Advocate General Jacobs's test was applied, it could be argued that a marriage criterion is "indissociable from sexual orientation" in that at that time persons of heterosexual orientation could marry and persons of homosexual orientation could not. However, at [21] Lady Hale said that applying the test as stated by Advocate General Sharpston, there was not an exact correspondence between those suffering the disadvantage of being denied a double bed, and those enjoying the correlative advantage of being allowed one, with the protected characteristic: while all same-sex couples were denied, so too were some opposite sex couples.

70. Therefore, on the basis of the authorities, in this case, by reference to Mr Banks's status as the holder of a particular political opinion or as a supporter of UKIP, there will be direct discrimination against Mr Banks if either it can be said that on its face s 24 IHTA discriminates against persons having either of these statuses or that there is an indissociable link between the conditions laid down in s 24 IHTA and his status as the holder of a particular political opinion or a supporter of UKIP.

71. Mr Afzal submitted that there was direct discrimination in this case. He submitted that the legislation did not apply neutrally on its face but on the contrary it drew a distinction between persons donating to different political parties.

72. We reject that submission. On its face, the legislation can apply to any political party. In order to qualify for the exemption, the political party concerned must meet the conditions laid down in s 24(2) IHTA. Donations to UKIP, or to a party of any other political persuasion, can meet the conditions, provided it has been successful in obtaining at least one MP and the requisite number of votes at the last general election.

73. Thus, for example, prior to the 2010 general election a supporter of UKIP wishing to make a donation to that party was in in the same position as a supporter of the Green Party wishing to make a donation to that party. Neither party at that time had an MP in Parliament. Following the 2010 general election, there would have been a difference in treatment between a supporter of UKIP and a supporter of the Green Party, for the

simple reason that the Green Party had been successful in having an MP elected whereas UKIP had not.

74. It is obvious that there is no distinction on the face of the legislation between (in this example) a donor to UKIP and a donor to the Green Party. But there is also no indissociable link between the criteria in the legislation and Mr Banks's status as the holder of a particular political opinion or a supporter of UKIP. It was possible for a donation to any political party to meet the conditions at any time, as donations to UKIP would have done if made after the 2015 general election (and before the following general election in 2017), since UKIP had two MPs elected at the 2015 general election. That is in contrast with the position described in *James*, as referred to by Lady Hale at [18] of *Preddy v Bull*, where there was a indissociable link between the criterion in the legislation, namely the requirement to have reached state pension age to qualify for free use of a swimming pool, and the sex of the individual, because of the differential pension ages at the time. All men in the age group 60 to 64 necessarily suffered discrimination, and it was no answer to this to say that any discrimination fell away once the age of 65 was reached. In this case, for the reasons that we have stated, it was possible for donations made by supporters of UKIP to meet the criteria at any time, depending on the measure of its electoral success.

75. We therefore find that there was no direct discrimination against Mr Banks in this case on the basis of his status as the holder of a particular political opinion or a supporter of UKIP.

76. We turn now to the question of indirect discrimination. In the case of indirect discrimination, the question is whether a policy or measure although not directed at a particular group, nevertheless has a disproportionately prejudicial effect on that group. That appears from the judgment of the ECtHR in *JD and A v United Kingdom* [2020] HLR 5 ("*JD and A*"), where the court said this at [85]:

> "The court has also held that a policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group. Thus, indirect discrimination prohibited under art.14 may arise under circumstances where a policy or measure produces a particularly prejudicial impact on certain persons as a result of a protected ground, such as gender or disability, attaching to their situation. In line with the general principles relating to the prohibition of discrimination, this is only the case, however, if such policy or measure has no "objective and reasonable" justification…"

77. The same approach was taken by the ECtHR in the earlier case of *Biao v Denmark* (2017) 64 EHRR 1: see [91] of the judgment. In the same case, the court said at [93] that Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.

78. Mr Afzal referred us to an example of indirect discrimination that was given in the Supreme Court's judgment in *R (DA and others) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 ("*R (DA)*"), where Baroness Hale said at [134]:

> "In the *SG* case the complaint was of indirect discrimination against lone parent women. It was indirect because the benefit cap applied equally to all lone parents, men and women. But the Government acknowledged that it had a disproportionate impact upon women because the overwhelming majority of lone parents are women"

79. In *Biao v Denmark* the relevant facts were that a person born in Togo, who had acquired Danish nationality by residence, married a Ghanaian national who then sought entry to Denmark for the purposes of "family reunion". At the relevant time, family reunion could only be granted if both spouses were over 24 years old and they had stronger ties to Denmark than anywhere else, but that requirement was lifted for those who had held Danish citizenship for at least 28 years.

80. At [96] the Court observed that the applicants were in a relatively similar situation to that of other couples in which a Danish national and a foreign national sought family reunification in Denmark, and it was acknowledged that the "28-year rule" treated Danish nationals differently depending on how long they had been Danish nationals. The applicants therefore maintained that the 28-year rule created a difference in treatment between Danish born nationals and those who acquired Danish nationality later in life, amounting to indirect discrimination on the basis of race or ethnic origin.

81. There was insufficient evidence for the court to establish exactly how many persons had benefited from the 28-year rule, how many of those were Danish nationals of Danish ethnic origin and how many were Danish nationals of other origin, but at [112] the court said that it could reasonably be assumed that at least the vast majority of Danish nationals born and resident in Denmark, who could benefit from the 28-year rule, would usually be of Danish national ethnic origin whereas persons acquiring Danish citizenship at a later point in life, like Mr Biao, who would not benefit from the 28-year rule, would generally be of foreign ethnic origin.

82. The court therefore held at [113] that the 28-year rule had the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage or having a disproportionately prejudicial effect on persons who, like Mr Biao, acquired Danish nationality later in life and who were of an ethnic origin other than Danish.

83. Although the ECtHR in *Biao* was able to make a reasonable assumption as to the facts which established a disproportionately prejudicial effect in that case, the burden is on the person complaining of indirect discrimination to prove a *prima facie* case to that effect on the basis of evidence, typically including statistical evidence, from which it may be presumed that there has been discrimination: see *DH v Czech Republic* (2008) 47 EHRR 3 ("*Czech Republic*") at [187] to [189] of the judgment.

84. Mr Stone submitted that Mr Banks had not established that s 24 IHTA had a disproportionately prejudicial effect on those who shared his alleged political opinion of being a UKIP supporter. Mr Afzal submitted that because the relevant question is whether the difference in treatment in this case was on the ground of political opinion, there is no question of statistical (or indeed any other) evidence being needed. Mr Afzal submitted that the ground for the difference in treatment is something that can be seen from the terms of the legislation: tax relief is given or denied based on the political

party to which a person makes a donation and it is simply a question of law (not evidence) whether that can properly be characterised as discrimination on the basis of political opinion.

85. We reject that submission. Although it might be argued that it is obvious that the conditions in s 24(2) IHTA had a disproportionately prejudicial effect on UKIP supporters in that donors to UKIP did not obtain tax relief, whereas donors to other parties such as the Labour Party or Conservative Party did, the conditions equally disadvantaged other parties not represented in the Westminster Parliament in the manner required by the conditions, whatever their political persuasion. The fact that donations to UKIP did qualify between 2015 and 2017 illustrates the absence of direct discrimination and in our view is relevant to the absence of indirect discrimination, even though the question of whether there is discrimination has to be assessed at the time the donations were made.

86. As Lord Mance said in the Supreme Court in *R (Stott) v Justice Secretary* [2018] 3 WLR 1831 ("*Stott*"), a case to which we return in more detail later, Article 14 addresses discrimination, whether deliberate or unconscious, having a "systematic" nature in the sense that it occurs on the ground of a characteristic or characteristics in some sense attributed to the victim, whether innately or as a matter of choice or against their will: see [235] of the judgment.

87. In this case, the only relevant differential impact is between supporters of parties which met the conditions for exemption as set out in s 24 IHTA at the time the relevant donations were made and those who did not. Those donors who were supporters of UKIP were simply part of the second group before 2015 and again after 2017. In other words, any disproportionately prejudicial effect was on all of those who were supporters of parties that did not meet the conditions at the relevant time. There was no evidence before the FTT to suggest that UKIP supporters were particularly adversely affected as a group. As Mr Stone submitted, the mere fact that UKIP did not succeed in getting an MP elected at the 2010 general election despite receiving 3% of the popular vote is not by itself evidence that s 24 IHTA had a disproportionately prejudicial effect on UKIP donors. It was simply political happenstance, rather than evidencing anything of a systematic nature amounting to discrimination. Neither was there any evidence that any UKIP donor would have donated more to UKIP if he were entitled to the exemption or that the pattern of donations changed after the 2015 general election when UKIP did qualify for the exemption. That is in contrast, for example, to the position in *R (DA)* where it was established that women were disproportionately prejudiced as a group by the measure in question because the vast majority of lone parents were women.

88. Accordingly, the FTT had no evidence before it to support its conclusions at [46] and [99] that the conditions in s 24 IHTA resulted in indirect discrimination against Mr Banks on the grounds of his political opinion within Article 14 ECHR. The FTT made no findings as to whether the provisions had a disproportionately prejudicial effect on supporters of UKIP. Indeed, its findings at [99] were that the conditions "have a particular effect on new political parties with broad national support". However, as Mr Stone submitted, that was not the basis on which the issue was argued before the FTT; Mr Banks's case before the FTT was that he was discriminated against on the basis that

he was a supporter of UKIP. The FTT's finding was therefore irrelevant to the political opinion that Mr Banks relied on, namely his support of UKIP.

89. It follows that, in our view, the FTT made an error of law in concluding that the differential treatment of which Mr Banks complains, namely the taxation of his contributions to UKIP, was indirect discrimination on the grounds of his political opinion that fell within the scope of Article 14 ECHR.

Discrimination on the basis of status as the supporter of a "new party" or as a supporter of a party without an MP

90. We now turn to consider whether Mr Banks's status as the supporter of a "new party", or his status as a supporter of a party which did not at the relevant time have an MP, was an "other status" falling within the scope of Article 14 ECHR and, if so, whether he was discriminated against on the grounds of that "other status".

91. We should mention at the outset that neither of these matters was pleaded as constituting an "other status" before the FTT. The only "other status" pleaded before the FTT was Mr Banks's status as a supporter of UKIP, and Mr Afzal only sought to rely on the other matters during the course of his oral submissions. However, Mr Stone did not object to these matters being raised and was able to deal with them at the hearing. Accordingly, we have dealt with the arguments raised in this decision.

92. The authorities demonstrate that Article 14 does not prohibit all differences in treatment but only "those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another": see *Clift ECtHR* at [55] and quoted by Lady Black at [23] of *Stott*.

93. In *Minter v United Kingdom* (2017) 65 EHRR SE6 the court held at [66] that there must be a difference in the treatment of persons in analogous, or relatively similar, situations and that only differences in treatment based on an identifiable characteristic are capable of amounting to discrimination within the meaning of Article 14. This passage was quoted by Lady Black at [42] of *Stott*.

94. In *R (RJM)* (referred to at [28] above) Lord Walker sought to clarify the term "personal characteristics" at [5] of his speech as follows:

> " "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord

> Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

95. At [58] of *Clift ECtHR* the Court gave a list of cases in which a violation of Article 14 had been found because of different treatment based on characteristics which were not personal in the sense of being innate or inherent. That list included *Paulik v Slovakia* (2008) 46 EHRR 10 where it was found that a father whose paternity had been established by judicial determination had a status which could be compared to putative fathers and mothers in situations where paternity was legally presumed but not judicially determined. In that case the ECtHR held that there was a breach of Article 14 in circumstances where the claimant had been declared to be the father of a child in judicial proceedings and subsequently, when DNA evidence showed that he was not in fact the father, there was no ability for him to challenge his paternity status. The Court accepted that he had been discriminated against as compared to fathers and mothers where paternity was presumed (as opposed to judicially determined), since the latter could have taken steps to challenge paternity status.

96. *Stott* involved a prisoner who was sentenced to an extended determinate sentence, and in consequence the time at which he became eligible for parole was different to that applicable to prisoners serving determinate sentences and those serving discretionary life sentences. Mr Stott contended that this was discriminatory and the "other status" he relied upon was that of being subject to an extended determinate sentence. The question was whether prisoners subject to an extended determinate sentence could be identified as a distinct group. The Court held that they could, because, as Baroness Hale said at [212]:

> "They are defined by much more than the particular early release regime to which they are subjected. Indeed, the argument that this particular type of sentence is a distinct "package", so persuasively put forward on behalf of the Secretary of State as a justification for the difference, confirms that fact…. If further support for that conclusion were required, it could lie in the different criteria for the imposition of each type of sentence, which concentrate upon the dangerousness of the defender, itself a personal characteristic…"

97. In the Court of Appeal's judgment in *R (C and others) v Secretary for Work and Pensions and others* [2019] 1WLR 5687 (*"R (C)"*) Leggatt LJ observed at [62] that in recent judgments the ECtHR had tended to prefer the description "identifiable characteristic", a phrase which assumes rather than provides a criterion for telling whether a ground of discrimination should be regarded as an "other status".

98. Mr Afzal submitted that UKIP met the criterion of a "new party" and that there is a distinction between a supporter of a "new party" and a supporter of established parties such as the Conservative Party and the Labour Party. He referred us to the Guidelines on Political Party Regulation (2010) which were prepared by the Venice Commission

working with the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe[3]. Paragraph 188 of that document (set out in full at [193] below) refers to the fact that to promote political pluralism, funding should ideally be extended beyond parties represented in Parliament to all parties representative of a minimum level of support and presenting candidates in an election. The Commission said that this was "particularly important in the case of new parties, which must be given a fair opportunity to compete with existing parties".

99. However, this report is of no assistance in determining what is meant by a "new party" in this context. The findings of fact in this case demonstrate that UKIP was founded in 1991, so that it had been in existence for 23 years at the time that Mr Banks made his donations. There are no identifiable objective criteria for determining what is a "new party". On the evidence before the FTT, it is impossible to determine, for example, at what age a party stops being a new party and what level of national support would be needed, if the additional criterion of having broad national support, as suggested by the FTT, was a defining characteristic of the group. In the cases we have referred to above where an "other status" was found, it was readily determinable who fell within the relevant group, whether for example it was prisoners subject to an extended determinate sentence (as in *Stott*, where that was described at [212] as a "distinct package"), fathers whose paternity was judicially determined, or for example holding a particular military rank, or being a tenant of the state rather than a private landlord (see the list of examples referred to in *Stott* at [25]).

100. That is not the case here. The concept of being a supporter of a "new party" is simply too vague and uncertain to meet the requirement for there to be an identifiable characteristic by which persons or groups of persons are distinguishable, as referred to by *Clift ECtHR* and *Minter v United Kingdom* (see [92] and [93] above).

101. We are therefore not satisfied that in this case Mr Banks has identified any characteristic of a "new party" or a "new party having broad national support" which would qualify a supporter of such a party as having an "other status" for the purposes of Article 14 ECHR.

102. Turning to the question of whether Mr Banks has an "other status" for the purposes of Article 14 on the basis of being a supporter of a party without an elected MP, in our view this characteristic falls foul of what has been established in the authorities as the "independent existence condition". In summary, as identified by the FTT and summarised at [29] above, a personal characteristic cannot be defined by the differential treatment of which a person complains. Thus, if, as found by the FTT, the only relevant distinction between supporters of various political parties is that some support parties which meet the conditions in s 24(2) IHTA and others support parties (like UKIP at the relevant time) which do not, then it can be said that Mr Banks's status as a supporter of a party without an elected MP derives from the very differential treatment of which he complains.

[3] The "Venice Commission" is the European Commission for Democracy through Law, an advisory body established by the Council of Europe.

103. The "independent existence condition" has been considered in a number of recent cases.

104. In *R v Docherty* [2017] 1WLR 181, the Supreme Court considered legislation that provided for sentences of imprisonment for public protection which was repealed with effect from 3 December 2012, but the repeal was of no effect in relation to persons convicted before that date. Mr Docherty was convicted before 3 December 2012 and was sentenced on 20 December 2012 to an indeterminate sentence of imprisonment for public protection. He argued that there was discrimination as compared to someone convicted of an identical offence after 3 December 2012. It was suggested that Mr Docherty had an "other status", being either his status as a person convicted prior to 3 December 2012 or his status as a prisoner subject to an indeterminate sentence. Lord Hughes, giving the only judgment, rejected the argument that the second suggested status was sufficient to bring Article 14 into question, because it was "defined entirely by the alleged discrimination". In contrast, although he was doubtful that a mere date of conviction could amount to a sufficient status, he was prepared to proceed on the basis that it was.

105. In *Stott* the independent existence condition was considered in detail. The court decided that the difference in the treatment of extended determinate sentence prisoners in relation to early release was a difference on the ground of "other status" within the scope of Article 14, but concluded that the difference in treatment was proportionate and justified. Its observations on the independent existence condition were therefore *obiter*.

106. Lady Black saw a number of difficulties about the independent existence condition. The first of these difficulties identified was, as she observed at [72], its "uncompromising rejection" in *Clift ECtHR*, although it featured as part of Lord Hughes's analysis in *Docherty*. Lady Black said that *Clift ECtHR* had cited *Paulik* in support and it was clear that the ECtHR saw the case as an example of a characteristic which did not exist independently of the treatment complained of and yet approved of its categorisation as an "other status".

107. The second difficulty identified by Lady Black, at [73], was that the condition made its appearance in the House of Lords decision in *Clift*[4] unsupported by much, if anything, by way of explanation or supportive authority.

108. Lady Black identified a third difficulty at [74] as follows:

> "The third difficulty is that the independent existence condition is not at all easy to grasp. Mr Clift satisfied it, because he relied upon being a prisoner serving a determinate term of 15 years or more, and his complaint was about the fact that, by virtue of a subsequent Order, he required the Secretary of State's approval for his release, rather than automatically being released if the Parole Board recommended it. The homeless person in *RJM*, who complained about losing his benefits, also satisfied it. However, it was not satisfied, according to *Docherty*, where the prisoner was relying upon being a prisoner subject to an indeterminate

[4] See [29] above.

> sentence, and complained that he had been discriminated against by virtue of the fact that he could not have been given that sentence had he been convicted after 3 December 2012. Even with these practical examples, it is a challenge to make general sense of the concept, and things do not improve when one takes into account the width of the approach taken in Strasbourg to the ambit of article 14."

109. Accordingly, at [75] Lady Black said that she "would be cautious about spending too much time on an analysis of whether the proposed status has an independent existence, as opposed to considering the situation as a whole….".

110. At [209] Baroness Hale observed that the requirement that the treatment complained of was on the ground of some "status" in order to bring a case within the scope of Article 14 was clearly intended to add something to the requirement of discrimination or a difference in treatment. Otherwise Article 14 ECHR would simply have said that "the enjoyment of the Convention rights shall be secured without (unjustified) discrimination (between persons in an analogous situation)".

111. At [210] Lady Hale rejected the view of the ECtHR in *Clift ECtHR* that *Paulik* illustrated that the independent existence condition had no clear support in its case law. She said this in relation to Mr Paulik:

> "….while it may well be the case that there was no other difference in treatment between the applicant and the others with whom he compared himself, his status, as a man who had been adjudged father in legal proceedings, was obviously different from the status of those fathers who had not, and even more different from the status of mothers. In other words, his status was not defined by the difference in treatment complained of. That, it seems to me is the true principle: the "status" must not be defined solely by the difference in treatment complained of, for otherwise the words "on any ground such as …" would add nothing to the article."

112. At [230] Lord Mance explained that a difference in the sentence imposed cannot amount to a difference in status, as opposed to a difference in the gravity of an offence. He said that also explained Lord Hughes's distinction between the two suggested statuses in *Docherty*, being the date of conviction and the imposition of an indeterminate sentence, the latter not giving rise to a different status. Having said at [231] that the root of the third difficulty expressed by Lady Black at [74] of her judgment arose from attempts to extend the application of the proposition that a mere difference in treatment does not by itself constitute a difference in status beyond its scope, he went on to say:

> "There is no reason why a person may not be identified as having a particular status when the or an aim is to discriminate against him in some respect on the ground of that status. Thus, in *Clift* the categorisation of Mr Clift as a prisoner serving a sentence of more than 15 years' imprisonment (a bright-line distinction clearly associated in the legislature's mind with a significantly higher level of risk) was with a view to the discriminatory treatment about which Mr Clift complained, since it meant that he would receive less favourable treatment (a) as regards early release, than life prisoners presenting on their face an even greater risk, and also (b) as regards prisoners serving sentences of less than 15 years, since his release

> would be subject to approval by the Secretary of State who could contribute nothing relevant to any evaluation of continuing risk. It is to my mind unsurprising that such categorisation was in these circumstances regarded as giving Mr Clift a relevant status. It was common ground in *Clift* that being a prisoner was a status, and it was a short step from that in the circumstances to accepting that being a particular type of prisoner, namely one serving a determinate sentence of 15 years of more and viewed accordingly as presenting a particular risk (which was however addressed in a discriminatory fashion), could also be identified as a status."

113. At [233] Lord Mance said in relation to *Paulik*:

> "*Clift* suggests that a difference in the basis of established paternity represented a sufficient difference in status, even though the only continuing effect of the distinction consisted in the discriminatory possibility in the one case and impossibility in the other of subsequent disproof of paternity by a DNA test."

114. As Mr Afzal submitted, this passage suggests that it does not matter that the only practical relevance of the "other status" is that it is the basis for discrimination, provided that the proposed "status" is not merely the difference in treatment itself.

115. It is clear from both *Docherty* and *Stott* that the independent existence condition exists, notwithstanding what was said in *Clift ECtHR*. Indeed, the ratio in *Docherty* was clearly based on that proposition and it was not departed from in *Stott*. It therefore binds us. It is, however, also clear from what Lord Mance said at [231] of *Stott*, that the principle should be confined to its proper and narrow scope, namely (as Lady Hale said at [210]) that the "other status" must not be defined solely by the difference in treatment.

116. *Stott* has been considered in two recent judgments of the Court of Appeal.

117. In *Simawi v London Borough of Haringey* [2019] EWCA Civ 1770 ("*Simawi*") the relevant facts were that a husband and wife were joint tenants in relation to a secure tenancy, and when the husband died the wife became the sole tenant. When the wife died her son was not entitled to succeed to the tenancy, because only one succession was permitted under the relevant statute. However, if the parents had been divorced, and the tenancy had been transferred to the mother by court order in divorce proceedings, then the son would have been entitled to succeed to the tenancy because transfer on divorce would not have counted as a first succession. It was contended that whether a person became a sole tenant through death rather than assignment following a relationship breakdown was an "other status", and the fact that the son could not succeed to the tenancy on his mother's death amounted to unlawful discrimination on the ground of that status.

118. Lewison LJ, who gave the only reasoned judgment, reviewed *Stott* and held that the son was entitled to rely on a status "provided that it is not defined entirely by the alleged discrimination": see [31] to [41] of the judgment. He went on to hold at [44] that the formulation of the "other status" by reference to the mother's position as a widow and Mr Simawi being her son "seems to introduce the question of discrimination into the definition of the "other status" itself", as did defining status by what kind of

tenancy was originally granted, and what happened to it. Lewison LJ held that was impermissible even after *Stott*. That finding was *obiter*, because at [45] Lewison LJ held that being the child of a widowed parent rather than a divorced parent is capable of amounting to an "other status". Nevertheless, we find the reasoning of Lewison LJ persuasive.

119. The second case (decided a few months earlier) is *R (C)*, which we have referred to at [97] above. That case is subject to an appeal to the Supreme Court.

120. Leggatt LJ, who gave the only reasoned judgment, referred to *Stott* and said at [67]:

> "It follows that the status cannot be defined solely by the difference in treatment complained of: it must be possible to identify a ground for the difference in treatment in terms of a characteristic or classification which is not merely a description of the difference in treatment itself (see paras 209—212). On the other hand, there seems no reason to impose a requirement that the status should exist independently in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of."

121. At [69] Leggatt LJ referred to the Supreme Court's judgment in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 as an illustration of the latter point. He noted that in that case the treatment which violated Article 14 was the suspension of disability living allowance to a child on the ground that he was an in-patient in an NHS hospital for more than 84 days. There was no suggestion that the 84 day criterion had any significance apart from the fact that it was the ground for the difference in treatment complained of (between the entitlement to disability living allowance of a disabled person in the claimant's situation and that of a disabled person who was an in-patient in an NHS hospital for 84 days or less). Leggatt LJ said that although the Supreme Court said that at first sight the claimant's contention appeared contrived, the Court reached the "confident conclusion" that the claimant had a status falling within the grounds of discrimination prohibited by Article 14.

122. It is therefore clear from the cases that whether or not the independent existence condition is satisfied can depend on some fine distinctions.

123. Mr Afzal submitted that on the facts of the present case, it is not the case that the "other status" is defined entirely by the difference in treatment. He said the "other status" being relied upon is not "being a person who is denied tax relief"; on the contrary the "other status" is that of being a supporter of a party without the requisite number of MPs elected at the last general election or the requisite number of votes. Therefore, Mr Afzal said, the status is not defined by the difference in treatment.

124. We reject that submission. Applying the test as formulated in *Simawi* and *R (C)*, following *Stott*, in our view the "other status" suggested by Mr Afzal is defined entirely by the alleged discrimination. Mr Afzal says Mr Banks is being discriminated against because he is a supporter of and donor to a party that failed to achieve an elected MP at the 2010 general election. In our view, that defines the characteristic in terms that is merely a description of the difference in treatment. Supporters of parties that failed to achieve an MP at the previous general election do not get the benefit of the exemption

if they donate to those parties, whereas supporters of parties who were successful in having an MP elected (and met the minimum vote criterion) can get the exemption on donations they make. On the facts of this case, the only reason that Mr Banks's donations to UKIP did not qualify for tax relief was because UKIP did not have an MP elected at the 2010 general election. Mr Afzal did not need to describe the status as also encompassing a minimum number of votes having been cast in the party's favour only because UKIP happened to have met that requirement.

125. Mr Afzal sought to draw an analogy with *Clift*, where Lord Mance described the position at [231] of *Stott* as being Mr Clift being discriminated against as a prisoner serving a sentence of more than 15 years' imprisonment and being viewed by the legislature as presenting a particular risk. But what Lord Mance was saying there was that a characteristic was identified (being a prisoner with a particular length of sentence) that was separate to the rule being complained about, and the provision complained about had an aim of discriminating against persons with that characteristic on the basis that they were regarded as presenting a particular risk. We do not accept that by describing Mr Banks's status as supporting a party which failed to have an MP elected at the last election identifies a characteristic possessed by Mr Banks which is separate to the conditions which are being complained about. The class of persons subject to the difference in treatment are those who support and donate to parties that do not meet the conditions in s 24(2) IHTA. That seems to us to be more analogous to the position in *Docherty* where the claimant claimed his "other status" was his status as a prisoner who was subject to an indeterminate sentence, a status which the court held was defined entirely by the alleged discrimination.

126. It is also possibly of some relevance to take account of the fact that, as discussed in relation to Issue (2), the suggested status of being a supporter of a party without an MP would in our view be on the outer fringes of the concentric circles described by Lord Walker in *R (RJM)*. In contrast, for example, particular issues arise in relation to prisoners, given the obvious issue of loss of liberty. Similarly, in *Mathieson* the discrimination related to the different needs of disabled people, close to the centre of the concentric circles.

127. We therefore determine Issue (1) in favour of HMRC.

128. As we found at [89], the FTT made an error of law in concluding that the differential treatment of which Mr Banks complains, namely the taxation of his contributions to UKIP, was indirect discrimination on the grounds of his political opinion that fell within the scope of Article 14 ECHR. It is therefore open to us to interfere with the FTT's decision on this point. Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides that if the Upper Tribunal finds that the making of the relevant decision involved the making of an error on a point of law it "may (but need not) set aside" the decision, and that if it does, it must either remit the case to the FTT with directions for reconsideration, or remake the decision. In our view, the error was material and we should therefore exercise our discretion to set aside the Decision. We remake the Decision on the basis of the facts found by the FTT by concluding that the differential treatment of which Mr Banks complains, namely the taxation of his

contributions to UKIP, was not indirect discrimination that fell within the scope of Article 14 ECHR.

129. If we are correct on this point then it would not strictly be necessary to decide Issue (2). However, we recognise that Issue (1) is not straightforward, and we also take account of Lady Black's words of caution in *Stott* at [75] about focusing on the proposed status, as opposed to considering the situation as a whole. We will therefore address the question of justification in detail.

Issue (2): Justification

Introduction

130. Before the FTT and before us this question was divided into two parts, first whether the legislation had a legitimate aim (or policy objective) and secondly whether it was proportionate. In relation to the first part of the test, it was common ground before the FTT and before us that the view of the legislature should be respected unless it was manifestly without reasonable foundation (the "MWRF" test). However, the parties disagreed, and continue to disagree, about whether the MWRF test also applies in determining proportionality.

131. Two preliminary points are worth clarifying. First, the burden of proof in demonstrating justification is on HMRC – see for example *Czech Republic* at [177]. Insofar as the MWRF test is relevant, the burden is on the appellant, but as explained by Lord Wilson in *R (DA)* at [66], this is more theoretical than real:

> "The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

132. Secondly, since this is a case where any discrimination would be indirect, it is the measure rather than its discriminatory impact that must be justified: *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 ("*R (SG)*") at [189] and *R (DA)* at [134]. The relevant measure here is the conditions contained in s 24(2) IHTA.

The FTT's decision

133. The FTT concluded at [109] to [110] that the legislation had a legitimate aim. It described that aim as follows:

> "109. … I agree with Mr Stone that the aim of the legislation is evident from the words of the statute, namely to promote private funding of political parties. The definition of political parties that qualify for exemption in s24(2) IHTA is designed to ensure that what may be a valuable tax relief is limited to prevent abuse of the relief. It does so by restricting donations to those political parties that play a meaningful role within national political debate."

134. At [110] the FTT concluded that these are legitimate aims. It added:

> "Given the degree of deference which should be given in relation to this part of the test, it cannot be said that those aims are manifestly without reasonable foundation."

135. Having determined earlier in the Decision (at [84] and [85]) that the MWRF test should not be applied in determining proportionality, the FTT reached the following conclusions on proportionality at [114] to [117]:

> "114. I accept most, if not all, of Mr Stone's points. But to my mind, they do not address the main point. The question is whether the chosen means for addressing the legitimate aim – that political parties should be able to demonstrate a minimum level of public support before donations to the party qualify for tax relief – is proportionate in the context of the differential treatment that it causes.
>
> 115. To my mind it is not.
>
> (1) I have accepted that it is a legitimate to place some restrictions on tax relief for donations to political parties in order to prevent abuse. Tax relief after all is a form of public funding for political parties.
>
> (2) A balance has to be struck between achieving that legitimate aim and the impact on Mr Banks's rights not to be discriminated against on the grounds of his political opinion.
>
> (3) I have also accepted that it is not irrational for those limits to be based on electoral success and/or public support. There are of course many ways in which it would be possible for a political party to demonstrate a level of electoral success or political support. They may include: reference to votes cast at various elections, whether to the House of Commons, local authorities, the European Parliament and/or the devolved parliaments and assemblies; or reference to the collection of signatures as suggested in the OSCE/ODIHR and Venice Commission guidelines[5]...
>
> (4) The choice that Parliament has made (in s24(2)) focusses to a significant extent (although not exclusively) on past success in elections to the House of Commons. I must give due deference to that legislative choice, which I do.
>
> (5) The difficulty with that choice is that those elections take place on a "first past the post" system which, as Mr Banks's case illustrates, is not, on its own, a reliable barometer of public support. The resulting test in s24(2) is liable to be prejudicial to supporters of new and as yet unrepresented parties even where those parties can demonstrate meaningful levels of public support.
>
> (6) Whilst I appreciate that wherever a line is drawn it may throw up some anomalies, I cannot agree that the current test is an

[5] See further [98] above and footnote 3. "OSCE/ODIHR" refers to the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe.

> appropriate one to apply to tax relief for donations. There are a number of other options available to Parliament to achieve that aim which would not have such a disproportionate effect on supporters of new political parties or parties that, despite being able to demonstrate a meaningful level of public support, are not represented in a parliament elected under that system.
>
> 116. Against that background, in my view, the concentration in s24(2) on MPs elected at the previous general election under a first past the post system does not strike a fair balance in the context of the provision of tax relief for the funding of political parties – whatever the advantages and disadvantages of that electoral system for the purposes of representative democracy.
>
> 117. For those reasons, in my view, the differential treatment of Mr Banks's donations to UKIP cannot be objectively justified by reference to the current conditions in s24(2) IHTA."

136. For the reasons explained below, we have concluded that the FTT was in error in its description of the aim of the legislation at [109] of the Decision, and that this error also affected the FTT's assessment of proportionality.

Use of Parliamentary material

137. In the course of submissions, we were referred to a significant amount of additional material, including not only Parliamentary debates but other material such as reports commissioned since 1975 relating to political funding.

138. In *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 ("*Wilson*"), Lord Nicholls provided important guidance about a court's approach to using background information in identifying the policy objective of a statute or assessing proportionality in a Convention context, having regard to article 9 of the Bill of Rights 1689, which prohibits the questioning of debates or proceedings in Parliament. It is worth setting out what he said at [63] to [67] in full:

> "63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the "proportionality" of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the "mischief") at which the legislation is aimed. This may throw light on the rationale underlying the legislation.
>
> 64. This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if

they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be "questioning" proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.

65. To that limited extent there may be occasion for the courts, when conducting the statutory "compatibility" exercise, to have regard to matters stated in Parliament. It is a consequence flowing from the Human Rights Act. The constitutionally unexceptionable nature of this consequence receives some confirmation from the view expressed in the unanimous report of the parliamentary Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-I, HC 214-I), p 28, para 86, that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability.

66. I expect that occasions when resort to Hansard is necessary as part of the statutory "compatibility" exercise will seldom arise. The present case is not such an occasion. Should such an occasion arise the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight. It should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions.

67. Beyond this use of Hansard as a source of background information, the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which "counts against" the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute. I agree with Laws LJ's observations on this *in International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 , 775, paras 113-114."

139. It is also worth referring to the following summary of the position by Lord Mance in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 ("*Asbestos*"), where he said this at [55]:

> "To put a legislative measure in context, domestic courts may (under a rule quite distinct from that in *Pepper v Hart* [1993] AC 593) examine background material, including a white paper, explanatory departmental notes, ministerial statements and statements by members of parliament in debate: *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816. But care must at the same time be taken not to question the "sufficiency" of debate in the United Kingdom Parliament, in a way which would contravene article 9 of the Bill of Rights."

Aim of what is now s 24(2) IHTA

140. What is now s 24 IHTA was introduced by the Finance Act 1975, as part of the replacement of estate duty by CTT (subsequently renamed IHT).

141. Although the FTT was referred to Parliamentary debates, it concluded that it did not need to resort to such evidence to conclude that the legislation had the legitimate aims that it described at [109] of the Decision (see [133] above).

142. Both parties criticised this part of the Decision, Mr Afzal on the basis that the FTT should have found that the difference in treatment had no legitimate aim, and Mr Stone on the basis that the FTT's description was incorrect and did not properly reflect his submissions.

143. In our view a number of key elements are apparent from s 24(2) IHTA. In particular, the donation must be to a "political party", and that party must be represented by one or more MPs elected to the House of Commons at the last general election. It is also apparent that it is not intended that relief be conferred in respect of donations to support an independent MP who does not form part of a wider grouping. The requirement for 150,000 votes is a clear indication that a broader level of support is required, going beyond a single constituency.

144. Whilst we are mindful of Lord Nicholls' guidance in *Wilson*, we also consider that in this case some reference to Hansard is instructive in understanding the aims of the legislation in this case, because it assists in understanding the origin and context of the conditions in s 24(2) IHTA and the reasons for them. An understanding of the origin and context of the conditions is also of particular relevance in this case in addressing Mr Afzal's point that we must test compliance with Convention rights by reference to the current circumstances (or at least the time when the relevant events occurred), and not by reference to the position when the legislation was first introduced in 1975 (see *Wilson* at [62] and [144]).

145. As originally proposed, CTT would have included no exemption for donations to political parties. This contrasted with estate duty, where gifts more than 12 months before death would have been free from duty. This led to amendments being tabled that were debated in a Standing Committee debate on 5 February 1975. Two alternative amendments were considered. One would have provided a general exemption for gifts

for public or charitable purposes. The other, tabled by Nigel Lawson (then an opposition MP), was in terms that were substantively identical to those now included in s 24(2) IHTA. Although neither amendment was adopted at the time, the second amendment was substantively adopted by a Government amendment introduced at the report stage of the Finance Bill, on 10 March 1975.

146. In the 5 February debate, Mr Lawson explained (Col. 926) that the conditions he proposed were taken from proposals tabled by the Leader of the House under the heading "Financial Assistance to Opposition Parties", with one alteration, namely that the proposed exemption should apply to Government parties as well as parties in opposition. Mr Lawson explained that he was "trying to get some consistency into the Government's thinking on this whole matter of funds for political parties". He referred to parts of a statement by the Leader of the House, including comments about the "Government's belief in the need to strengthen our Parliamentary democracy" and a belief that the funding proposals "will strengthen the effectiveness and independence of Members of Parliament, of Parliament itself and of the political parties…".

147. The funding proposals tabled by the Leader of the House were what became known as the "Short Money" rules, introduced in 1975 and named after Edward Short, the then Leader of the House. The criteria for eligibility for funding have remained unchanged since the introduction of those rules and continue to match the requirements of s 24(2) IHTA (save for being restricted to opposition parties). We were referred to a useful Parliamentary briefing paper entitled "Short Money" prepared in October 2018 (Briefing Paper number 01663). Section 2 explains that Short Money general funds are largely spent on research support for frontbenchers, assistance in the Whips' offices and staff for the Leader of the Opposition. It refers to the original 1975 resolution as having made financial assistance available to a qualifying party "to assist that party in carrying out its Parliamentary business", and states that parties were required to certify "that the expenses in respect of which assistance is claimed have been incurred exclusively in relation to that party's Parliamentary business". The 2018 paper also refers to a statement by Edward Short about the proposal in July 1974 which referred to the need "to provide additional support for the Opposition parties in Parliament – support which they certainly require if they are to play their full part here". In addition, the paper notes that some modifications had since been made in relation to travelling and associated expenses, and in relation to the Office of the Leader of the Opposition.

148. In our view the relationship with the Short Money rules, and the fact that those rules remain unchanged in relevant respects, is noteworthy. It is clear that Short Money is focused on providing funding to parties that are represented at Westminster and is intended to support their Parliamentary business. It is not aimed at parties that are not represented at Westminster.

149. Mr Afzal suggested that Mr Lawson's references in the debates to the need for consistency related to the Government's failure to propose any specific relief for donations to political parties rather than to the conditions in what is now in s 24(2) IHTA, and that there was no consideration of those conditions. The latter point seems to us to come close to questioning the sufficiency of debate, but in any event we do not agree. Mr Lawson was proposing an amendment that precisely tracked the Short Money

proposals as to the conditions to be satisfied, save for extending relief to the party in Government (a party which would of course meet the conditions without difficulty). His point about inconsistency extended to the particular terms of the amendment he proposed. This is evident from the terms of the amendment he tabled and from his statement at Col. 927 of Hansard that:

> "The Government must be consistent. It is right to encourage the flow of funds to the political parties for the strengthening of Parliamentary democracy. Therefore, the capital transfer tax, unless amended as I suggest, must be wholly wrong…" [Emphasis added.]

150. We have therefore concluded that the FTT was in error in its description of the aim of the legislation at [109] of the Decision. Whilst the legislation does indeed promote private funding of political parties, it is not correct to describe the conditions as being intended to prevent "abuse" of the relief by restricting donations to parties that "play a meaningful role within national political debate". The aim is much more specific. It is to provide tax relief on donations to political parties that are participating in Parliamentary democracy by being represented in the House of Commons, and not in respect of individual independent MPs. That is a rational and legitimate aim. The focus is on Parliamentary activity. The conditions do not prevent "abuse" but instead describe the type of organisation that is intended to benefit from relief: in other words, something that is a recognisable political party that is represented at Westminster. In our view that is apparent from the language of s 24 IHTA, but it is also supported by the Hansard material and by an understanding of the relevant context, namely the introduction of the Short Money arrangement. That additional material explains the inclusion of the conditions contained in s 24(2) IHTA.

Developments since 1975

151. As already indicated, it is significant in our view that the Short Money rules have remained unchanged in relevant respects[6]. This is so despite such developments as the introduction of direct elections to the European Parliament in 1979 and the creation of devolved assemblies, as well as the introduction of a system for the registration of political parties.

152. Similarly, the IHT conditions have not been amended. A proposal was put forward in the 2016 Autumn Statement to extend IHT relief to donations to parties with representatives in the devolved legislatures and parties who had acquired representatives through by-elections, but that proposal was not taken forward.

153. In summary, while there have been a number of proposals and reports commissioned in relation to the possible reform of political funding, changes have not been made to the conditions either for Short Money or for IHT relief. We were taken to several of the reports in some detail. We do not propose to comment on them save to note that, overall, they serve to emphasise that this is a sensitive political area where

[6] Although we should note for completeness that a similar scheme, Cranborne money, was introduced in the House of Lords in 1996, and from 2006 there have been special arrangements, Representative Money, for Sinn Fein.

proposals for change have been put forward but, for whatever reason, the legislature has not resolved to implement them.

Proportionality: the test

Asbestos: the "fair balance" approach

154. In *Asbestos*, Lord Mance summarised the process for reviewing legislation for compliance with Convention rights as follows at [45]:

> "There are four stages, which I can summarise as involving consideration of (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right, (ii) whether the measure adopted is rationally connected to that aim, (iii) whether the aim could have been achieved by a less intrusive measure and (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right."

155. In response to a submission about the stages at which the court will respect the legislature's judgment as to what is in the public interest unless that is manifestly without reasonable foundation, Lord Mance indicated at [46] that that test applied "to the first or at all events the first to third stages", and not to the fourth stage.

156. At [51] Lord Mance explained that this approach reflected the one adopted in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 ("*AXA*"), and at [52] he summarised the position of the ECtHR as follows:

> "I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness". In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker."

157. Strictly, this analysis in *Asbestos* was *obiter*, but it was based on the ratio in *AXA*. Both cases related to alleged contraventions of A1P1, and not to discrimination or indeed, to taxation measures. *Asbestos* related to a Welsh Assembly proposal to require costs of medical treatment for asbestos-related diseases to be recovered from an employer or insurer from whom the individual received compensation. *AXA* related to a law passed by the Scottish Parliament relating to the scope of a claim for damages in connection with asbestos-related diseases.

The MWRF test: R (DA)

158. Mr Stone submitted that the Tribunal was not bound to follow the "fair balance" approach described above, and instead the correct approach was to apply the single MWRF test adopted in welfare benefit cases, and in particular the Supreme Court decision in *R (DA)*, which post-dated the Decision. He also referred us to the comments of Leggatt LJ in *R (C)* (a case which predated the Supreme Court decision in *R (DA)* and where it was common ground that the MWRF test applied). Having referred to the non-application of the margin of appreciation test in a domestic context (as to which see below at [186]), Leggatt LJ said this at [87]:

> "Nonetheless, there are compelling reasons for according the full area of judgment allowed to the UK under the Convention in matters of social and economic policy to the legislature and the executive. Within the UK's constitutional arrangements, the democratically elected branches of government are in principle better placed than the courts to decide what is in the public interest in such matters. Those branches of government are in a position to rank and decide among competing claims to public money, which a court adjudicating on a particular claim has neither the information nor the authority to do. In making such decisions, the legislature and the executive are also able and institutionally designed to take account of and respond to the views, interests and experiences of all citizens and sections of society in a way that courts are not. Above all, precisely because decisions made by Parliament and the executive on what is in the public interest on social or economic grounds are the product of a political process in which all are able to participate, those decisions carry a democratic legitimacy which the judgment of a court on such an issue does not have. For such reasons, in judging whether a difference in treatment is justified, it is now firmly established that the courts of this country will likewise respect a choice made by the legislature or executive in a matter of social or economic policy unless it is 'manifestly without reasonable foundation'."

159. *R (DA)* related to the imposition in 2016 of a revised cap on housing benefit, which was challenged under Article 14 read with Article 8 or A1P1. The majority concluded that, rather than the four stage approach referred to above, the "sole question" in determining justification was whether the relevant rule was manifestly without reasonable foundation (Lord Wilson's judgment at [65], and see also [110] and [125]). Lord Carnwath, with whom Lord Reed agreed and with whom Lord Hodge and Lord Hughes also agreed on this aspect, explained this in more detail at [110] to [118]. In particular, at [116] Lord Carnwath cited the following passage from Lord Toulson's judgment in *R (MA) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2016] 1 WLR 4550:

> "32. The fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems was given by the Grand Chamber in *Stec*[7] (para 52). Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities."

[7] *Stec v United Kingdom* (2006) 43 EHRR 47.

160. At [117] Lord Carnwath went on to disagree with Baroness Hale's suggestion that the court should re-address the MWRF test and noted that the context in *Asbestos* was quite different:

> "…not social security benefits, but compensation for asbestos-related disease; and not article 14 discrimination, but interference with property rights under A1P1."

161. He concluded his explanation as follows at [118]:

> "…the fact that the Strasbourg court uses the MWRF test when applying the margin of appreciation and that the same margin of appreciation does not necessarily apply at the national level does not entail that domestic courts cannot also use the MWRF test. It is being used as a means of allowing the political branches of the constitution an appropriately generous measure of leeway when assessing the proportionality of measures concerning economic and social policy. The seven-Justice decision in *MA* surely settled the point for the foreseeable future."

162. It is also worth noting that, before *R (DA)*, the MWRF test was applied by the Supreme Court in the context of State pension benefits in *Re Brewster's application for judicial review (Northern Ireland)* [2017] 1 WLR 519 ("*Re Brewster*"), when considering a challenge under Article 14 read with A1P1, although because the measure failed the MWRF test the point was not essential to the decision: see [55] where Lord Kerr stated that he was prepared to accept that the MWRF test applied for the purposes of the appeal.

163. Following *R (DA)*, the question of the correct test to apply was briefly considered again by the Supreme Court in *Gilham v Ministry of Justice* [2019] 1 WLR 5905 ("*Gilham*"), which related to a claim by a judge for whistle-blower protection. Baroness Hale referred at [34] to the cases in which the MWRF test had been applied as all being cases relating to the welfare benefit system, and said that it was in that context that the test had been articulated by the ECtHR, referring to *Stec*. She added that *Gilham* was not in that category, but rather in the category of economic or social policy, where the MWRF test had not always been applied, referring to *In re G (Adoption: Unmarried Couple)* [2009] AC 173. However, since no legitimate aim had been put forward it was not possible to judge proportionality, and a breach was found to have occurred without it being necessary to decide which test applied ([37]).

164. The question was also considered in *Simawi*, where it was explained at [59] that the reason for applying the MWRF test was that "…choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities", and it was noted that the MWRF test had been applied in a social housing context.

165. Mr Stone referred us to *R (Independent Workers' Union of Great Britain) v The Mayor of London* [2019] 4 WLR 118 ("*Independent Workers' Union*") at [113] to [115], where Lewis J determined that MWRF was the appropriate test when considering a challenge under Article 14 taken with A1P1 to the removal of an exemption to the

congestion charge for private hire vehicles, but in fact assessed proportionality both by using that approach and by asking whether the measure struck a fair balance.

166. We should also refer briefly to some earlier cases which considered proportionality in a tax context. *R (Rowe) v Revenue and Customs Comrs* [2018] STC 462 (CA) ("*Rowe*") concerned an alleged breach of A1P1 and Articles 6 and 7. McCombe LJ referred to the "fair balance" test at [196] but also stated that tax measures "are entitled to particular deference" at [197], citing Barling J's judgment in *Allan v Revenue and Customs Comrs* [2015] STC 890.

167. *Reeves v Revenue and Customs Comrs* [2018] STC 2056 involved a claim for infringement of Article 14 read with A1P1. The Upper Tribunal referred both to *Re Brewster* at [102] and, at [111], to the four-stage approach applied in *Asbestos*, including the "fair balance" test. However, the case is of limited assistance because the parties agreed that a fair balance test should be applied: see [102].

168. The earlier case of *Gallagher v Church of Jesus Christ of Latter-Day Saints* [2008] 1 WLR 1852 (HL) ("*Gallagher*") concerned an exemption from non-domestic rates for places of worship open to the public which was said to contravene Articles 9 and 14. Lord Hoffmann concluded that there was no discrimination but added at [15]:

> "Parliament must have a wide discretion in deciding what should be regarded as a sufficient public benefit to justify exemption from taxation and in my opinion it was entitled to take the view that public access to religious services was such a benefit."

169. At [31] Lord Hope agreed with Lord Hoffmann that there was no discrimination within the ambit of Article 9. He added that it was easier to see the case as falling within the ambit of A1P1, but noted the second paragraph of that article, concluding:

> "In my opinion Parliament's decision as to the scope of the exemption was within the discretionary area of judgment afforded to it by that paragraph."

Submissions on the test to apply

170. In summary, Mr Afzal submitted that we should apply the *Asbestos* test. This was not a case about welfare benefits. He relied on Baroness Hale's comment in her dissenting judgment in *R (DA)* at [150] that if the approach taken in *Asbestos* and *AXA* was correct in an A1P1 case then it would be wrong to apply a different approach in the context of discrimination (in that case, in the context of the enjoyment of the right to respect for family life), because:

> "The principles applicable when, say, insurance companies challenge interferences with their property rights should not be more favourable to them than the principles applicable when children challenge discrimination in their right to respect for their family lives."

171. Mr Afzal pointed to the express reservation of taxation powers in the second paragraph of A1P1, and submitted that it cannot be right that it would be harder to justify a claim of discrimination under Article 14 read with A1P1 (where it is only

necessary to show that the claim is within the ambit of A1P1) than it would be if the only complaint was under A1P1 itself, where the carve out in the second paragraph clearly applies.

172. Mr Afzal also referred us to paragraph [88] of the ECtHR decision in *JD and A* (referred to above at [76]), which suggests that in the sphere of economic and social policy the Court has limited the MWRF test to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme implemented to correct an inequality. However, this approach is not reflected in domestic law: see for example *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545 ("*Humphreys*") at [22].

173. Mr Stone submitted that we were not bound by authority, that it was open to us to conclude that the MWRF test was the correct one to apply, and that we should adopt that approach.

Application to this case

174. We agree with Mr Stone that we are not bound by authority as to the correct test to apply. Neither *Asbestos* nor *AXA* relate to tax legislation. *R (DA)* makes the position clear in relation to welfare benefits rather than applying more broadly. The point was not necessary to the decisions in *Re Brewster* or *Gilham*, and there was no debate about the precise test to apply in *Rowe* or *Reeves*. *Gallagher* also does not determine which test should be applied.

175. Although Mr Stone urged us to reach a decision on whether a single MWRF test applies in this case on the basis that it would provide guidance for other cases, we have decided that we should not do so. It is not a straightforward matter, it is clearly still a developing area of law, and it is not necessary for our decision in this case. We also note that *R (C)* is under appeal to the Supreme Court, and that may result in further guidance.

176. We therefore restrict our comments to the following. Baroness Hale was clearly making a fair point in comparing the application of different tests to "pure" A1P1 cases and those involving a claim of discrimination. However, we note that she was not commenting on cases relating to tax measures. More generally, we can see that there is much to be said for taking a similar approach in respect of at least some aspects of taxation policy as the approach taken in respect of welfare benefits. Leggatt LJ referred in *R (C)* to matters of "social or economic policy", and Lord Carnwath also referred at [118] of *R(DA)* to "economic and social policy". Taxation policy is at least a matter of economic policy, and in some cases a matter of social policy. *Humphreys*, for example, was a case about tax credits. As Lewis J said in *Independent Workers' Union* at [114], "…in areas involving general social and economic policy adopted by the legislature or government, there is a need to respect the democratic legitimacy of the decision-maker". Furthermore, this case relates to a matter of fundamental political sensitivity, namely the taxation treatment of the funding of political parties.

177. As we discuss below, the key point is that because of the degree of deference to the legislature that is appropriate, there will often be no difference in the result as between a "fair balance" and MWRF approach. There is none in this case.

Proportionality: application to this case

178. As already indicated, the FTT's error in identifying the aim of the legislation affected its assessment of proportionality. This is evident, for example, from the reference to "abuse" in [115(1)] of the Decision (see [135] above). This was an error of law, and for that reason we re-address the question of proportionality on the facts of this case.

179. For the reasons set out below we have concluded that the legislation is proportionate applying the "fair balance" approach. *A fortiori* the legislation would be proportionate applying the MWRF test. The conditions in s 24(2) IHTA are clearly rationally connected to the legitimate aim we have identified and achieve a fair balance.

Deference to legislative choice

180. The key reason that the choice of test to apply makes no difference to the conclusion that the legislation is proportionate is that, even without a MWRF test, significant deference is appropriate in this case. This is the case even though the concept of "margin of appreciation" is one applied by the ECtHR rather than a test that should be applied by national courts: *Asbestos* at [44] and [54], per Lord Mance. As Lord Mance went on to say at [54], it is nonetheless the case that domestic courts must:

> "attach appropriate weight to informed legislative choices at each stage in the Convention analysis".

181. This reflected his description of the Strasbourg case law at [52] (see [156] above) and echoed the following qualification to his comment at [46] about the non-application of the MWRF test to the fourth stage, where he said:

> "…that does not mean that significant weight may not or should not be given to the particular legislative choice even at the fourth stage."

182. In our view very significant weight should be given to the legislative choice in this case, for the following reasons:

(1) Not only is this a case related to economic (in this case taxation) policy, but it relates directly to a politically sensitive question, namely the funding of political parties, and it touches to some extent on the system by which MPs are elected. In such cases the Tribunal must be very careful to pay sufficient regard to the constitutional role of the judiciary and recognise that some matters are pre-eminently political questions that are for Parliament and not for the courts or tribunals (see, for example, Lord Reed's comments in *R (SG)* at [92] and Leggatt LJ's comments in *R (C)* at [87], set out at [158] above)). To take one example that stands out, the FTT referred at [115(5)] of the Decision to the "first past the post" system as not being a

"reliable barometer of public support" such that new parties may be prejudiced. Whilst we appreciate that the comments the FTT made in this connection related only to the question of tax relief, great care is needed in respect of any comment that might be regarded as raising questions about the appropriateness or otherwise of that system. It is the system adopted for elections to Parliament and it must be accorded the greatest of respect.

(2) The relief is contained in primary legislation (a relevant factor, see for example *R (C)* at [92]).

(3) In enacting the relief in the form it did, Parliament exercised a clear choice in limiting the scope of the relief to certain types of donations. As already explained, the aim of s 24 IHTA is to provide tax relief on donations to recognisable political parties that are participating in Parliamentary democracy by being represented in the House of Commons following a general election, rather than to confer relief on political donations generally. This is apparent from s 24 IHTA and from the context in which the relief was introduced, including the Parliamentary debates.

(4) The relief was introduced in a context that directly linked the conditions for the relief to the Short Money rules, which were specifically designed to provide funding towards the Parliamentary work of opposition parties.

(5) The Short Money rules have, like the s 24(2) conditions, remained unaltered in relevant respects, notwithstanding changes since 1975 which have included direct elections to the European Parliament and the development of devolved assemblies, and notwithstanding a number of reviews relating to political funding.

183. It is also worth noting that the ECtHR has itself also observed a substantial degree of deference to the manner in which States organise their electoral systems, including for example in relation to a challenge to the first past the post system by the Liberal party, see *Human Rights Practice*, Jessica Simor, at 14.053 and the cases referred to there, including *Liberal Party v United Kingdom* (1980) 4 EHHR 106.

Other relevant factors

184. In determining whether there is a "fair balance" between the aim of the measure and the requirement to protect Convention rights, all relevant interests must be weighed: *Asbestos* at [52]. However, the intensity of the review will be affected by a variety of factors. The most significant in this case is the need for deference to the choice of the legislature, discussed above. Others are discussed in the following paragraphs.

185. One relevant factor is that, as we have found, if there is any discrimination in this case it is indirect rather than direct. That generally requires less weighty reasons to justify it: *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117, per Henderson J at [28]. However, we acknowledge that by itself this is unlikely to be a very significant factor in this case.

186. Another potentially relevant factor is the extent to which active consideration has been given to the relevant measure by the legislature or other decision maker: see for example Lord Reed's judgment in *R (SG)* at [94] and [95]. We consider that this is a point in favour of HMRC's case. The provisions are part of primary legislation, there was active consideration by Parliament, and the conditions reflect those in the Short Money rules which were adopted around the same time. Although there was clearly no specific consideration of human rights issues, we do not think that is a material factor in this case. It was obvious from the terms of the legislation that it was intended that some political donations would not qualify for relief.

187. A further point is that the intensity of the review is also affected by the nature of the "status" for Article 14 ECHR purposes. As we described at [94] above, in *R (RJM)* at [5] Lord Walker described characteristics for Article 14 ECHR purposes as a series of concentric circles, innate personal characteristics being at the centre, and other acquired characteristics which are "more concerned with what people do, or with what happens to them, than with who they are" being further out. He commented that the more peripheral or debatable any suggested personal characteristic is "the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify".

188. In the same paragraph in *R (RJM)* Lord Walker stated that politics, along with nationality, language and religion, may be "almost innate" and are characteristics regarded as important to the development of personality. Similarly in *R (C)* at [61] political opinion was given as an example of a ground strongly connected to personality, and in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at [15] Lord Hoffmann included membership of a political party on a list of characteristics which were "seldom, if ever acceptable grounds for differences in treatment".

189. If we are wrong in our conclusions about discrimination and Mr Banks was discriminated against because of his "status" being based on him supporting UKIP or holding a political opinion, then that would be a factor weighing in the balance against the proportionality of the conditions because it would be towards the centre of the circles, although in our view this point is outweighed by the other factors we have set out.

190. However, if the status was supporting a "new" party or one without an MP, then we think it would be on the outer fringes of the concentric circles described by Lord Walker. It would be an acquired characteristic which is more concerned with what a person does than with who that person is. The position on this point could be different if Mr Banks had established that his *political opinion* was being a "supporter of new parties" or "supporter of parties without MPs" (that is, someone whose political view favours plurality in that way). But that is not his case and there was no evidence to that effect.

191. Finally, it is of some relevance to have regard to the position in other Convention States, on the basis that case law suggests that differences "traditionally encountered in the contracting states" will be more likely to be justifiable: see *Human Rights Practice,*

Jessica Simor, at 14.024, referring to *Engel and Others v The Netherlands (No. 1)* (1979-80) 1 EHRR 647 at [72]. One of the reports we were taken to, the Fifth Report of the Committee on Standards in Public Life (the "Neill Report"), included at Appendix 1 a survey of other countries. Although somewhat dated (the report was published in October 1998), it nonetheless provides an illustration of the range of eligibility requirements for State support for political parties, typically relating to a minimum percentage of votes, varying between 0.5% and 5%, and in some cases linking funding to parliamentary seats. This demonstrates that States tend to impose minimum conditions for support, and that there is a wide variety of conditions that have been adopted. In our view this provides some additional support for the proportionality of the conditions.

Alternative provisions

192. In the course of argument, Mr Afzal postulated a number of alternative conditions which he suggested would be proportionate measures meeting the fair balance test (and which would permit Mr Banks's donations to qualify for tax relief). These are considered further below in the context of our consideration of Issue (5), but a point to make at this stage is that the task of the Tribunal is not to design what it considers to be the ideal provision, or to substitute one legislative choice for another because it is considered to be a better option. In the context of justification its task is to identify whether the conditions in s 24(2) IHTA have a legitimate aim and whether (if the test adopted in *Asbestos* and *AXA* applies) a fair balance has been struck. That does not require the measure adopted to be the only, or even what the Tribunal might view as the best, way of achieving a fair balance. A line has to be drawn somewhere and, within the limits just indicated, it is for Parliament to decide where to draw that line.

193. Mr Afzal relied, in particular, on guidelines produced in 2001 and 2010 by the Venice Commission, whose work was referred to by the ECtHR in *Parti Nationaliste Basque v France* (2008) 47 EHRR 47 *("PNB"),* as demonstrating that the conditions operated inappropriately. We did not find the extracts to which we were taken to be persuasive. At most, they indicate suggested good, or best, practice, as the following two paragraphs from the 2010 guidelines[8] illustrate:

> "188. At a minimum, some degree of public funding should be available to all parties represented in parliament. However, to promote political pluralism, some funding should ideally be extended beyond parties represented in parliament to all parties representative of a minimum level of the citizenry's support and presenting candidates in an election. This is particularly important in the case of new parties, which must be given a fair opportunity to compete with existing parties.…
>
> …
>
> 190. Public funding, by providing increased resources to political parties, can increase political pluralism. As such, it is reasonable for legislation to require a

[8] Guidelines on Political Party Regulation (2010), prepared by the Venice Commission working with the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe.

> party to be representative of a minimum level of the electorate prior to receipt of funding. However, as the denial of public funding can lead to a decrease in pluralism and political alternatives, it is an accepted good practice to enact clear guidelines for how new parties may become eligible for funding and to extend public funding beyond parties represented in parliament. A generous system for the determination of eligibility should be considered to ensure that voters are given the political alternatives necessary for a real choice."

194. It is worth noting that the conditions in s 24(2) IHTA adhere to the first point made in paragraph 188. The other comments in these paragraphs are about the "ideal" position and what is considered to be "good" practice, or make a suggestion of what should be "considered".

195. For all these reasons, we determine Issue (2) in favour of HMRC.

196. As we have found, the FTT made an error of law in its description of the aim of the legislation at [109] of the Decision. We have also found that this error affected its assessment of proportionality. In our view, the errors are material and we should therefore exercise our discretion to set aside the Decision on these points. We remake the Decision on the basis of the facts found by the FTT by concluding that (i) the aim of s 24 IHTA is to provide tax relief on donations to political parties that are participating in Parliamentary democracy by being represented in the House of Commons, and not in respect of individual independent MPs and (ii) that the legislation is proportionate because the conditions in s 24(2) IHTA are clearly rationally connected to the legitimate aim we have identified and achieve a fair balance.

Issue (3): Whether there has been a breach of Article 14 ECHR taken together with Article 10 and/or Article 11 ECHR or a breach of Mr Banks's rights under Articles 10 and/or 11 ECHR alone

197. As already noted, Mr Afzal submitted in the alternative that there was a breach of Article 14 taken together with Articles 10 and/or 11 (freedom of expression and freedom of assembly and association), or a breach of Articles 10 and/or 11 alone. This was not separately addressed by the FTT, beyond a statement at [138] of the Decision that "it was not clear…that Article 10 or Article 11 was engaged on the facts of this case".

198. Articles 10 and 11 ECHR provide as follows:

> **"Article 10**
>
> **Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> **Article 11**
>
> **Freedom of assembly and association**
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Article 14 taken with Articles 10 and/or 11

199. Mr Afzal accepted that, in the context of a tax charge, the more obvious focus of an Article 14 discrimination claim was Article 14 read with A1P1 rather than Article 14 taken with Articles 10 and/or 11. He relied on the relevance of Articles 10 and/or 11 as reinforcing the seriousness of the alleged discrimination, and referred us to the following comment by Baroness Hale in *R (DA)* at [137]:

> "That we are concerned here, not only with the right to property, but also with the right to respect for family life is clearly relevant to the issue of justification."

200. Mr Stone submitted that, in the same way as Mr Banks had not demonstrated interference with his Article 10 or Article 11 rights (as to which see below), he had also not demonstrated that the case was within the "ambit" of those Articles.

201. We do not need to reach a conclusion on Mr Stone's submission. Whilst the nature of the rights in question is obviously relevant to the question of justification, we do not think it makes any difference to the analysis we have undertaken. We have concluded that there was no discrimination within Article 14. If we are wrong about that, our analysis in relation to justification takes careful account of the factual context, and in particular the point that Mr Banks was relying on discrimination on the grounds of political opinion. We cannot see a basis for concluding that there is a breach of Article 14 taken with Articles 10 and/or 11 in circumstances where we have concluded that there is no breach of Article 14 taken with A1P1.

Articles 10 and/or 11 ECHR alone

202. It is obviously correct that the freedom to support a political party potentially falls within Articles 10 and 11. In *PNB* (referred to at [193] above) the ECtHR considered a French rule that prohibited funding of a political party by a foreign legal entity, the relevant entity on the facts being a Spanish party established to promote Basque nationalism. [33] of the judgment records the Court's acceptance in previous cases that political parties fall within the scope of Article 11 ECHR, and that Article 11 ECHR must be considered in the light of Article 10 ECHR because one of the objectives of the Article 11 ECHR freedoms is to protect the freedoms enshrined in Article 10 ECHR. However, the Court concluded that the issues in that case essentially related to Article 11 ECHR because there was no attempt to penalise the party "on account of the political views it promoted". The same applies here, and in the light of that we think it is correct to focus primarily on Article 11 ECHR, although we have also considered Article 10 ECHR.

203. We agree with Mr Stone that the conditions in s 24(2) IHTA do not breach Mr Banks's rights under Article 10 or Article 11.

204. It is not apparent that the conditions place any restrictions on Mr Banks's freedom of expression within Article 10(1), or his freedom of association under Article 11(1). The existence of a tax charge does not obviously restrict the expression of any opinion or the ability to associate, whether with UKIP or anyone else. There was also no evidence to support the argument that Mr Banks was in fact deterred from expressing opinions or supporting UKIP, whether by making donations or otherwise.

205. Mr Afzal suggested that it was self-evident that the imposition of a tax charge on donations deterred and thus interfered with Mr Banks's freedom to support UKIP. In response to the argument that Mr Banks did not declare the donations to HMRC, so that it should be inferred that he did not consider the tax position when deciding to donate, Mr Afzal relied on *Ezelin v France* (1992) 14 EHHR 362 and *Lingens v Austria* (1986) 8 EHRR 407 to support the proposition that interference can come after the event.

206. However, the facts of *Ezelin* and *Lingens* were very different. In the former case there was found to be a breach of Article 11 where a member of the Guadeloupe bar was disciplined for participating in a public demonstration. That was a clear interference with the exercise of freedom of assembly. In *Lingens* a magazine publisher was convicted of criminal defamation following the publication of articles critical of the Austrian Chancellor, and that was found to be a breach of Article 10. Again, the interference with the relevant freedom was clear. In both cases, while the sanction was imposed after the event, it related directly to the exercise of the freedom in question.

207. In contrast, there is no clear link between the imposition of a tax charge on donations to UKIP and the freedoms protected by Articles 10 and 11. In the absence of any evidence to demonstrate that Mr Banks was in fact deterred from expressing his opinions or from supporting UKIP it is not possible to conclude that there was any interference with his rights under Article 10 or 11.

208. *PNB* is readily distinguishable. The Court found in that case that there was an interference with Article 11 rights in respect of the party, but this was because the prohibition on donations was found to have a significant impact on its resources and thus its ability to engage in political activities: see paragraphs [37] and [38] of the judgment (albeit that the conclusion of the majority was that the interference was justified).

209. We have not separately considered whether, if there was an interference with rights under Article 11(1) ECHR, that interference was justified. That would require consideration of the text of Article 11(2) ECHR, which expressly limits the restrictions that can be placed on the exercise of Article 11 ECHR rights. We did not receive any detailed submissions on that point, it is not necessary to our decision and we do not express a view on it.

210. We therefore determine Issue (3) in favour of HMRC.

Issue (4): UKIP's rights

211. Mr Afzal also submitted that UKIP's rights had been breached, either under Article 14 taken with Articles 10 and/or 11, or under Articles 10 and/or 11 alone. Again, the FTT did not address these arguments: see [142] and [143] of the Decision.

212. The arguments relied on by Mr Afzal on this issue were the same as those relied on in respect of the alleged breaches of Mr Banks's rights under these Articles. We reject them for the same reasons, including the absence of any evidence of an impact on UKIP's ability to raise funds or to undertake political activities. We do not therefore need to address Mr Stone's argument that Mr Banks has no standing to rely on UKIP's rights, although we note the circularity he points out: any impact on UKIP was an indirect consequence of an imposition of a tax charge on the donor, and the real complaint (if there is one) is one by the donor, not UKIP.

213. We therefore determine Issue (4) in favour of HMRC.

Issue (5): Whether s 24 IHTA can be interpreted under s 3 HRA in a way that is compliant with Mr Banks's ECHR rights.

214. Since we have resolved Issues (1) to (4) in favour of HMRC it is not strictly necessary for us to consider Issue (5), but we heard full argument on the issue and have set out our conclusions in case this matter goes further. We therefore proceed to deal with this issue on the basis that we are wrong on our conclusions in respect of Issues (1) to (4)[9], such that we are obliged to consider whether s 24 IHTA can be interpreted under s 3 HRA in a way that is compliant with Mr Banks's ECHR rights.

[9] Whether Issue (1) and/or (2) (both of which would need to be determined in favour of Mr Banks), or alternatively Issue (3) or Issue (4). In relation to Issue (4) the question would strictly be whether s 24 IHTA can be interpreted in a way that is compliant with UKIP's rights.

Section 3 HRA: the authorities

215. The general principles to be applied by the courts and tribunals when considering the application of s 3 HRA were set out by Lord Nicholls in the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 ("*Ghaidan*") at [29] to [33], as follows:

> "[29]…It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning…
>
> [30] From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
>
> [31] On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.
>
> [32] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
> [33] Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the

> right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

216. It is important to emphasise that the application of s 3 HRA remains a process of interpretation of the statute in question, commonly referred to as giving the relevant legislation a conforming interpretation. The court or tribunal concerned is not given a free hand to re-write the legislation in a manner which means that the court or tribunal is in effect engaging in a process of law making. That is apparent from the words of s 3 itself, which direct the court or tribunal concerned to "read and give effect" to the legislation concerned in a way which is compatible with the relevant Convention rights but only "so far as it is possible to do so". Even though in undertaking the interpretative exercise the court or tribunal may depart from the intention of Parliament as expressed in the particular words used in the statute, the court or tribunal must not adopt a meaning which is inconsistent with a fundamental feature of the legislation: see [31] and [33] of Lord Nicholls's speech.

217. As Lord Nicholls envisaged at [33] of his speech, there may be a number of choices available to the court or tribunal in interpreting the legislation which properly call for legislative deliberation, and which therefore makes a conforming construction impossible.

218. It is also clear that a conforming interpretation will be prevented where the exercise of choice involves taking a decision in relation to third parties' rights. That is apparent from the Court of Appeal's judgment in *Revenue and Customs Commissioners v IDT Card Services Ltd* [2006] STC 1252. That case involved the Court considering whether domestic legislation could be given a conforming interpretation in accordance with European Union law, but the principles are the same as those which apply in relation to s 3 HRA as regards this point. Arden LJ stated at [113]:

> "Moreover, this is not a case, in my judgment, where it is not possible for the court to interpret para 3(3) of Sch 10A 'so far as possible' in conformity with European Union law because the provision, as so interpreted, would raise policy issues as to its effect which the court cannot, in performance of its role, resolve. Such issues might arise for instance (to take a very different case) if the interpretation of a statute in conformity with a European Union directive required the court to limit a provision of domestic law which had been inserted to protect third parties, such as creditors or consumers, and some equivalent protection would have to be provided. In those circumstances, the task of interpretation might go beyond the judicial role of interpretation…"

219. In *Vodafone 2 v HMRC* [2010] 2 WLR 288 ("*Vodafone 2*") the Court of Appeal restated the principles to be observed in looking for a conforming interpretation in either

the EU or Human Rights contexts. What Sir Andrew Morritt C, who gave the leading judgment, said at [37] and [38] in this regard can be summarised as follows:

> (1) The obligation on UK courts to construe domestic legislation consistently with EU law obligations is both broad and far-reaching.
>
> (2) It is not constrained by the normal domestic rules of statutory interpretation.
>
> (3) It does not require ambiguity in the legislation being interpreted.
>
> (4) It is not an exercise in semantics or linguistics.
>
> (5) It permits departure from the strict and literal application of the words used by Parliament.
>
> (6) It permits the implication of words necessary to comply with EU law.
>
> (7) The precise form of the words to be implied does not matter.
>
> (8) The interpretation adopted should "go with the grain of the legislation" and be "compatible with the underlying thrust" of the legislation in issue.
>
> (9) An interpretation cannot be adopted which is inconsistent with a fundamental or cardinal feature of the legislation (as that would be amendment rather than interpretation).
>
> (10) The interpretation adopted cannot require the court to make a decision which it is not equipped to make or which gives rise to important practical repercussions which the court cannot evaluate.

220. In this case, the parties' arguments centred around the application of the last three principles set out above, and in particular how the matter should be approached in circumstances where the court or tribunal is faced with a number of choices as to how the legislation may be interpreted so as to give it a conforming interpretation.

221. An example of where the Court said that adopting any of the choices available to the court or tribunal in interpreting the legislation would require the Court to make a decision which it is not equipped to make is the case of *Bellinger v Bellinger* [2003] 2 AC 467 (*"Bellinger"*).

222. The relevant legislation in that case was the Matrimonial Causes Act 1973, which provided that a marriage was void unless the parties were a male and a female. Mrs Bellinger was a transsexual female and she sought a declaration that the marriage was valid at its inception, and in the alternative a declaration that the legislation was incompatible with the ECHR.

223. Lord Nicholls stated at [36] that accepting Mrs Bellinger's case would require giving "male" and "female" novel and extended meanings. He said at [37]:

> "This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be

> evaluated and balanced. The issues are altogether ill-suited for determination by courts and procedures. They are pre-eminently a matter for Parliament…"

224. His Lordship further noted at [42] that "there must be some objective, publicly available criteria by which gender reassignment is to be assessed. If possible, the criteria should be capable of being applied readily so as to produce a reasonably clear answer" and at [43] that the House of Lords was not in a position to decide where the demarcation should be drawn.

225. Lord Hobhouse stated at [78]:

> "The threshold question is whether, by applying section 3, it is possible, as a matter of interpretation, to 'read down' section 11 (c) of the 1973 Act so as to include additional words such as "or two people of the same sex one of whom has changed his/her sex to that of the opposite sex". This would in my view not be an exercise in interpretation however robust. It would be a legislative exercise of amendment making a legislative choice as to what precise amendment was appropriate."

226. A further example where a conforming construction was not possible because the social and administrative ramifications would be far-reaching, such that the choices involved should be taken by Parliament and not the courts, is *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 ("*Re S*").

227. That case related to care orders made in relation to children. Under the relevant legislation, when a care order was made the responsibility for a child's care was with the local authority rather than the court, and the court retained no supervisory role. However, as Lord Nicholls said at [17], the Court of Appeal had propounded a new procedure to apply after the court had made a care order, by which at the trial the essential milestones of a care plan would be identified and elevated to a "starred status". If a starred milestone was not achieved within a reasonable time after the date set at trial, the local authority was obliged to "reactivate the interdisciplinary process that contributed to the creation of the care plan". At the least the local authority had to inform the child's guardian of the position. Either the guardian or the local authority would then have the right to apply to the court for further directions.

228. The House of Lords held that the Court of Appeal's introduction of a "starring system" was not justified as a legitimate conforming interpretation pursuant to s 3 HRA. Lord Nicholls (with whom all the other Lords agreed) stated at [43]:

> "I consider this judicial innovation passes well beyond the boundary of interpretation. I can see no provision in the Children Act which lends itself to the interpretation that Parliament was thereby conferring this supervisory function on the court… the starring system is inconsistent in an important respect with the scheme of the Children Act…It would have far-reaching practical ramifications for local authorities and their care of children. The starring system would not come free from additional administrative work and expense. It would be likely to have a material effect on authorities' allocation of scarce financial and other resources. This in turn would affect authorities' discharge of their responsibilities to other children…"

229. At [44] Lord Nicholls said:

> "These are matters for decision by Parliament, not the courts. It is impossible for a court to attempt to evaluate these ramifications or assess what would be the views of Parliament if changes are needed."

230. Mr Afzal submitted that a conforming interpretation in tax cases does not go against the grain or contradict a fundamental feature of the legislation where a tax relief is extended, or a tax charge restricted, as long as there is still scope for some taxpayers to be outside the scope of relief or within the charge to tax. He relies on a statement to that effect made by the FTT in *Panayi v HMRC* [2019] UKFTT 622 (TC) ("*Panayi*") at [99] (Judge Mosedale).

231. The issue in that case was whether the exit charge on trustees, contained in s 80 Taxation of Chargeable Gains Act ("TCGA"), on the value of a trust fund if the trustees (or a majority of them) ceased to be resident in the UK, was compatible with EU law.

232. Following an earlier referral by the FTT to the CJEU, the CJEU had found that s 80 TCGA constituted an unjustified restriction on freedom of establishment because it made no provision for the taxpayer being able to defer the time when the tax is paid: see [14] of the FTT's decision. A number of possible conforming interpretations were proposed and the FTT felt able to choose one of them.

233. At [134] Judge Mosedale gave attention to the fact that in *Ghaidan* Lord Nicholls had used the word "may" in relation to whether the existence of choice between different conforming interpretations would involve issues calling for legislative deliberation, such that he appeared to have contemplated the possibility that some choices might not involve issues calling for legislative deliberation.

234. In that case, the appellant had submitted that all choices by definition would call for legislative deliberation. The FTT dealt with that submission at [135] as follows:

> "Such a narrow view would mean that whether or not a conforming interpretation could be made would depend on whether or not more than one conforming interpretation was possible, and that would not only be a somewhat arbitrary rule but one which would depend on the inventiveness of the parties or the panel."

235. At [136] Judge Mosedale noted that a narrow view is inconsistent with the authorities, such as *Vodafone 2* where the Court of Appeal, finding that a conforming construction was possible in that case said at [59]:

> "It is the case that there are likely to be other ways of achieving conformity….and the choice of one rather than another may well involve policy decisions. But if that consideration alone could render a conforming interpretation illegitimate it would considerably restrict the occasions in which conforming interpretation could be adopted and lead to an increase in disapplications. The choice of a conforming interpretation which faithfully follows a conclusion of the Court of Justice as in this case, does not in my view trespass on the forbidden ground of legislation."

236. Judge Mosedale held at [137] that it was open to her to choose between different options for conforming interpretations where it does not involve making decisions with far-reaching consequences which are difficult to assess and it does not involve making choices between competing rights of different persons. She then held at [138] that none of the conforming interpretations put forward in that case would affect anyone else's rights. She also held that none of the proposed conforming interpretations would involve consequences the FTT could not evaluate. She therefore concluded at [139] that the fact that making a conforming interpretation would necessarily involve deciding which of the proposed conforming interpretations was the most appropriate did not mean that a conforming interpretation should not be adopted.

237. The conforming interpretation that Judge Mosedale chose in that case, as set out at [166], was that the legislation in question should be read as including an option to defer payment of the s 80 TCGA exit tax in five annual instalments, without liability to interest. In doing so, Judge Mosedale adopted an interpretation which clearly recognised and built on the specific defect that the CJEU had identified in the legislation in its judgment following the FTT's reference, and reflected earlier case law which indicated that setting the period at five years was proportionate (see paragraph [28] of *Panayi*).

238. In *Panayi* Judge Mosedale had declined to follow the earlier FTT decision in *Gallaher Limited v HMRC* [2019] UKFTT 207 (TC) ("*Gallaher*"). In that case, the issue was whether provisions in the UK's domestic tax legislation which relate to intra-group disposals were compliant with EU law and, if not, the manner in which such provisions should be applied. Specifically, the appeals related to HMRC's conclusions that the taxpayer was liable to pay corporation tax on gains arising in respect of a disposal of certain intangible assets to a Swiss resident company in the same group and on the gain arising in respect of the disposal of shares in one of its subsidiaries to an indirect parent company, a company resident in the Netherlands.

239. As was the case in *Panayi*, the FTT was faced with a choice of conforming interpretations put forward by the parties and had to consider whether it was appropriate to adopt an interpretation which provided for the payment of exit taxes by way of instalment. Having considered the options put forward, at [205] the FTT (Judge Beare) decided that, although the question was "finely-balanced", he accepted the appellant's submission "in the context of this case" that it was beyond the competence of the UK courts to choose between various proportionate options, because that would involve legislating and was therefore something which could be done only by Parliament.

240. Judge Beare went on to say at [212]:

> "…I consider that it is clear both as a constitutional matter and based on the observations of Lord Nicholls in *Ghaidan* and Lord Scott in *Fleming*[10] that, if there are a number of different ways of applying a conforming interpretation of the existing UK legislation, each of which is proportionate and equally valid as a matter of EU and UK law, I am precluded from applying a conforming

[10] *Fleming v Customs and Excise* [2008] UKHL 2

> interpretation of the existing UK legislation which involves selecting one of those options over the other or others. That selection can be made only by Parliament and my role must necessarily be confined to disapplying some part of the existing UK legislation which will have the effect of rendering the UK legislation EU law-compliant."

241. Judge Beare, however said at [214] that he did not rule out completely the possibility of the UK courts making any form of choice in the context of applying the doctrine of conforming interpretation. He said this at [215] and [216]:

> "215. For example, UK case law shows that, if a UK court has two fixed and clear possible conforming interpretations, both of which give rise to a proportionate restriction on the relevant freedom but one of which does less violence to the existing UK legislation than the other, it is open to the court to choose the latter option. Indeed, the UK court is obliged to choose the latter option, given the principle described in *Routier* at paragraph [93] to the effect that the conforming interpretation of the legislation must do no more than ensure that the existing UK legislation is EU law-compliant. So, the option for the court in that case is more apparent than real….
>
> 216. Similarly, UK case law shows that, if there are two or more possible ways of applying a conforming interpretation to the UK legislation, both of which have the same substantive effect in terms of removing a particular hindrance to an EU freedom identified by the CJEU but which take different legal forms (ie necessitate different changes to the existing legislation), a UK court is entitled to choose between those methods of effecting the change. Critically, in that event, the court in question is simply exercising a discretion as to the form which the relevant conforming interpretation will take - it is not making a policy decision as to the substantive effect on the existing UK legislation to which its conforming interpretation will give rise. Those were the facts in *Vodafone 2*."

242. We do not think that either *Panayi* or *Gallaher* assist us to any material extent. They do not establish any precedent and were decided on their own particular facts. In any event, as we have mentioned, in *Panayi*, the FTT had the assistance of CJEU case law which set out a clear framework within which it could make its choice of conforming interpretation. The position was similar in *Vodafone 2*, where at [59] the Court of Appeal said that it chose a conforming interpretation that "faithfully follows the conclusion of the [CJEU]". That is not the position in the case with which we are concerned. There is, for example, no specific judgment of the ECtHR which can operate as a framework for our decision.

243. We therefore do not accept Mr Afzal's submission that the statement at [99] of *Panayi*, referred to at [230] above, establishes that as a matter of principle a conforming interpretation in tax cases does not go against the grain or contradict a fundamental feature of the legislation where a tax relief is extended or a tax charge restricted, as long as there is still scope for some taxpayers to be outside the scope of relief or within the charge to tax. It is necessary for the tribunal or court in question to apply the principles set out by the higher courts to the facts in question, and the fact that the statute concerned is a taxing statute makes no difference to the principles to be applied.

Submissions

244. Against that background, we turn to Mr Afzal's submissions as to why we should adopt a conforming interpretation of s 24 IHTA in this case. We can summarise his submissions as follows:

(1) The FTT was wrong to conclude at [127] of the Decision that interpreting s 24 IHTA so that it read that donations to any registered political party qualified for exemption would go against the grain of the legislation. He submits that the underlying thrust, or grain, of the legislation is that it provides tax relief for donations to political parties. Whilst extending relief to donations to any registered political parties would significantly increase the number of parties in respect of which donations will qualify for relief, it would remain the case that the relief would be limited to donations to political parties.

(2) The FTT was wrong at [128] of the Decision to say that it needed to make a choice between the different possible conforming interpretations. This was because the proper conforming interpretation will be dictated by the reason for the breach of the ECHR. For example, if the breach lay in the fact that the relief did not extend to donations to all registered political parties, then the FTT could have inserted a reference to such parties. If the breach lay in the fact that relief was only available if a party satisfied the conditions in s 24(2) IHTA in the preceding general election, and did not extend to cases where a party met the conditions in the next general election, then the FTT could have included a reference to the next general election. The FTT should have focused on providing a remedy in this case rather than formulating a rule for universal application.

(3) In any event, if it is necessary to make a choice, then the FTT erred in deciding that it was not equipped to do so. By way of example, the FTT could have considered the different options and either selected the option which it considered to strike the fairest balance, or alternatively the option which departed the least from the legislation as it stands.

(4) This case is clearly different from cases such as *Bellinger* and *Re S*. In cases involving matters of complicated social policy it is obvious that choices made may have far-reaching knock-on consequences. By contrast, there is no question of far-reaching ramifications, in the present case. It is simply a matter of whether or not donations to political parties do, or do not, qualify for tax relief.

Discussion

245. We reject all of these submissions because, in essence, all of the suggestions made before the FTT and repeated before us as to how the legislation might be given a conforming interpretation adopt a meaning which, in our view, goes against the grain of the legislation and is inconsistent with the fundamental feature of the legislation. They would amount to a legislative exercise of amendment.

246. The following suggestions were made as to how the legislation might be read so as to give it a conforming interpretation:

(1) by substituting a reference to all parties registered under the Political Parties Referendums and Elections Act 2000 ("PPERA") for all of the words after "a political party qualifies for exemption under this section if" in s 24(2) IHTA;

(2) by including a reference to "the European Parliament" after the words "House of Commons" each time they appear in s 24(2)(a) and (b) IHTA;

(3) by replacing the reference in s 24(2) IHTA to "the last general election preceding the transfer of value" with "the general election preceding or following the transfer of value";

(4) by adding "or at a by-election" after "the last general election"; or

(5) by extending the relief to any political party which had candidates standing at the last general election.

247. In our view it matters not whether the conforming interpretation proposed either emerges as a result of the reason for the breach of the ECHR or as a result of a number of choices put forward for consideration. In either case, the court or tribunal has to consider whether the proposed interpretation goes against the grain of the legislation or is inconsistent with a fundamental feature of the legislation.

248. In this case, at [150] we have identified the aim of the legislation as being to provide tax relief on donations to political parties that are participating in Parliamentary democracy by being represented in the House of Commons, and not in respect of individual independent MPs. As we have said, the conditions in s 24(2) IHTA describe the type of organisation that is intended to benefit from relief; in other words, something that is a recognisable political party that is represented at Westminster. We also noted that the conditions are based on those in the Short Money arrangement.

249. That being the case, it is readily apparent that each of the suggestions set out at [246] would go against the grain of the legislation, which reflects the aim referred to above, and would be inconsistent with the fundamental feature of the legislation, namely the support for political parties participating in Parliamentary democracy by being represented in the House of Commons.

250. As far as the first suggestion is concerned, there are undoubtedly many political parties who are registered under PPERA who have never had an elected MP and are unlikely ever to achieve that result.

251. A Research Paper compiled by the House of Commons Library for the benefit of MPs in April 2007 and to which we were referred, explained the aims of PPERA as being, inter alia, to:

(1) improve public trust through increased transparency as regards party political funding;

(2) establish the Electoral Commission, which is independent of Government and reports directly to Parliament;

(3) require political parties to register with the Electoral Commission;

(4) set down accounting requirements for the parties;

(5) introduce controls on donations to parties and their members;

(6) control campaign expenditure;

(7) amend the rules on the donations received and expenses incurred in election campaigns; and

(8) require companies to obtain approval before making political donations.

252. It is to be noted that none of these aims directly relate to how political parties should be funded or how tax relief on donations to political parties should operate. Rather, PPERA focuses primarily on the regulation of political donations and how they are accounted for. On the basis of these aims, there is nothing in PPERA which would indicate that extending the exemption in s 24(2) IHTA to donations made to all political parties would be in accordance with the fundamental feature of s 24(2) IHTA, as identified above.

253. As far as extending exemption to parties represented in the European Parliament, again that would be inconsistent with the aims of the legislation, which is focused entirely on the Westminster Parliament. We note that a review carried out on the funding of political parties in March 2007 by Sir Hayden Phillips, to which we were also referred, observed (at page 19) that political groupings in the European Parliament received funding from the European Commission, and that it could be argued that there was no need for the British taxpayer to make any further contribution to the costs of European democracy. This point reinforces the point that whether political parties should be funded by the British taxpayer, whether directly or by the provision of tax relief, is a choice to be made by Parliament alone, which has not responded to the Phillips report by introducing any legislation to amend s 24(2) IHTA.

254. As far as the third suggestion is concerned, making the relief available according to what happens in the future as opposed to what happened in the past clearly goes against the entire grain of tax legislation. The result would be to establish a person's eligibility for the exemption based on events which could take place up to five years ahead of the donation having been made. We do not accept that there is a parallel with the way that potentially exempt transfers ("PETs") operate, where tax charges arise at the time of death in respect of transfers made within the preceding seven years. PETs are covered by a detailed regime which provides, among other things, that the tax charge is not backdated to the date of transfer in question and arises on the transferee.

255. As far as the fourth suggestion is concerned, we cannot say that a measure which only operates by reference to how a political party performed at the last general election is anything other than a proportionate legislative choice. Including by-election results would in our view amount to an amendment which makes a different legislative choice (see *Bellinger* at [78], cited at [225] above). Such a change would also introduce complications because of the 150,000 vote requirement contained in s 24(2) IHTA. It is not clear how that could apply since no by-election could result in the winner obtaining more than 150,000 votes.

256. Finally, extending the relief to any party which had candidates standing at the last election would not reflect the aim of the legislation, which relates to parties represented in the House of Commons. The focus is on activity at Westminster.

257. In conclusion, the suggestions all go against the grain and conflict with the fundamental feature of the legislation. In any event we do not think that the position is materially different to the position in *Bellinger* or *Re S*. It is difficult to envisage a more politically charged decision than how the funding of political parties, including the granting of tax relief on donations to political parties, should be determined. This is a matter which Parliament has chosen not to address by legislative change since 1975, notwithstanding numerous legislative opportunities against a backdrop of the changing political landscape, and a number of reviews of the matter. The ramifications of altering the conditions potentially include calling into question the terms of the Short Money arrangement. In those circumstances, the FTT was undoubtedly right to conclude that this was a decision which it was not equipped to make, and neither is this Tribunal. The matter should clearly be left to Parliament.

258. We therefore determine Issue (5) in favour of HMRC. The FTT did not make an error of law in its conclusion on this issue.

Issue (6): Whether the conditions in s 24(2) IHTA constitute a breach by the UK of its obligations under Article 4(3) TEU (taken alone or taken together with other provisions), and if so whether that provision (or provisions taken together) gives rise to any directly enforceable right

259. As we have mentioned above, Mr Afzal submitted that the conditions described in s 24(2) IHTA are in breach of the UK's obligations under Article 4(3) TEU. The FTT dismissed this ground of appeal. As explained in [152] to [160] of the Decision, the FTT considered that Article 4(3) TEU, taken alone or read with other provisions set out above at [22], did not give rise to a directly enforceable right. The FTT did not make any findings on whether the conditions substantively breached EU law but suggested at [151] that the availability of tax relief on donations to UK political parties may be too remote and any potential effect too indirect to be regarded as a breach of Article 4(3) TEU.

260. Mr Afzal submitted that the UK was in breach of Article 4(3) and that there was direct effect. He also suggested that if we did not agree then a reference to the CJEU may be required.

261. We will examine the question of substantive breach of EU law first, before considering the issue of direct effect. In doing so we take account of the fact that, although we have concluded that the FTT made no error of law in reaching its conclusion on direct effect, we acknowledge that there is some uncertainty on that point in the light of *R (On the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin) (High Court) and [2014] 1 WLR 2921 (Court of Appeal) ("*Bancoult*").

Breach of EU law

262. In the course of his submissions, Mr Afzal directed our attention to a number of authorities concerning the establishment of a breach of Article 4(3) TEU. The first authority we were addressed on was *Hurd v Jones* [1986] STC 127, which concerned a supplement paid by the EU (the "EU Supplement") to teachers at the European School in order to standardise the disparate national salaries of the teaching staff. It was disputed whether the UK was permitted to tax the EU Supplement, in circumstances where, if the EU Supplement was taxed, a financial burden would fall on the Community budget to reimburse the tax to the teachers.

263. The CJEU recognised at [44] and [45] that domestic taxation of the EU Supplement breached Article 5 of the Treaty establishing the European Economic Community ("EEC") (the predecessor to Article 4(3) TEU), reasoning that if the UK taxed the EU Supplement, the financial burden would fall entirely on the Community budget in a manner directly detrimental to the Community, contrary to the duty of genuine co-operation and assistance owed by Member States, as expressed in Article 5 EEC.

264. However, the claim ultimately failed as the CJEU held at [48] that Article 5 EEC did not have direct effect, as the provision was not sufficiently precise (applying the *Van Gend en Loos* criteria). This was because the rules for exempting teachers from domestic taxation was an area in which legitimate differences could exist between the practices of Member States.

265. Mr Afzal also relied on *The Rt Hon. Lord Bruce of Donnington v Eric Gordon Aspden, Her Majesty's Inspector of Taxes* (case 208/80) ("*Lord Bruce*"). The relevant issue was whether a flat rate allowance paid by the European Parliament to an MEP in respect of travel and subsistence costs, could be subject to UK income tax. The CJEU held at [15] that the reimbursement of travel and subsistence expenses incurred by MEPs in the exercise of their mandates was a measure of internal organisation intended to ensure the proper functioning of the European Parliament. The CJEU therefore concluded that the taxation of these payments was likely to impair the effectiveness of and disrupt the internal organisation of the European Parliament, failing to ensure its proper functioning. As a result, rules concerning subsistence and travel expenses were properly a matter for the European Parliament, which had responsibility for its internal organisation under Article 142 EEC. Member States were bound to respect this by virtue of Article 5 EEC.

266. The direct effect of Article 5 EEC was not expressly addressed by the CJEU, but Mr Afzal invited us to infer that the CJEU must have regarded Article 5 EEC as giving rise to a directly enforceable right, given that the CJEU ultimately held at [20] that there was a breach of EU law requiring a remedy.

267. The third case we were directed to was *Luxembourg v European Parliament* (Case 230/81). In this case, Luxembourg sought a declaration that a resolution of the

European Parliament, which transferred the seat of the European Parliament for part-sessions from Luxembourg to Strasbourg, was void. Luxembourg asserted that the decision as to the location of the seat of Parliament was reserved for agreement between Member States, and as such the European Parliament was not competent to make such a resolution. The CJEU disagreed. The CJEU held at [38] that by virtue of Article 142 EEC (among other articles), the European Parliament had the power to determine its internal organisation. As described at [37], Article 5 EEC requires Member States to respect Parliament's competence to regulate its internal organisation and ensure non-interference with the proper workings of Parliament. As the case arose from a Member State's challenge to an EU measure, direct effect was not in issue in these proceedings.

268. In his submissions on the authorities, Mr Afzal emphasised the fact that a substantive breach had been established in both *Hurd v Jones* and *Lord Bruce* and that the CJEU had given a broad and expansive meaning to the obligations enshrined in what is now Article 4(3) TEU, whether alone or coupled with other articles.

269. In this regard, he submitted that a measure, such as the conditions in s 24(2) IHTA, which makes it less attractive to donate to and support parties operating in the European Parliament, relative to the House of Commons, would interfere with the proper functioning of the European Parliament and jeopardise the aims of equality and democracy, and therefore, in accordance with the authorities, constitutes a substantive breach of Article 4(3) TEU (alone or together with other articles).

270. We reject Mr Afzal's submission. In each of the three cases outlined above, there was a direct and obvious interference with an EU institution. In *Lord Bruce* and *Luxembourg v European Parliament*, there was a direct interference (or in the case of *Luxembourg v European Parliament*, an attempted interference) with the autonomy of the European Parliament to determine its own practices, which threatened to undermine the proper functioning of the European Parliament, contrary to Article 5 EEC. In *Hurd v Jones*, the taxation of the EU Supplement directly interfered with the Community budget, which would be forced to bear an undue burden.

271. In our view, Mr Banks's situation is not equivalent. Mr Banks provided a donation to UKIP, a party which partakes in political activities and (at the time) campaigned for seats in the European Parliament. HMRC has determined that the donation is ineligible for tax relief in accordance with s 24(2) IHTA. This did not self-evidently affect the party's ability to engage in politics in the European Parliament. Neither did it self-evidently impact the functioning of the European Parliament as an EU institution or the principles of equality and democracy, as Mr Afzal submitted.

272. Any such interference would need to be proved with evidence. We agree with Mr Stone's submission that, in the absence of evidence from Mr Banks to demonstrate an interference with or a detrimental impact on the European Parliament and its functioning, there is no proper basis for accepting Mr Afzal's argument that there has been a breach of Article 4(3) TEU, whether taken alone or together with other articles.

273. We therefore consider that the s 24(2) IHTA does not amount to a breach of the UK's obligation under Article 4(3) TEU.

Direct effect

274. As already indicated, the FTT decided that Article 4(3) TEU did not give rise to any directly enforceable right in this case.

275. The main authorities cited by both Mr Afzal and Mr Stone as regards the issue of direct effect were *Hurd v Jones* and *Lord Bruce*, both of which we have addressed above, and *Bancoult*.

276. *Bancoult* concerned the establishment of a marine protected area (an "MPA") in the British Indian Ocean Territory (the "BIOT"), impacting the Chagos Islands, and in particular fishermen who fished around the Chagos Islands. The relevant issue was whether the decision to create an MPA was in breach of the UK's obligations under Article 4(3) TEU read together with Articles 198 and 199 of the Treaty of the Functioning of the European Union ("TFEU"). Articles 198 and 199 TFEU aim to improve the association of the BIOT with the European Union and strengthen its economic, social and cultural development.

277. At first instance, the Divisional Court stated at [196] that the obligations enshrined in Article 4(3) TEU were sufficiently clear, precise and unconditional to give rise to a directly effective right. However, the Court went on to conclude that a substantive infringement of the relevant treaty provisions had not been established.

278. On appeal, the Court of Appeal upheld the Divisional Court's finding that there had been no substantive breach of the treaty provisions. In light of this conclusion, the issue of direct effect did not require a determination. However, Lord Dyson set out the court's observations on the issue. Having considered *Hurd v Jones*, he explained:

> "140. In our judgment, the underlying question of direct effect in this case is not quite as straightforward as the Divisional Court perceived it to be. The authorities do not seem to us to say that, simply because you can spell out of treaty provisions a clear, precise and unconditional obligation on a member state, that obligation will automatically be directly enforceable. The question of direct effect is also concerned with whether the provisions in question are in the nature of general rules imposing on member states mutual duties of genuine co-operation and assistance, and whether there are likely to be legitimate differences that exist between the practices of the member states concerning the detailed rules and procedures for implementing the general rules. These factors will have a bearing on whether the provisions are properly to be regarded as being of direct effect."

279. Lord Dyson went on to comment at [142] and [143] that it would be surprising if Articles 198 and 199 TFEU met the test to be directly effective, because they were about the attainment of objectives of association rather than the detailed ways in which that should be achieved, and that Part 4 of the TFEU (of which Articles 198 and 199 formed part) provided for objectives that are not "hard-edged obligations", which could not have direct effect "even taking into account the obligatory provision in Article 4(3)".

280. Lord Dyson concluded at [144] that, if the Court had had to decide the issue of direct effect, they would not have considered the matter free from doubt and would have thought it appropriate to refer the matter to the CJEU.

281. Mr Afzal encouraged us to accept the view of the Divisional Court that Article 4(3) TEU alone is directly effective, a finding which he says was not overturned by the Court of Appeal. He emphasised that the Court of Appeal's observations on direct effect were not binding on us and that the Court of Appeal itself had said it considered the issue uncertain enough to be appropriate for a preliminary reference. Alternatively, he submitted that the Court of Appeal's suggestion that the articles may not have direct effect turned on the court's initial conclusion that Articles 198 and 199 TFEU were not hard-edged obligations, and therefore did not exclude the possibility that Article 4(3) TEU taken alone or together with other treaty provisions Mr Banks relied on could give rise to directly enforceable rights.

282. Conversely, Mr Stone submitted that, applying Lord Dyson's comments, Article 4(3) TEU is a vague aspirational article, focused purely on the attainment of objectives rather than detailed requirements or hard-edged obligations. Therefore, if Article 4(3) TEU together with Articles 198 and 199 TFEU was not capable of giving rise to directly enforceable rights (as the Court of Appeal suggests), then logically Article 4(3) TEU alone or together with the vague principles of equality, democracy and the functioning of the European Parliament, cannot either. He also pointed out that we are bound by *Hurd v Jones*.

283. In our view the nature of the obligations in Article 4(3) TEU alone, or taken with the other treaty provisions relied on by Mr Banks, do not create obligations of an appropriate nature to be directly enforceable in the context of this case for the reasons explained in *Bancoult* (CA) at [140] (which in turn reflects *Hurd v Jones* at [38] and [48] in particular). The obligations relied on are in the nature of general objectives or aspirations, concerning the co-operation between Member States and the EU and such matters as equality and democracy, rather than detailed requirements as to how those objectives are to be fulfilled. Furthermore, the funding of political parties is an area in which Member States are likely to have legitimate differences, not least because of differing political systems and traditions. In our view this supports the proposition that the treaty obligations relied on by Mr Banks are not sufficiently precise to create directly enforceable rights.

284. Whilst Mr Afzal submitted that *Lord Bruce* established that Art 5 EEC has direct effect, we are not persuaded. Unlike *Hurd v Jones* the point was not discussed. *Lord Bruce* appears to have been decided with regard to Article 142 EEC (and other equivalent provisions in the treaties and charter), and does not, in our view, provide authority for Article 4(3) TEU alone having direct effect as Mr Afzal suggested.

285. We therefore determine Issue (6) in favour of HMRC.

286. In accordance with Article 267 TFEU a court or tribunal "may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon". Applying the principles summarised by Sir Thomas Bingham

MR in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd ex parte Else (1982) Ltd and another* [1993] QB 534 at 545, we have concluded with complete confidence that s 24 IHTA does not breach EU law. The question of direct effect is therefore not necessary to our decision, and on that basis, we do not need to determine whether a reference would have been appropriate in relation to that question.

Issue (7): If so, whether s 24(2) IHTA can be construed in a manner which is consistent with EU law or must be disapplied on the basis that a conforming construction is not possible

287. In light of our conclusion on Issue (6) it is not necessary to determine this issue.

Conclusions

288. We conclude by summarising our conclusions as follows:

(1) The differential treatment of which Mr Banks complains, namely the taxation of his contributions to UKIP, was not discrimination that fell within the scope of Article 14 ECHR.

(2) The aim of s 24 IHTA is to provide tax relief on donations to political parties that are participating in Parliamentary democracy by being represented in the House of Commons, and not in respect of individual independent MPs. That legislation is proportionate because the conditions in s 24(2) IHTA are clearly rationally connected to the legitimate aim so identified and achieve a fair balance.

(3) There has been no breach of Article 14 ECHR taken together with Articles 10 and/or 11 ECHR, and no breach of Mr Banks's rights under Articles 10 and/or 11 ECHR alone.

(4) The current conditions in s 24(2) IHTA do not represent a breach of UKIP's rights under the ECHR.

(5) Even if there were a breach of Mr Banks's ECHR rights, s 24 IHTA cannot be interpreted under s 3 HRA in a way that is compliant with those rights.

(6) There has been no breach of the UK's obligations under Article 4(3) TEU, whether alone or taken together with other provisions.

Disposition

289. The appeal is dismissed.

MRS JUSTICE FALK **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES
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