Trinity Term
[2025] UKPC 28
Privy Council Appeal No 0044 of 2024

JUDGMENT

Imperium Trustees (Jersey) Limited (Respondent) *v* Jersey Competent Authority and another (Appellants) (Jersey)

From the Court of Appeal of Jersey

before

Lord Lloyd-Jones
Lord Sales
Lord Leggatt
Lord Stephens
Lady Simler

JUDGMENT GIVEN ON
24 June 2025

Heard on 24 and 25 February 2025

Appellants
Jason Coppel KC
Cecilia Ivimy KC
Mark Temple KC
(Instructed by Ashurst LLP (London))

Respondent
Rory Mullan KC
Justin Harvey-Hills
(Instructed by Mourant Ozannes (Jersey) LLP Sinclair Gibson LLP)

LORD LLOYD-JONES:

Introduction

1. This appeal raises the question whether article 6 of the European Convention on Human Rights ("ECHR") applies to judicial review proceedings brought by the respondent Imperium Trustees (Jersey) Limited ("Imperium") challenging a notice to produce tax information issued by the first appellant, the Jersey Competent Authority ("the JCA"). If it does, the appeal raises the further question whether article 2(1)(c) of the International Co-operation (Protection from Liability) (Jersey) Law 2018 ("the 2018 Law"), which protects the JCA from liability for costs in those proceedings, infringes the right of access to the court or the principle of equality of arms with the result that it is incompatible with article 6(1) in its application to the present case.

2. The JCA is the public authority responsible for administering Jersey's international and domestic obligations for the exchange of tax information.

3. Imperium is a trust company regulated by the Jersey Financial Services Commission. It is a trustee of the Amiral Trust ("the Trust").

4. The second appellant, His Majesty's Attorney General for the Island of Jersey ("the Attorney General"), was joined to the proceedings by the Court of Appeal of Jersey ("the Court of Appeal") pursuant to his right under article 6 of the Human Rights (Jersey) Law 2000 (the "HRL") to intervene in proceedings where the court is considering making a declaration of incompatibility.

Factual background

5. On 24 December 2021, the JCA received a request for assistance from the Belgium Competent Authority ("the request"). The request was made under the Organisation for Economic Co-operation and Development Convention on Mutual Administrative Assistance in Tax Matters ("the OECD Convention") and the bilateral agreement between Jersey and the Kingdom of Belgium for the exchange of information relating to tax matters ("the Jersey / Belgium Agreement"). The request sought information from Imperium in respect of the Trust.

6. The Trust is a Jersey law trust. Its sole ascertained beneficiary is Ferdinand Huts, a Belgian national resident in the United Kingdom. The Trust's principal asset is a 100% shareholding in Katoen Natie Group SA, a Luxembourg company ("Luxco 1"). Luxco

1 in turn owns 100% of Katoen Natie International SA ("Luxco 2"), a Luxembourg holding company, which, amongst other interests, wholly owns Katoen Natie NV, a Belgian company ("Belgco").

7. Belgco is the taxpayer for the purposes of the request made by the Belgian Competent Authority. The Belgium Competent Authority was concerned to investigate whether withholding tax was payable on dividends paid by Belgco to Luxco 2, having regard to the wider corporate structure. The dividend sums were in excess of EUR 150 million.

8. On 22 February 2022, following the request, the JCA issued a notice to Imperium. The notice required Imperium to produce documents and information in relation to (i) dividends paid to the Trust by Luxco 1, (ii) the Trust and its beneficiaries and (iii) assets held by the Trust and payments made by it.

9. The notice stated that it was issued pursuant to Regulation 2 of the Taxation (Implementation) (Convention on Mutual Administrative Assistance in Tax Matters) (Jersey) Regulations 2014 ("the 2014 Regulations") as applied by Regulation 3 of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 ("the 2008 Regulations"). The 2008 and 2014 Regulations enable Jersey to comply with its obligations under bilateral tax information agreements and under the OECD Convention. Both sets of Regulations were made under article 2 of the Taxation (Implementation) (Jersey) Law 2004 ("the 2004 Law").

10. On 15 March 2022, Imperium delivered to the JCA the information requested by the notice.

Procedural background

Judicial review proceedings: application for leave

11. On 8 March 2022, Imperium applied for leave to apply for judicial review of the decision to issue the notice. On 20 April 2022, the application was heard *inter partes* by the Royal Court of Jersey ("the Royal Court") (RJ MacRae, Deputy Bailiff). On 20 May 2022, the Royal Court refused the application: [2022] JRC 300. By consent it made no order for costs.

12. By order dated 27 May 2022, the Royal Court stayed the effect in law of its decision to refuse leave to apply for judicial review and directed that the JCA should not

provide any documentation or information to the Belgian tax authorities pending Imperium's application for leave to appeal.

13. Imperium applied to the Judicial Committee of the Privy Council on 6 June 2022 and to the Court of Appeal on 9 June 2022 for leave to appeal the Royal Court's refusal to grant leave to apply for judicial review. Imperium submitted that the Court of Appeal had jurisdiction to hear the appeal; the JCA maintained that an appeal lay only to the Privy Council. On 22 September 2022, the Court of Appeal (Clare Montgomery KC JA President, Jonathan Crow KC JA, Rt Hon James Wolffe KC JA) held in favour of Imperium that it had jurisdiction to hear the appeal. On 17 November 2022, with the consent of the JCA, Imperium's application before the Privy Council was stayed.

14. By its order of 22 September 2022, the Court of Appeal directed that there be a single hearing of the application for leave to appeal and, if leave were granted, the appeal itself, in the week of 23 to 27 January 2023. It also stayed the effect of the Royal Court's decision of 24 May 2022, and directed that the JCA should not provide the documents and information to the Belgium Competent Authority, pending determination of the appeal. On 11 October 2022, the Court of Appeal directed by consent that costs should be determined at the conclusion of the hearing in January 2023.

15. On 24 January 2023, at a half-day hearing, the Court of Appeal (Sir William Bailhache JA President, the Rt Hon James Wolffe KC JA and Mr Paul Matthews KC JA) heard oral argument on the issue of leave to appeal and leave to apply for judicial review. It reserved judgment.

16. On 1 June 2023, the Court of Appeal delivered its judgment and by order of the same date granted leave to appeal, allowed the appeal, and gave leave to apply for judicial review: [2023] (1) JLR 229.

17. Leave to apply for judicial review was limited to two grounds advanced by Imperium:

> (1) the JCA could not reasonably have concluded that the information it requested was foreseeably relevant to Belgco's tax affairs; and
>
> (2) the notice was a disproportionate breach of the rights of the beneficiaries of the Trust under article 8 ECHR: [2023] (1) JLR 229, paras 76, 132.

18. The substantive claim for judicial review was remitted to the Royal Court. The claim has not yet been determined. The claim has been amended to add an additional

ground that, in light of the Court of Appeal's declaration of incompatibility and its inability to award Imperium its costs (as to which see below), proceedings to challenge notices under the 2008 and 2014 Regulations do not comply with article 6(1) and/or article 8 ECHR. The claim on grounds (1) and (2) and the additional ground is due to be heard in October 2025.

Judicial review proceedings: costs

19. Following the Court of Appeal's judgment and order of 1 June 2023, Imperium sought an order that the costs of the jurisdiction and substantive appeals before the Court of Appeal be Imperium's costs in the cause and that the costs of the leave application before the Royal Court should also (by way of amendment to the order by consent of the Royal Court that there be no order as to costs) be Imperium's costs in the cause. It was also suggested that the issue of the court's ability to order costs in light of the 2018 Law could be determined at the conclusion of the proceedings.

20. The JCA resisted the making of a costs order in favour of Imperium on the basis that article 2(1)(c) of the 2018 Law protected it from liability for costs ("the costs rule"). Imperium submitted that the costs rule violates article 6(1) ECHR and the HRL. Imperium's primary argument was that article 2(1)(c) should be read down so as to be compatible with article 6(1) ECHR. In the alternative, it asked for a declaration of incompatibility.

21. In accordance with article 6(2) HRL, on 27 July 2023, the Court of Appeal notified the Attorney General that it was considering making a declaration of incompatibility in the proceedings and on 17 August 2023 the Attorney General gave notice that he wished to be joined to the proceedings.

22. On 1 September 2023, the parties filed written submissions on costs. Imperium's position was as set out above. The JCA and the Attorney General maintained that the costs rule was not incompatible with article 6(1) ECHR and that there should be no order for costs.

23. On 19 September 2023, at a one day hearing, the Court of Appeal heard oral argument on costs. It received further written submissions after the hearing.

24. On 18 January 2024, the Court of Appeal gave judgment: [2024] JCA 014. It held that the costs rule could not be interpreted, pursuant to article 4 HRL, so as to be compatible with Convention rights and that it was incompatible with article 6(1) ECHR.

25. By its order of 18 January 2024, the Court of Appeal made a declaration of incompatibility under article 5 HRL. As the declaration did not, by virtue of article 5(4) HRL, affect the continuing validity and operation of the 2018 Law, the Court of Appeal did not make any costs order in favour of Imperium. It made no order for costs.

Permission to appeal to the Judicial Committee of the Privy Council

26. On 14 February 2024, the Attorney General and the JCA applied for leave to appeal to the Privy Council against the order of the Court of Appeal of 18 January 2024. On 11 April 2024, the Court of Appeal refused leave to appeal.

27. The Attorney General and the JCA then applied to the Privy Council for leave to appeal which was granted on 18 December 2024.

Issues

28. The following issues arise on this appeal:

(1) Whether judicial review proceedings in respect of a notice to provide tax information issued under Regulation 3 of the 2008 Regulations as applied by Regulation 2 of the 2014 Regulations determine civil rights and obligations so as to engage article 6(1) ECHR in all cases and/or in Imperium's case.

(2) If so, whether in such proceedings the operation of article 2(1)(c) of the 2018 Law is incompatible with article 6(1) ECHR. In particular, whether that provision unlawfully compromises equality of arms and/or restricts the right of access to the court in all cases and/or in Imperium's case.

(3) If there was no infringement of article 6(1) ECHR in Imperium's case, whether the Court of Appeal erred in making a declaration of incompatibility.

Legal framework

Article 6 ECHR

29. Article 6 ECHR provides in relevant part:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Human Rights Law

30. The HRL is in substantially similar terms to the United Kingdom Human Rights Act 1998. Article 2(1) HRL provides that the Convention rights in Schedule 1, which include article 6 ECHR, shall have effect in the law of Jersey. The HRL further provides:

> "4. Legislation
>
> (1) So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.
>
> (2) This Article –
>
> (a) applies to principal and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible principal legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) principal legislation prevents removal of the incompatibility.
>
> 5. Declaration of incompatibility

(1) If in any proceedings in which a court determines whether a provision of principal legislation is compatible with a Convention right, the court is satisfied that the provision is not so compatible, it may make a declaration of incompatibility.

…

(4) A declaration of incompatibility –

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

…

7. Public authorities and the States Assembly

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

…

(6) Paragraphs (1) and (4) do not apply to an act if –

(a) as the result of one or more provisions of principal legislation, the authority or the Assembly, as the case may be, could not have acted differently; or

(b) in the case of one or more provisions of, or made under, principal legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority or the Assembly, as the case may be, was acting so as to give effect to or enforce those provisions.

…

8. Proceedings

(1) A person who claims that –

(i) a public authority has acted, or proposes to act, in a way which is made unlawful by Article 7(1); or

(ii) the States Assembly has acted in a way which is made unlawful by paragraph (4) of that Article,

may –

(a) bring proceedings against the authority or, in the case of the Assembly, the States, under this Law in the Royal Court; or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if the person is (or, in the case of proposed action by a public authority, would be) a victim of the unlawful act.

…

(5) For the purposes of this Article, a person is a victim of an unlawful act only if he or she would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

OECD Convention

31. The OECD Convention is a multilateral treaty governing mutual administrative assistance in tax matters. It was developed jointly by the OECD and the Council of Europe. It entered into force for the United Kingdom on 1 October 2011. It was extended

by the United Kingdom to the Bailiwick of Jersey on 1 June 2014, subject to certain reservations. It provides in relevant part:

> "Article 1 – Object of the Convention and persons covered
>
> (1) The Parties shall, subject to the provisions of Chapter IV, provide administrative assistance to each other in tax matters. Such assistance may involve, where appropriate, measures taken by judicial bodies.
>
> (2) Such administrative assistance shall comprise:
>
> (a) exchange of information, including simultaneous tax examinations and participation in tax examinations abroad;
>
> (b) assistance in recovery, including measures of conservancy; and
>
> (c) service of documents.
>
> (3) A Party shall provide administrative assistance whether the person affected is a resident or national of a Party or of any other State."

The taxes covered by the OECD Convention as it applies in Jersey are those set out in article 2(1)(a), namely taxes on income or profits, taxes on capital gains and taxes on net wealth.

> "Article 4 – General provision
>
> (1) The Parties shall exchange any information, in particular as provided in this section, that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by this Convention.
>
> …

Article 5 – Exchange of information on request

(1) At the request of the applicant State, the requested State shall provide the applicant State with any information referred to in Article 4 which concerns particular persons or transactions."

Article 21 provides for protection and limits on the obligations to provide assistance. Article 21(4) provides:

"In no case shall the provisions of this Convention, including in particular those of paragraphs 1 and 2, be construed to permit a requested State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person."

Article 22 makes provision for secrecy and provides in material part:

"Article 22 – Secrecy

(1) Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law.

(2) Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes."

The Jersey / Belgium Agreement

32. Jersey has entered into a number of bilateral tax information exchange agreements ("TIEAs") including the Jersey / Belgium Agreement. In the present case the request by Belgium for information was made pursuant to the OECD Convention and the Jersey / Belgium Agreement. The notice issued by the JCA to Imperium was issued pursuant to the OECD Convention.

Taxation (Implementation) (Jersey) Law 2004

33. The 2004 Law enables Jersey to give effect by Regulations to its international obligations under TIEAs and the OECD Convention.

Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 and Taxation (Implementation) (Convention on Mutual Administrative Assistance in Tax Matters) (Jersey) Regulations 2014

34. The 2008 and 2014 Regulations were made pursuant to article 2 of the 2004 Law. The 2008 Regulations enable Jersey to comply with its obligations under TIEAs by conferring power on the JCA to issue notices to persons to provide information in response to requests made by third countries pursuant to those TIEAs. The 2014 Regulations enable Jersey to comply with its obligations under the OECD Convention. Regulation 2 of the 2014 Regulations applies the 2008 Regulations to requests made pursuant to the OECD Convention.

35. The present appeal is concerned with a third party notice issued by the JCA to Imperium pursuant to Regulation 3 of the 2008 Regulations as applied by Regulation 2 of the 2014 Regulations. Regulation 1A of the 2014 Regulations provides as follows:

> "1A. Tax information
>
> (1) For the purposes of these Regulations 'tax information' means information that is foreseeably relevant to the administration or enforcement of the domestic laws of the requesting Party concerning any tax described in Article 2(1)(a) of the Convention and listed in Annex A to the Convention as being a tax of the requesting Party, including information that is foreseeably relevant to –

(a) the determination or assessment of the liability of person to such taxes;

(b) the determination, assessment and collection of such taxes;

(c) the recovery and enforcement of such taxes;

(d) the recovery and enforcement of tax claims; or

(e) the investigation or prosecution of tax matters.

(2) Information is foreseeably relevant to the administration or enforcement of the domestic laws of a requesting Party –

(a) if there are reasonable grounds to believe that there is sufficient connection between the person who is the subject of the request and the domestic laws of the requesting Party and that there is a reasonable possibility those laws may apply to the person; and

(b) regardless of whether there are matters that are still to be determined by the requesting Party in respect of the person's liability to tax."

Regulation 10A of the 2008 Regulations provides:

"10A. Restrictions regarding requirement to provide information

(1) Nothing in these Regulations requires a person to provide to the competent authority for Jersey information that is subject to legal professional privilege.

(2) The answers given or a statement or deposition made by an individual in compliance with a notice given under Regulation 2 or 3 may not be used in evidence against the individual in any criminal proceedings, except proceedings under Regulation 15(2).

> (3) Notwithstanding any other enactment (whenever passed or made) or the terms of any contract (whenever made), a person required to provide information by notice given under Regulation 3 shall not incur any civil or criminal liability by reason of disclosing the information in compliance with the requirement."

Regulation 12 of the 2008 Regulations confers power on the Bailiff to issue search and seizure warrants.

Regulations 14 and 14A of the 2008 Regulations make special provision for judicial review of information notices. Regulation 14(3) provides that, despite an application for leave to apply for judicial review being made, the recipient of the notice shall provide the information requested to the JCA within the time limits specified in the notice but the JCA shall not provide the information to the requesting country unless the claim is dismissed, withdrawn or discontinued, or with the permission of the Royal Court.

Regulations 15 and 16 of the 2008 Regulations create offences. Regulation 15(3) provides that a person who knowingly and without reasonable excuse fails to comply with a requirement imposed under Regulation 3(1) is guilty of an offence and is liable to imprisonment for a term of 12 months and a fine.

International Co-operation (Protection from Liability) (Jersey) Law 2018

36. The 2018 Law is primary legislation adopted by the States of Jersey on 10 July 2018. It received the sanction of Her late Majesty in Council on 10 October 2018, was registered by the Royal Court on 19 October 2018 and came into effect by an Act of the States on 18 June 2019.

37. Article 2 of the 2018 Law provides:

> "2. Protection from liability for damages, costs and consequential loss
>
> (1) Subject to paragraphs (2) and (3) but despite any other provision in any other enactment to the contrary, a public authority shall not be liable –
>
> (a) in damages;

(b) for consequential loss; or

(c) for costs in legal proceedings,

in respect of any act done in the discharge or purported discharge of the public authority's functions under any enactment specified in Schedule 1 or Regulations or an Order made under such enactment which entitles the public authority to give assistance to a relevant authority of any country or territory outside Jersey unless it is shown that the act was done in bad faith.

(2) Paragraph (1) shall not apply so as to prevent an award of damages made in respect of an act on the ground that the act was unlawful as a result of Article 7(1) of the Human Rights (Jersey) Law 2000.

(3) A public authority may rely on the good faith of the relevant authority to which it gave the assistance referred to in paragraph (1) to prove that the public authority did not act in bad faith.

(4) The Minister may by Order exclude any type of damages, costs or consequential loss in respect of assistance in any legal proceedings from the application of this Law."

Schedule 1 sets out a list of enactments under which a public authority is protected from liability. They all concern situations in which Jersey public authorities are responding to requests for assistance from other jurisdictions.

"1. Bankers' Books Evidence (Jersey) Law 1986

2. Civil Asset Recovery (International Co-operation) (Jersey) Law 2007

3. Competition (Jersey) Law 2005

4. Criminal Justice (International Co-operation) (Jersey) Law 2001

5. Financial Services (Jersey) Law 1998

6. International Criminal Court (Jersey) Law 2014

7. Investigation of Fraud (Jersey) Law 1991

8. Proceeds of Crime (Jersey) Law 1999

9. Taxation (Implementation) (Jersey) Law 2004"

The International Co-operation (Protection from Liability) (Jersey) Order 2024

38. After the Court of Appeal's ruling of 18 January 2024, on 3 June 2024 the Chief Minister made the International Co-operation (Protection from Liability) (Jersey) Order 2024 ("the 2024 Order") which came into effect on 4 June 2024. The 2024 Order states that it is made under article 2(4) of the 2018 Law. That article provides that the Minister may by Order exclude any type of damages, costs or consequential loss in respect of assistance in any legal proceedings from the application of the 2018 Law.

39. The 2024 Order states that it excludes from the application of the 2018 Law:

(a) costs below £75,000;

(b) costs of £75,000 or more, but only to the extent that the person claiming recovery of those costs can demonstrate to the Court's satisfaction that the costs will cause the person financial hardship if they are not recovered; or

(c) costs of £75,000 or more, if the person claiming recovery of those costs can demonstrate to the Court's satisfaction that the public authority acted unreasonably in the conduct of the legal proceedings giving rise to the costs.

The status and effect of the 2024 Order are disputed by Imperium.

Issue 1: Article 6(1)

40. Article 6(1) ECHR applies to "the determination of … civil rights and obligations or of any criminal charge". In *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1 a Grand Chamber of the European Court of Human Rights (at para 595) provided the following description of the operation of the civil limb of article 6(1):

> "For Article 6(1) in its civil limb to be applicable, there must be a 'dispute' ('*contestation*' in French) over a right which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The provision does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play. Lastly, the right must be a 'civil' right …."

41. The concept of determination of civil rights and obligations is an autonomous concept of ECHR law, independent of the characterisation in national legal systems. The precise scope of this concept, which lies at the heart of the first issue in this appeal, can sometimes be difficult to identify or define. In *QX v Secretary of State for the Home Department* [2024] UKSC 26; [2024] 3 WLR 547 Lord Reed explained (at para 61) that while litigation between private individuals in the civil courts will normally fall within the scope of "the determination of … civil rights and obligations", it may be less certain whether proceedings other than those normally disposed of in the civil courts or issues which fall outside the ambit of private law do so. He noted that a progressive broadening of the scope of these concepts is apparent in the case law of the European Court of Human Rights, but that this "has tended to develop from case to case without the articulation of sharp-edged definitions or principles". Citing Lord Dyson in *R(G) v Governors of X School* [2011] UKSC 30; [2012] 1 AC 167, para 67, Lord Reed noted that the European Court of Human Rights "adopts a pragmatic context-sensitive approach", with the result that it "is not possible to classify all the cases into neat hermetically-sealed categories".

42. In its case law the European Court of Human Rights has recognised that disputes concerning the exercise of certain categories of public authority prerogatives fall outside the scope of article 6(1). Prominent examples are disputes relating to tax (*Ferrazzini v Italy* (2001) 34 EHRR 45), deportation (*Maaouia v France* (2000) 33 EHRR 42), political rights (*Pierre-Bloch v France* (1997) 26 EHRR 202) and public sector employment

(*Pellegrin v France* (1999) 31 EHRR 26). The fact that disputes falling within such a category may incidentally engage other Convention rights will not normally have the effect of bringing the proceedings within the protection of article 6(1). Here it is the nature of the proceedings which is of critical importance. In *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110, a case concerning deportation, Lord Hoffmann expressed the matter as follows (at para 175):

> "It is clear that the criterion for the European court in deciding whether article 6 is engaged is the nature of the proceedings and not the articles of the Convention which are alleged to be violated. If the proceedings concern deportation, article 6 is not engaged, whatever might be the other articles potentially infringed by removal to another country."

The *Ferrazzini* principle

43. So far as tax disputes are concerned, the judgment of a Grand Chamber of the European Court of Human Rights in *Ferrazzini* provides considerable assistance. In that case the applicant relied on articles 6(1) and 14 ECHR in his complaint that the duration of tax proceedings had exceeded a reasonable time. The national proceedings concerned the payment of capital gains tax, the applicable rate of stamp duty, registry tax and capital transfer tax, and the application of a reduction in the rate. The Grand Chamber accepted (at para 25) that pecuniary interests are clearly at stake in tax proceedings. However, merely showing that a dispute was pecuniary in nature was not in itself sufficient to attract the applicability of article 6(1) under its civil head. The Grand Chamber pointed to the case law of the Convention institutions and emphasised that there may exist pecuniary obligations vis-à-vis the State or its subordinate authorities which, for the purpose of article 6(1), are to be considered as belonging exclusively to the realm of public law and are accordingly not covered by the notion of civil rights and obligations. This will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation or is otherwise part of normal civic duties in a democratic society.

44. The judgment in *Ferrazzini* is of particular significance because the Grand Chamber expressly reviewed the position in relation to tax disputes and addressed whether, in the light of changed attitudes in society to the legal protection that falls to be accorded to individuals in their relations with the State, the scope of article 6(1) should be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the decisions of a tax authority. In this regard it noted that the European Court of Human Rights had extended the application of article 6(1) to certain cases involving disputes between individuals and the State, including cases where the outcome was decisive for private rights and obligations (para 27). It went on, however, to observe that rights and obligations existing for an individual are not necessarily civil in

nature. Here it referred to cases concerning political rights and obligations, public sector employment and expulsion of aliens (para 28). It then stated in relation to tax matters:

> "29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the 'civil' sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes. Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.
>
> 30. The principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions in democratic societies does not give the Court power to interpret Article 6(1) as though the adjective 'civil' (with the restriction that that adjective necessarily places on the category of 'rights and obligations' to which that Article applies) were not present in the text."

The Grand Chamber concluded, therefore, that article 6(1) did not apply in that case.

45. The decision is a clear and categorical reaffirmation that tax matters form part of the hard core of public authority prerogatives outside the scope of article 6(1). The principle is expressed in broad and unqualified terms. The Board would also draw attention, in particular, to the acceptance by the European Court of Human Rights that the incidental effect of the exercise of such public authority powers on other rights, in this instance rights to property, does not have the effect of bringing a matter within the scope of article 6(1).

46. It is necessary to consider, therefore, what is a tax matter within the *Ferrazzini* principle. The case law of the European Court of Human Rights shows that it has been broadly interpreted. Thus, for example, in *Vegotex International SA v Belgium* (2022) 76 EHRR 15 a taxpayer argued that article 6(1) applied to its challenge to retrospective legislation which deprived it of a limitation defence to a disputed liability to tax. The Grand Chamber rejected the submission that the dispute did not concern the State's right to impose tax on a citizen and affirmed the decision of the Chamber that the civil limb of article 6(1) was not applicable. The proceedings were aimed at contesting the assessment of the tax and the fact that the issue of the time-barring of the debt was central to the proceedings did not alter that conclusion (paras 63-66).

47. The European Court of Human Rights has held inadmissible complaints under article 6(1) relating to proceedings to recover tax wrongly levied (*Beires Côrte-Real v Portugal* (App No 48225/08) 11 October 2011, para 35; *Antonucci v Italy* (App No 31650/15) 10 May 2022, para 9). In *Antonucci* the Court considered that the public nature of the relationship between the applicant in his capacity as taxpayer and the State was decisive (para 9). These decisions should be contrasted with that in *National & Provincial Building Society v United Kingdom* (1997) 25 EHRR 127 where it was held that article 6(1) applied to civil restitution proceedings to recover wrongly levied tax. That decision was distinguished in *Vegotex* (para 65) on the ground that the domestic proceedings were aimed at obtaining repayment of tax that had been wrongly paid by the applicant companies under tax legislation that was subsequently struck down.

48. *HM v Germany* (2005) 41 EHRR SE15 concerned the provisional attachment of the applicant's goods by the German tax authorities to secure expected claims for supplementary tax payments. The complaint founded on the civil aspect of article 6(1) was held inadmissible by the European Court of Human Rights on the ground that it fell outside the scope of the civil limb. The Court noted that there were certain links between the applicant's action in the tax courts for a declaration that the provisional attachment of her goods had been unlawful and her planned subsequent official liability proceedings in the civil courts. However, these links could not be considered as connecting them so closely that the proceedings must be regarded as a concerted private law action, with the proceedings in the tax courts sharing the private law character of the proceedings in the civil courts.

49. In *Ravon v France* (App No 18497/03) 21 February 2008 search and seizure operations were carried out by the tax authorities at premises occupied by the applicant companies and the first applicant who controlled them. The applicants invoked article 6(1) in support of their complaint that they had been denied effective access to a court in order to challenge the legality of the search and seizure operations. The European Court of Human Rights rejected a submission by the French Government, based on *Ferrazzini*, that the national proceedings were tax proceedings and fell outside the ambit of article 6(1). The Court considered that the proceedings did not concern tax disputes ("contentieux fiscal"):

> "Comme indiqué précédemment, elle porte sur la régularité des visites domiciliaires et saisies dont les requérants ont fait l'objet : en son cœur se trouve la question de la méconnaissance ou non par les autorités de leur droit au respect du domicile." (at para 24)

> "As indicated above, it concerns the lawfulness of the searches of premises and seizures to which the applicants were subjected: at its heart is the question of whether or not the authorities breached their right to respect for the home." (unofficial translation)

Ravon was subsequently followed in four further decisions, all concerned with the application of the same French law (*André v France* (App No 18603/03) 24 July 2008*, Kandler v France* (App No 18659/05) 18 September 2008*, Maschino v France* (App No 10447/03) 16 October 2008 and *Société IFB v France* (App No 2058/04) 20 November 2008).

50. More recently, however, the European Court of Human Rights in *Lindstrand Partners Advokatbyrå AB v Sweden* (App No 18700/09) 20 December 2016, has applied the *Ferrazzani* principle to proceedings concerning a search and seizure operation, holding that the proceedings did not fall within the civil limb of article 6(1). In an audit of the tax liabilities of three Swedish companies, the Swedish tax authority suspected that tax had been evaded as a result of irregular transactions between one of the companies, SNS, and a Swiss company. Seeking access to documents that showed the Swiss company's relationship to the Swedish companies, the tax authority conducted, pursuant to a court order, a search and seizure operation at two addresses connected to a Mr Jurik, namely the registered premises of Draupner Universal AB (a flat which was also used by Mr Jurik as a *pied-à-terre*) and at the office of Mr Jurik at the applicant law firm. The applicant brought proceedings challenging the search and seizure order and separate proceedings in which it sought to exclude from the audit parts of the material seized, on grounds of privilege. The European Court of Human Rights held that article 6(1) did not apply to those proceedings. Citing *Ferrazzini*, it reiterated that:

> "[the Court] has consistently held that, generally, tax disputes fall outside the scope of 'civil rights and obligations' under Article 6 of the Convention, despite the pecuniary effects which they necessarily produce for the taxpayer …." (para 110)

51. It will often be the case that coercive measures employed in a search and seizure operation will incidentally engage other rights, for example an interference with an applicant's article 8 rights. This, in itself, will not be sufficient to change the nature of the

proceedings challenging those measures so as to engage the protection of article 6(1). In *Lindstrand*, for example, the European Court of Human Rights held (at paras 101-102) that article 6(1) was not engaged notwithstanding the fact that the coercive measures employed interfered with (but did not breach) the applicant's article 8 rights which are acknowledged to be a civil right for the purposes of article 6(1). By contrast in *Ravon* the national proceedings were predominantly and essentially concerned with the violation of the right to respect for the home both under national legislation and under article 8 ECHR ("en son cœur se trouve la question de la méconnaissance ou non par les autorités de leur droit au respect du domicile" (*Ravon* at para 24)). It may well be that the *Ravon* line of authority is distinguishable on this basis. In any event, the Board considers that *Lindstrand* should be considered authoritative and should be followed. It is a more recent pronouncement by the European Court of Human Rights and is entirely consistent with the reasoning in *Ferrazzini*. The *Ferrazzani* principle is therefore not limited to the assessment of liability to pay tax or to the collection of tax. In particular, it extends to proceedings concerning the investigative process.

52. The *Ferrazzini* principle has been applied by domestic courts in England and Wales. In *R (APVCO 19 Ltd) v Revenue and Customs Comrs* [2015] EWCA Civ 648; [2015] STC 2272 the issue was whether retrospective tax legislation, which rendered ineffective an avoidance scheme into which the claimants had entered, was incompatible with the claimants' rights under article 6(1) and article 1 of Protocol 1. The Court of Appeal held that this was a tax dispute which fell outside the scope of civil rights and obligations under article 6(1).

53. In *R (Rowe) v Revenue and Customs Comrs* [2015] EWHC 2293 (Admin) the claimant taxpayers challenged by judicial review the legality of partner payment notices issued by HMRC pursuant to the Finance Act 2014. The claimants contended that partner payment notices were not taxation but peremptory demands for payment of monies that may or may not in future give rise to liabilities that are subject to a penalty regime for non-payment. As a result, they submitted, partner payment notices determined civil rights for the purposes of article 6(1) on which they relied in support of the complaint that they had been deprived of a fair and public hearing. At first instance, Simler J (at paras 151-152) rejected the submission. The question was not one of classification but one of substance. The amounts due were as a matter of substance payments on account of tax. The decision was upheld by the Court of Appeal, Arden LJ observing that the procedures for issuing partner payment notices were intimately bound up with the process for assessing tax. Although McCombe LJ observed (at para 214) that he would not wish to extend the *Ferrazzini* principle further than necessary, the decision is consistent with that principle.

54. The Board was also referred to *R (Derrin Bros Properties Ltd) v First-Tier Tribunal (Tax Chamber)* [2016] EWCA Civ 15; [2016] 1 WLR 2423. However, in that case it was assumed both at first instance and in the Court of Appeal that article 6(1) was engaged.

55. It can be seen, therefore, that, contrary to the submission of Mr Rory Mullan KC on behalf of Imperium, the *Ferrazzini* principle is not limited to disputes involving an obligation arising from tax legislation which is pecuniary in nature or concerned with the obligation to pay tax. On the contrary, it has been applied to proceedings more widely and, particularly relevant for present purposes, the European Court of Human Rights has applied it to proceedings challenging the exercise of powers of search and seizure by a tax authority (*Lindstrand*).

56. Decisions of the European Court of Human Rights and domestic courts in analogous areas cast light on the operation of the *Ferrazzini* principle in certain respects. First, they confirm that it is the nature of the proceedings which is key to the question whether civil rights and obligations are in issue. Secondly, they confirm that the fact that other Convention rights may incidentally be engaged does not bring within the protection of article 6(1) proceedings which are essentially concerned with the exercise of public authority prerogatives. Lord Hoffmann's statement to this effect in *RB (Algeria)*, a deportation case, is cited at para 42 above. In *Maaouia v France* the European Court of Human Rights held that proceedings in relation to an exclusion order did not determine a civil right and therefore did not engage article 6(1). The Court observed (at para 38) that the fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment could not suffice to bring those proceedings within the scope of civil rights protected by article 6(1). Similarly, in *R (BB (Algeria)) v Special Immigration Appeals Commission (No 2)* [2012] EWCA Civ 1499; [2013] 1 WLR 1568 the Court of Appeal of England and Wales stated (at para 21) that the fact that the exercise of the power to deport would have an effect on an individual's right to respect for private or family life or other rights did not mean that the exercise of the power involved a determination of the individual's civil rights.

57. On behalf of Imperium, Mr Mullan correctly draws attention to the observation of the European Court of Human Rights in *Delcourt v Belgium* (1970) 1 EHRR 355, para 25, that a restrictive interpretation of article 6(1) would not correspond to the aim and purpose of that provision. It is also the case, as Lord Reed observed in *QX* (at para 61), that there has been a progressive broadening of the scope of the concept of the determination of civil rights and obligations. It does not follow, however, that there is a presumption in favour of concluding that a given situation concerns the determination of civil rights or obligations. This is an issue which requires to be decided by the application of the principles laid down by the European Court of Human Rights, which include the principle in *Ferrazzini*. In this regard it is important to note that a restricted application of the *Ferrazzini* principle would result in a corresponding broadening of the scope of article 6(1). It is well established that, in the absence of some special circumstances, the possible expansion of the scope of ECHR rights is a matter for the European Court of Human Rights and not for domestic courts in this jurisdiction. As Lord Bingham observed in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20:

> "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

(See also *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487 per Lord Reed at paras 54-57; *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559 per Lord Reed at para 63.) In the Board's view, the jurisprudence of the European Court of Human Rights on the scope of the *Ferrazzini* principle is clear and consistent and should be followed.

58. The Board therefore accepts the following propositions advanced on behalf of the appellants:

(1) The exercise of public law powers in tax matters forms part of the hard core of public authority prerogatives and falls within the sphere of public not private law.

(2) Such matters include but are not limited to assessments of tax and surcharges and may in principle encompass investigatory measures, enforcement measures and other closely related measures.

(3) Where there is a dispute about the exercise of powers in tax matters in public law proceedings, the applicability or otherwise of article 6 turns on the nature of the proceedings and the measure challenged and not the grounds on which it is challenged nor upon any incidental effects on other civil rights.

59. The Board would add that *Ferrazzini*, by emphasising the public law nature of the relationship of taxpayer and taxing authority and focusing on the nature of the proceedings, provides a rule which is workable in practice. It can be applied prospectively so that it can be known in advance of proceedings what level of protection applies. Furthermore, a more elaborate approach which distinguished between different "tax matters" might have the disadvantage that certain aspects of one set of proceedings would engage article 6(1) whereas other aspects would not.

Application to this case

60. Imperium submits, as it did before the Court of Appeal, that the dispute between the parties is not a dispute as to payment of tax but a dispute in relation to the confidentiality of trust documentation. It submits that the essential issue is whether it can maintain the confidentiality of its documents and information against the demands of the

JCA on behalf of a foreign tax authority. That, it submits, at its heart involves determination of whether its article 8 ECHR rights can be lawfully interfered with and that requires a determination of civil rights within article 6. If a stranger to the Trust were to seek the same information, it submits, there would be little doubt that the dispute fell within article 6(1). The disputed context that the information is relevant to a tax investigation does not alter that position. A link to a tax dispute is not sufficient to exclude the application of article 6(1). In its submission, the correct approach is to identify the right which is subject to the dispute and to determine whether that is a civil right.

61. These submissions on behalf of Imperium were accepted by the Court of Appeal in the judgment now under appeal to the Board. It is convenient to set out two paragraphs from the judgment of Matthews JA (with which the President and Wolffe JA concurred on this issue) which are particularly relevant.

> "109. As I have observed, *Ferrazzini* is authority for the proposition that a dispute between a taxpayer and a taxing authority as to whether tax is due, and, if so, as to the amount of tax, does not engage Article 6. But it does not, in my view, follow that disputes about the lawfulness of coercive investigative steps, which involve an interference with property rights or rights of privacy recognised in domestic law, are excluded from the scope of Article 6 simply because those steps have been undertaken as part of a tax investigation or pursuant to powers contained in the tax code. I do not consider that the decision of the Grand Chamber in [*Ferrazzini*] compels such a conclusion.
>
> …
>
> 120. It is clear from the decision in *Ravon* that there can be cases where some civil right or obligation is in dispute over and above any possible tax liability owed to the state, and in such cases Article 6(1) applies, notwithstanding *Ferrazzini*. For the reasons I have explained, I do not consider that *Lindstrand* compels a different view. My conclusion in the present case is that the rights and obligations of confidentiality between trustee and beneficiaries, and the Article 8 rights (which it has been accepted were engaged here) constitute civil rights and obligations recognised in the domestic law of Jersey. Thus, if there is (as there was here) a dispute about whether or not a notice lawfully interferes with those rights, Article 6(1) applies, even though the issue arises in the context of a tax investigation. My conclusion in this respect is reinforced by the structure of

> the legislation, which provides in Jersey for no other method of reviewing the exercise of state power than the time limited right to apply for judicial review pursuant to the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations, as amended."

62. In the Board's view this reasoning is erroneous for a number of reasons.

63. First, the description of the *Ferrazzini* principle (as applying to "a dispute between a taxpayer and a taxing authority as to whether tax is due, and, if so, as to the amount of tax") is unduly restrictive. The principle is not limited to the assessment or payment of tax or to obligations which are pecuniary in nature. Measures closely connected to the assessment of tax, including investigation and enforcement measures, may constitute tax matters for this purpose. This has been fully explained above (at paras 43-59) and is not repeated here.

64. Secondly, the characterisation of the present proceedings as a dispute "about the lawfulness of coercive investigative steps" misrepresents their true nature. The judicial review proceedings in Jersey are clearly a tax matter within the *Ferrazzini* principle. The core issue in those proceedings is the lawfulness of the notice issued by the JCA pursuant to the 2008 and 2014 Regulations. The notice requires Imperium to provide information to assist the Belgian tax authorities in assessing the tax liabilities of Belgco which is ultimately owned by the Trust. The lawfulness of the notice turns on whether the information requested is "tax information" within the scope of those Regulations; that will depend on whether the information is "foreseeably relevant" to the administration and enforcement of Belgian tax laws, as widely defined in Regulation 1A of the 2014 Regulations. (It is immaterial for present purposes that Imperium is not the taxpayer. The scheme as implemented by the 2008 and 2014 Regulations makes express provision for obtaining information from third parties by a third party notice.) The decision to issue the notice was purportedly made in compliance with the international obligations of Jersey under the OECD Convention which are given effect by the 2014 Regulations. If obtained, the information could only be used in accordance with the governing domestic and international law structures for the purposes of tax assessment and enforcement. In the Board's view the decision to issue the notice was an exercise of powers within the hard core of public law prerogatives which fall outside the scope of article 6(1) ECHR.

65. Thirdly, it seems that in the circumstances of the present case there is no scope for a free-standing challenge founded on domestic law rights of confidentiality or article 8 ECHR independent of the challenge to the legality of the notice. Any such challenge would be likely to stand or fall with the challenge to the legality of the notice. So far as any domestic law right of confidentiality is concerned, if the notice under the Regulations is valid, compliance would not give rise to any valid claim based on infringement of rights of confidentiality. Equally, if the notice is invalid, there will be no need to rely on any

right of confidentiality in domestic law. Similarly, so far as article 8 rights are concerned, in order to decide whether the interference is in accordance with law, the court would have to decide whether the notice complies with the Regulations. If it does, it is difficult to see that any interference could be disproportionate. The Court of Appeal should have concluded, having regard to the nature of the proceedings, that a challenge founded on article 8 or rights of confidentiality in domestic law, would be purely incidental and would not have the effect of engaging article 6(1).

66. This view of the nature of the judicial review proceedings is in fact confirmed by the same constitution of the Court of Appeal in its judgment delivered by Wolffe JA in the present proceedings on 1 June 2023, giving permission to Imperium to appeal to the Court of Appeal against the Royal Court's decision refusing permission to apply for judicial review: [2023] JCA 057. The Board would draw attention to the following matters, in particular.

(1) The Court of Appeal noted that Imperium advanced three grounds of appeal:

(a) The JCA could not reasonably have concluded that the information requested was foreseeably relevant to Belgco's tax affairs.

(b) The notice is a disproportionate breach of the rights of the beneficiaries of the Trust under article 8 ECHR.

(c) The notice is ultra vires as it was issued in response to a request which did not comply with the terms of the OECD Convention, or because the JCA did not take into account relevant considerations (para 76).

(2) In a judicial review, the court would require itself to address the question whether the information sought was "tax information" as defined in the 2008 and 2014 Regulations (para 101).

(3) The Court of Appeal doubted whether any separate question would arise in relation to article 8. It was common ground that article 8 was engaged in this case. A court, when considering whether the interference was "in accordance with law", would have to decide whether the notice complies with the statutory requirements of Jersey law. The Court of Appeal observed that if the notice in the present case was lawful, it doubted if it could be said to be disproportionate. In this regard, it considered the role of the court a sufficient safeguard for any article 8 rights that might be engaged. If, on the other hand, the notice was held to be unlawful, it would also be incompatible with article 8 (para 130).

67. In the Board's view, this demonstrates why any case founded on article 8 or a duty of confidentiality in domestic law would necessarily be incidental, while the dispute as to whether the notice complied with the Regulations is the very essence of the judicial review proceedings.

68. In its analysis at paras 109 and 120 of the judgment presently under appeal, set out at para 61 above, the Court of Appeal has inverted the approach required by the *Ferrazzini* principle. It should have identified the question whether the notice complied with the Regulations as the core issue of the proceedings. Instead, it accorded to peripheral issues relating to confidentiality a disproportionate effect. It failed to appreciate that, as in *Lindstrand* and *Ferrazzini* itself, the fact that other rights might incidentally be engaged did not alter the essential nature of the proceedings as concerning tax matters forming part of the hard core of public authority prerogatives and therefore falling outside the scope of civil rights and obligations within article 6(1).

69. The Board would add that, in the present case, the fact that the notice was issued pursuant to Regulations giving effect to the OECD Convention serves to underline the public law character of the powers invoked by the JCA which form the subject matter of the judicial review proceedings.

70. For these reasons, the Board considers that the judicial review proceedings are not concerned with the determination of civil rights and obligations and that, accordingly, article 6(1) ECHR is not engaged.

Further matters

71. The Board's conclusion on Issue 1 is determinative of this appeal. In these circumstances, the Board does not consider it appropriate to address the remaining issues in this judgment. However, it wishes to draw attention to certain other matters arising out of the judgment of the Court of Appeal.

Victim status

72. Article 8 HRL provides that a person who claims that a public authority has acted or proposes to act in way which is made unlawful by article 7(1) may bring proceedings or rely on Convention rights but only if he is a victim of the unlawful act. Article 8(5) provides that for this purpose a person is a victim of an unlawful act only if he or she would be a victim for the purposes of article 34 ECHR if proceedings were brought in the European Court of Human Rights in respect of that act.

73. The judgment of Matthews JA, with which the other members of the Court of Appeal concurred on this issue, deals at some length (at paras 73-86) with the question whether Imperium has victim status within article 8 HRL. The Court of Appeal held that Imperium was a victim. However, Imperium did not rely on article 7(1) HRL in its challenge to the costs rule (presumably because it could not maintain that a public authority had acted in a way which was incompatible with a Convention right). Its case was founded on articles 4 and 5 HRL. It maintained that the 2018 Law should be read down so as to be given effect in a way which is compatible with Convention rights (under article 4) or alternatively that it should be declared incompatible with Imperium's Convention rights (under article 5). By contrast with the position in relation to article 7 HRL, it is not necessary to establish the status of a victim in order to rely on articles 4 or 5 (*R (Rusbridger) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357, per Lord Steyn at para 21; *In re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27; [2018] NI 228, per Lord Kerr at paras 185-190). It became clear at the hearing of the appeal before the Board that this is now common ground between the parties and that the discussion of victim status by the Court of Appeal was beside the point.

Evidential basis for examination of compatibility

74. While Imperium was not required to establish victim status in order to bring a challenge under articles 4 or 5 HRL, the essential question for decision by the Court of Appeal was whether, on the assumption that article 6(1) was engaged, Imperium's article 6(1) rights had been infringed by the costs rule. Imperium relied on two aspects of article 6(1), maintaining that the costs rule was a restriction on the right of access to the court and an infringement of the principle of equality of arms. In the case of each it was necessary for the Court of Appeal to consider whether the costs rule was an infringement of Imperium's Convention right and, if so, whether the costs rule had a legitimate aim and whether it was proportionate.

75. The Court of Appeal's consideration of these issues was, in the Board's view, impeded by a dearth of relevant evidence. This may be explained by the unusual way in which the proceedings came before the Court of Appeal. Following the Court of Appeal's judgment of 1 June 2023, Imperium sought an order that the costs of the jurisdiction and substantive appeals before the Court of Appeal and the costs of the leave application below be Imperium's costs in the cause. That was resisted by the JCA on the ground that the costs rule in the 2018 Law protected it from liability for costs. Imperium responded that the costs rule violated article 6(1) and argued that it should be read down or that there should be a declaration of incompatibility. On 17 August 2023 the Attorney General gave notice that he wished to be joined to the proceedings. The parties filed written submissions on costs and the hearing of the matter took place on 19 September 2023. The Court of Appeal gave judgment on 18 January 2024. The Board was informed by the parties on the hearing of the appeal that they had asked the Court of Appeal not to rule on the costs

issue but to adjourn it to the hearing of the judicial review. However, the Court of Appeal had proceeded to hear the matter itself.

76. Whatever the cause, it is clear that there was a lack of evidence before the Court of Appeal on a number of important issues. In particular, there seems to have been no evidence in relation to the purpose behind the costs rule, or on its impact on Imperium's access to the court or participation in the proceedings. Imperium's case was founded on an allegation of actual breach. Yet there is no evidence of prejudice resulting in a restriction on access to the court or in inequality of arms. Before these issues were adjudicated the Court of Appeal should have required the filing of detailed grounds, the sequential exchange of evidence and the sequential exchange of written submissions.

The need to focus on whether there was an infringement of Imperium's article 6(1) rights in the circumstances of this case

77. This lack of relevant evidence is likely to have contributed to the failure on the part of the Court of Appeal to focus on the essential issue which was whether the operation of the costs rule in its application to Imperium's participation in these legal proceedings infringed any right of Imperium under article 6(1). Instead, it focussed on the more abstract question of whether the legislation was compatible with article 6(1), as if it were an ab ante challenge to the legislation.

78. While it is possible in certain circumstances to bring a general challenge to legislation on ECHR grounds, this is exceptional and a violation of the ECHR is usually required to be established by reference to the manner in which the law has been applied to the claimant in the specific circumstances of the case. In *Verein KlimaSeniorinnen Schweiz v Switzerland*, a Grand Chamber of the European Court of Human Rights observed:

> "460. The Convention does not provide for the institution of an *actio popularis*. The Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, for instance, *Roman Zakharov v Russia* [GC], (Application No 47143/06), para 164, ECtHR 2015, with further references). Accordingly, a person, non-governmental organisation or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention. The Convention does not permit individuals or groups of individuals to complain about a provision of national law simply because they consider, without having been directly

> affected by it, that it may contravene the Convention (see *Aksu v. Turkey* [GC], (Application Nos 4149/04 and 41029/04), paras 50-51, ECtHR 2012)."

79. It was Imperium's case that the 2018 Law should be read down so as to be given effect in a way which is compatible with Convention rights (under article 4 HRL) or alternatively that it should be declared incompatible with Imperium's Convention rights (under article 5 HRL). In either case, it is necessary to focus on the effect of the 2018 Law as applied to Imperium's case. In *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327 Lord Sales explained (at para 114) with regard to section 3 of the United Kingdom Human Rights Act 1998 (the equivalent provision to article 4 HRL):

> "The proper approach to construction is that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person who is affected by it can show that this would be incompatible with their Convention rights under the [Human Rights Act 1998] … as applied to their case. Only then do the special interpretive obligations under section 3(1) of the [Human Rights Act] … come into play to authorise the court to search for a conforming interpretation at variance with the ordinary meaning of the legislation."

The position with regard to section 4 of the United Kingdom Human Rights Act 1998 (the equivalent provision to article 5 HRL) is very similar. In *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271, although Baroness Hale accepted that there may be occasions when it might be appropriate to make a declaration of incompatibility in the abstract, irrespective of whether the provision in question is incompatible with the rights of the individual litigant, she continued (at para 102):

> "But in my view the court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible. Any other approach is to invite a multitude of unmeritorious claims."

80. The close interaction of sections 3 and 4 of the United Kingdom Human Rights Act 1998 is described by Lord Nicholls in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816, para 14. The same tight focus is called for under both provisions. A statutory rule prohibiting the recovery of costs in litigation might conceivably be in itself a restriction on access to the court or an impediment to equality of arms. But this will not invariably be the case and in cases such as the present it is

necessary to consider the impact of the operation of the rule in the particular case. There is no absolute rule requiring the availability of a costs order. Contracting States have a margin of appreciation and the outcome of any challenge must depend on the precise factual and legal background. A rule denying costs is not necessarily a breach of article 6 ECHR as a restriction on access to the court or an impediment to equality of arms. In each aspect there is a need for a proportionality analysis in the context of the specific facts. This is apparent, for example, from *Jakutavičius v Lithuania* (App No 42180/19) 13 February 2024, a costs case, where the European Court of Human Rights observed at para 73:

> "… the Court reiterates that it is not its task to express a view on whether the policy choices made by the Contracting Parties with regard to access to a court are appropriate or not; its task is confined to determining whether their choices in this area produce consequences that are in conformity with the Convention. Therefore, what the Court needs to ascertain in the present case is whether the application of the rule which was in force at the material time hindered the applicant's right of access to a court and was therefore incompatible with Article 6(1) of the Convention …."

The Court then took an intensely fact-sensitive approach to deciding the proportionality of the infringing measure (at paras 80-85).

81. In the present case, the issue of compatibility called for a close examination of the facts of this specific case and the role which the legislation played in bringing about the alleged violation. However, the case was not presented on this basis by Imperium. In his judgment Matthews JA referred (at para 167) to the fact that counsel for Imperium "does not found on any specific circumstances of this case to argue that a regime, which may in itself be compatible with article 6, nevertheless results in a breach of article 6 by reason of its effect in this particular case". Furthermore, there was no evidence directed at the effect of the breach in the circumstances of this case. There were therefore no factual findings as to the effect of the costs rule on Imperium. Instead, the Court of Appeal undertook an abstract examination of the legislation, addressing the impact of the legislation on a hypothetical class. Thus, in considering access to justice (at paras 171, 172) it noted that the costs rule might not be much of a restriction for a well-financed corporation, but added that "[i]t may, for other potential applicants, represent a very significant barrier to access to justice". Similarly, in considering equality of arms (at paras 214, 215) it noted that "there is a readily foreseeable, and potentially significant, class of litigants for whom that structural and systematic difference [of treatment] does indeed place the claimant at a substantial disadvantage vis-à-vis the public authority defendant".

82. Furthermore, the Court of Appeal did not limit itself to an examination of the operation of the costs rule in relation to tax proceedings. It observed (at para 171) that "for potential appellants against other administrative directions, for example, of the Jersey Financial Services Commission or the Jersey Competition Regulatory Authority, it may be especially true that the 2018 Law represents a barrier to access to justice". This unwarranted breadth of approach was also reflected in the declaration of incompatibility which is considered further below.

83. Save in very exceptional circumstances which are not applicable here, analysis of compatibility with Convention rights must focus on the effect of the measure complained of on the individual claimant.

Legitimate aim

84. Having concluded that the costs rule in the 2018 Law could, in principle, operate as a restriction on the right of access to the court, the Court of Appeal turned to the issue whether the costs rule pursued a legitimate aim. This was a central area of dispute before the Court of Appeal. On behalf of Imperium it was submitted that the aim of the costs rule was to insulate public authorities from the costs consequences of their own illegality and, therefore, that this was not a legitimate aim. The Attorney General, on the other hand, submitted that the aim of the costs rule was to protect public authorities in the particular classes of case to which the 2018 Law applies from the chilling effect which would flow from a potential liability to costs. He submitted that the 2018 Law protects public authorities in Jersey which are acting in aid of authorities in other jurisdictions and emphasised the importance of Jersey being seen to be a reliable partner in law enforcement activity internationally.

85. The judges of the Court of Appeal disagreed as to the correct approach to identifying the aim of the costs rule in the 2018 Law.

86. Matthews JA, with whom the President agreed, stated that the court should follow the approach set out in *Wilson v First County Trust*. He then set out extensive passages from the judgment of Lord Nicholls in *Wilson* (paras 57-58, 61, 63-66). Matthews JA interpreted these passages as establishing that the primary tool for ascertaining the policy objective of the statute was the construction of the statute itself. It was not permissible to form a conclusion as to the aim of the legislation on the basis of any extraneous material which was different from the aim or purpose established from its proper construction on usual principles (para 178). The court was therefore to use the construction of the statute as the basis for ascertaining its purpose, but it was permissible when considering the question of compatibility to have regard to external material such as the Report accompanying the proposition and the speeches of members when the legislation was debated (para 179). Proceeding on this basis, he considered that the provision has as its

obvious purpose a prohibition against a court making a costs order or an order for damages against one of the public authorities listed in the statute and that one could probably imply from that provision an intention to protect the States Assembly's budget or the budget of the public authority concerned (para 180). After expressing doubt as to whether this was a rare case where it was legitimate to use the travaux préparatoires (para 182), he concluded that in any event there was not enough to satisfy him that the purpose of the legislation was to avoid any possible chilling effect such costs orders might have on the performance of Jersey's international obligations. In his view the real purpose was to protect the States Assembly's budget (para 186).

87. By contrast, Wolffe JA, dissenting on this point, noted that, while at one level it could be said that the purpose of the legislation is to provide the relevant public authorities with immunity from liability to damages, costs and consequential losses, that was not the relevant level for Convention purposes. Citing Lord Nicholls in *Wilson* (at para 61), he considered that "[w]hat is relevant is the underlying social purpose sought to be achieved by the statutory provision". That was not evident from the 2018 Law itself but, after referring to the Projet de Loi and the statement of the Assistant Chief Minister in presenting the 2018 Law to the States Assembly, he concluded that the over-arching policy objective which the 2018 Law was intended to advance was the proper fulfilment of Jersey's international obligations and the consequent protection of Jersey's reputation as a reliable law enforcement partner. It had been thought that the risk to public funds which such claims presented could constrain the provision of assistance to other jurisdictions. The risk to public funds would lead the relevant public authorities to be unduly risk averse or defensive when exercising their functions in the context of international co-operation. He found further support for that conclusion in the speech of a member of the Assembly apparently speaking for the Corporate Services Scrutiny Panel which had scrutinised the Bill (paras 231-238). He went on to conclude that this was a legitimate aim and "a policy objective of very high importance" (para 239).

88. The Board considers that the approach to this issue adopted by the majority was based on an unduly restrictive misreading of the speech of Lord Nicholls in *Wilson*. The interpretation of the statute is clearly an important part of the process of ascertaining its aim but not to the exclusion of other sources. In *Wilson* Lord Nicholls explained (at paras 61, 63) that the court may need enlightenment on the nature and extent of the social problem (the mischief) at which the legislation is aimed and that the court may need to look outside the statute in order to see the complete picture. Wolffe JA was correct in concluding that, in determining in the context of Convention rights whether legislation has a legitimate aim, it is necessary to have regard to its underlying social purpose. As he put it (at para 233):

> "The critical question is not what the measure does (and may be taken to have been intended to do), but *why* the States Assembly enacted it."

For this purpose, recourse to the extraneous materials to which he referred was permissible.

Declaration of incompatibility

89. Finally, it is necessary to refer to the scope of the declaration of incompatibility made by the Court of Appeal on 18 January 2024. It simply declares that:

> "the 2018 Law is incompatible under Article 5 of the 2000 Law."

It therefore declares the 2018 Law in its entirety and in its general application to be incompatible with the Convention.

90. For reasons explained above, the focus of the Court of Appeal should have been upon the impact of the 2018 Law on Imperium in its operation in relation to costs orders in judicial review proceedings challenging the issue of a tax information notice under the 2008 and 2014 Regulations. It was not open to the Court of Appeal to make a declaration in relation to other matters not in issue before it. The declaration granted extends to the operation of the rules in the 2018 Law in relation to claims for damages or consequential losses and in relation to statutory regimes other than those governing tax information notices, matters not in issue in the proceedings. Any declaration of incompatibility should have been limited to the compatibility with Convention rights of the costs rule in article 2(1)(c) and Schedule 1, para 9 of the 2018 Law in proceedings to challenge a tax information notice issued pursuant to the 2008 and 2014 Regulations.

Conclusion

91. Under Issue 1 the Board has concluded that article 6(1) ECHR is not engaged in the proceedings by which Imperium challenges the legality of the tax information notice issued under the 2008 and 2014 Regulations. For this reason, the Board will humbly advise His Majesty that the appeal should be allowed.