

JERSEY / JUDGMENT

Imperium Trustees (Jersey) Limited v Jersey Competent Authority [2022] JRC 165 (10 August 2022)

[2022] JRC 165

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judgment

the deputy bailiff: 1. On 24 th May 2022, I refused the Applicant's application for leave for judicial review in respect of a notice issued under the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 ("the Notice"). 2. Having handed down judgment on that day, I then heard various ancillary applications (the judgment handed down on 24 th May 2022 having been sent in draft to the parties on 10 th May 2022). 3. By consent I made no order as to costs of the application for leave and reserved my decision in respect of the various applications made by the Applicant and indicated that by 5pm on 27 th May 2022 I would provide the parties with a summary of my decision so that they knew, or at least were best advised as to which, if any, avenues of appeal they should pursue, with written reasons to follow. 4. On 27 th May 2022 I communicated the following to the parties: "At the hearing on 24th May 2022 I reserved my decisions and reasons on the matters before me but I indicated that I would endeavour to give a summary of those decisions to assist the parties by the end of the week. My decisions are as follows: (i) Applications for leave to apply for judicial review are encompassed by Regulation 14A of the Taxation (Exchange of Information with Third Parties) (Jersey) Regulations 2008 and accordingly any appeal against my decision refusing leave to apply for a judicial review is to the Privy Council only and not the Court of Appeal; (ii) Nonetheless, I have a power to stay the effect of my decision to refuse leave to apply for judicial review, and in the circumstances of this case that entitles me to direct that the Respondent shall not provide to the Belgian tax authorities any of the documentation or information provided to it pursuant to the Notice pending the Applicant's application for leave to appeal to the Privy Council; (iii) The said stay at (ii) above is conditional upon the Applicant filing a Notice seeking application for permission to appeal to the Judicial Committee of the Privy Council under Regulation 14A within 14 days commencing 24th May 2022; and (iv) In the event that the Privy Council refuses leave to appeal (or gives leave and the appeal is not successful) then the documents or information provided to the Respondent pursuant to the Notice may be transmitted to the Belgian tax authorities forthwith without any further order of the Court." 5. I now give reasons for these decisions. The scope of Regulation 14A of the 2008 Regulations 6. Regulation 14A provides: "14A. Further appeal to Privy Council (1) An

appeal lies to the Privy Council from a decision of the Royal Court on a judicial review to which Regulation 14 applies. (2) An appeal under this Regulation lies at the instance of - (a) a taxpayer, against a requirement made of that taxpayer under Regulation 2; (b) a person, against a requirement made of that person in a third party notice; (c) a taxpayer, against a requirement made of a third party in respect of that taxpayer; or (d) the competent authority for Jersey. (3) An appeal under this Regulation lies only with the leave of the Privy Council. (4) An application to the Privy Council for leave to appeal under this Regulation against a decision shall be made before the end of the period of 14 days commencing on the day on which the Royal Court makes its decision. (5) If leave to appeal under this Regulation is granted, the appeal shall be brought before the end of the period of 14 days commencing on the day on which leave is granted. (6) If paragraph (5) is not complied with - (a) the appeal shall be taken to have been brought; and (b) the appeal shall be taken to have been dismissed by the Privy Council immediately after the end of the period specified in that paragraph. (7) For the purpose of paragraph (6)(b) - (a) any power of a court to extend the period permitted for giving notice of appeal; and (b) any power of a court to grant leave to take a step out of time, shall be disregarded. (8) The Privy Council may allow or dismiss the appeal." 7. The Applicant contends that Regulation 14A only applies to substantive applications for judicial review i.e. appeals made after hearings when leave has been given. The Respondent argues that it encompasses all applications for judicial review including applications determined at the leave stage i.e. where the applicant has been refused leave to seek judicial review. 8. The Applicant argues that the wording in Regulation 14A(1), namely 'a decision of the Royal Court on a judicial review', does not encompass a decision made on leave to apply for judicial review. The Applicant argues in summary that: (i) Regulation 14A does not in terms mention leave to apply for judicial review which must have been a deliberate act on the part of the legislature; (ii) There is no basis upon which to imply these words into the provisions of the statute; (iii) It is natural not to imply the words as it is more natural that the Court of Appeal retains jurisdictions in this sort of interlocutory matter; and (iv) There is no authority on this point in any event and it is for the Court of Appeal to determine the scope of its own jurisdiction. 9. Various authorities were drawn to my attention on statutory interpretation including the well-known text, Bennion, Bailey and Norbury on Statutory Interpretation (8th Edition 2020). It is further argued that Regulation 14A, which purports to oust the jurisdiction of the Court of Appeal in certain circumstances, is a 'highly exceptional provision which amounts to a severe infringement of the rights of persons who are subject to it' as it deprives them of one level of appeal. The only authority which considered the terms of Regulation 14A is the decision of the Court of Appeal in *Larsen and Volaw Trust and Corporate Services v Comptroller of Taxes*

[2016] (2) JLR 198 where the Court of Appeal considered, inter alia, its jurisdiction to entertain an appeal from a decision of the Royal Court on a judicial review to which Regulation 14 applied. 10. In *Larsen*, Pleming JA, delivering the judgment of the Court, had regard to the report accompanying the proposition laid before the States in respect of the amendments made to the Regulations in 2013 which replaced 'the right of appeal with a modified limited right of access to judicial review' (paragraph 12 of the judgment). That report provided, inter alia, that 'Avoidance of delay in the effective exchange of information by

the use of rights and safeguards provided by the States which are parties to the J/NTIEA is one of the J/NTIEA's objectives'. The judgment continued: "15. The key words for consideration are in reg. 14A(1): "An appeal lies to the Privy Council from a decision of the Royal Court on a judicial review to which Regulation 14 applies." We were encouraged to focus only on the words "to which Regulation 14 applies," so that the argument could shift to challenges to the lawfulness of reg. 14, but the central question is whether or not there has been "a decision of the Royal Court on a judicial review to which Regulation 14 applies." Put that way it is clear and obvious that (1) there has been a decision of the Royal Court, and (2) that decision was on a judicial review to which reg. 14 applies. 16. The applicants' contention is that the combined effect of regs. 14 and 14A is that the States have excluded "the fundamental right of meaningful access to the Court, to natural justice and to freedom from arbitrary state interference." 17. The complaint, when cleared of some of the clutter, was that there was no judicial review at all to which reg. 14 applied because reg. 14 was void/a dead letter as it fell outside the rule-making power in the 2004 Law, and, therefore, the judicial review had in fact and in law been made under Part 16 of the Royal Court Rules 2004, so that there was an untouched right to apply for leave to appeal under the Court of Appeal (Civil) (Judicial Review) Rules 2000." 11. Various criticisms of the Regulations were made by the Appellant in Larsen which are summarised at paragraph 28 of the

judgment.

They were rejected; in particular the criticisms in relation to the scope of Regulation 14 and 14A as follows: "37. So far, we are satisfied that regs. 14 and 14A do not unlawfully oust the courts' ability to determine disputes relating to the issue of notices under the 2008 Regulations as amended, nor prevent access by affected persons to the court system in Jersey. We do not see regs. 14 and 14A as ouster provisions at all but rather the creation of an alternative, but effective, means of challenging the lawfulness/validity of the notices-in which all the usual public law and human rights arguments can be deployed (with the minor restriction on technical grounds imposed by reg. 14(2)). It is part of a statutory scheme "which allocates jurisdiction" (Farley v. Works & Pensions Secy. (3) (

[2006] 1 WLR 1817, at para. 18, per Lord Nicholls)). 38. Further, for the reasons set out above, we do not accept Advocate Harvey-Hills' overarching argument that, as reg. 14A applies only to appeals to the Privy Council in relation to a judicial review to which reg. 14 applies, the Court of Appeal retains its jurisdiction where there is a challenge to the legality of the Regulations themselves, or where there are challenges based on a breach of the Convention. This is a non sequitur and fails to recognize that the grounds for judicial review of a decision made under the Regulations can include (and here did include) allegations of illegality and breach of fundamental rights. Raising such grounds does not take the judicial review outwith reg. 14. 39. That leaves for determination the argument that the strict time limits in reg. 14 offend art. 8(3) of the Human Rights Law 2000, and that the time limits in reg. 14A offend the times prescribed by the Privy Council. The first point

has caused us the most concern but in the end we have decided that the challenge on this ground must also fail, and it does not in any event lead to the conclusion that this court has jurisdiction in relation to an appeal from the judicial review brought by these applicants." 12. It can be seen that the attempt to adopt a restrictive (one could say irrational) interpretation to these provisions was rejected by the Court of Appeal. Towards the end of the judgment, Fleming JA said: "48 Finally, it is argued that the time limits in reg. 14A are inconsistent with the provisions of the Judicial Committee Act 1833 and the Judicial Committee (Appellate Jurisdiction) Rules 2009. We see no conflict and no attempt to overrule the Privy Council time limits. What has happened is that Jersey has placed time restrictions at a Jersey level to enable the authorities here to know at an early stage whether or not an application for leave to appeal has been made, so that the release of the information to the requesting state remains in abeyance until the end of the appeal process, unless the automatic triggers in reg. 14A(5) apply." 13. The submissions filed by the Applicant in support of its contentions were extensive; those filed by the Respondent were short and did not exceed one page. 14. It was argued on behalf of the Respondent that the position was straightforward. Regulation 14A deals with decisions of the Royal Court to which Regulation 14 applies. 15. Regulation 14 provides, so far as is relevant, as follows: "14. Judicial review: limitations (1) Despite any Rule made to the contrary under the Royal Court (Jersey) Law 1948, an application for leave to apply for judicial review may not be made - (a) by a taxpayer, against a requirement made of that taxpayer under Regulation 2, later than 14 days after the requirement arose under Regulation 2; (b) by a person, against a requirement made of that person in a third party notice, later than 14 days after the third party notice was given to that person under Regulation 3; or (c) by a taxpayer, against a requirement made of a third party in respect of that taxpayer, later than 14 days after the copy of the third party notice was given to that taxpayer under Regulation 3. (3) Despite any application for leave to apply for judicial review being made - (a) a taxpayer or a third party shall provide the competent authority for Jersey the information requested in the notice served under Regulation 2 or 3, as the case may be, within the time limits specified in the notice; but (b) the competent authority for Jersey shall not provide to the competent authority for the third country the tax information obtained under these Regulations unless - (i) the application for leave to apply for judicial review or any subsequent application for judicial review is dismissed, (ii) the application for leave to apply for judicial review or any subsequent application for judicial review is withdrawn or discontinued, or (iii) the competent authority for Jersey is permitted to do so by the Royal Court. (4) In all other respects the Royal Court shall apply the principles applicable on an application for judicial review." 16. The Respondent says Regulation 14 clearly applies in its terms to applications for leave to apply for judicial review. Indeed, the judgment handed down by the Court on 24 th May 2022 was an event expressly contemplated by Regulation 14(3)(b)(i); an application for leave to apply for judicial review which was dismissed. This was an application the type of which was expressly catered for and envisaged by Regulation 14. 17. The position is in my judgment as simple and straightforward as contended for by the Respondent. Accordingly, an appeal against

the decision refusing leave lies only to the Privy Council and not to the Court of Appeal. It is only the Privy Council that may give leave to appeal in those circumstances and accordingly there is no need for me to consider the question of leave to appeal to the Court of Appeal. In any event, I do not accept that it is, as contended by the Applicant, 'highly arguable that the Court of Appeal has jurisdiction to hear the Applicant's appeal' . As I have said, I regard the provisions of the relevant Regulations as clear and even if they had been less clear I would have construed the reference to 'judicial review' in Regulation 14A to encompass applications for leave. Stay pending appeal 18. The second issue for my consideration was whether or not I had power to stay the effect of my decision to refuse leave to apply for judicial review pending the Applicant filing a Notice seeking permission to appeal to the Judicial Committee of the Privy Council and whether or not in those circumstances I am entitled to direct the Respondent not to provide to the Belgian tax authorities any of the documentation secured under the Notice pending the resolution of the Applicant's application for leave to appeal to the Privy Council. 19. The Respondent argued that I had no power to stay the effect of the decision I handed down pending appeal. The Respondent argued that the prohibition that existed as a matter of law preventing transmission of the tax information provided by the Applicant ceased once the Court has made a ruling under Regulation 14(2)(b)(i). There is no mention of a stay pending appeal in Regulation 14 or indeed Regulation 14A. The Respondent says that it was not the Court that made an order that the information could not be sent pending the Applicant's application for leave - that was the effect of Regulation 14(3)(b). Once the Court has refused then there is nothing to prevent transmission. The Respondent further says that Jersey has undertaken obligations internationally for the efficient and effective exchange of tax information. Once a Court of competent jurisdiction has considered the challenge to the obtaining of the tax information and it has found that the Applicant cannot show that there is a realistic prospect of successfully persuading the Court of the grounds that were challenged, there should be no further delay in the transmission of tax information to the relevant tax authority. The Respondent is correct to point to the fact that there is nothing in the legislation providing the Court with the power to order a stay of provision of the information pending appeal and one might have expected to see a specific power to the effect bearing in mind the purpose for which this legislation was adopted and the international imperative of these requests for information being dealt with timeously. 20. The Applicant in response says that disclosure prior to the resolution of its application for leave to appeal to the Privy Council would render its right of appeal nugatory. Further, they rely upon an Act of Court issued by Commissioner Beloff on 27 th November 2015 in the Larsen litigation. Both advocates were familiar with the litigation in question and were confident that no reasoned judgment was ever issued by the judge. Nonetheless, it is useful to set out the relevant terms of the Act of Court issued on 29 th November 2015 in the proceedings between Larsen and the States of Jersey and the connected proceedings between Volaw Trust and the States of Jersey. The Act of Court provided that upon hearing the parties through the intermediaries of their advocates, the Court 'for the reasons set out in a judgment delivered by the Commissioner' (no such

judgment on this point was issued) ordered, inter alia , that: "3. the First Respondent (including its employees and agents) shall not provide to the Norwegian Competent Authority or any other body all or any of the documents or information provided to it pursuant to the Notices pending the determination or withdrawal of appeals to be brought by the Applicant against the dismissal of this judicial review application to the Court of Appeal to the Judicial Committee of the Privy Council ("the Stay"); 4. the Stay is conditional on the Applicant filing notice of appeal to the Court of Appeal and its application for permission to appeal to the Judicial Committee of the Privy Council within fourteen days of this date..." 21. The Applicant observes that Commissioner Beloff clearly felt that he had a power to issue a stay in not dissimilar circumstances pending appeal and that he was considering these Regulations, which had been introduced in 2013. The reference to the Court having a power to grant a stay in judicial review proceedings under Royal Court Rule 16/2 (16) was drawn to my attention by the Applicant but does not apply to these circumstances. Reference was also made to the Judicial Committee (Appellate Jurisdiction) Rules 2009, in particular Rule 39 which provides: "Any appellant who wishes to obtain a stay of execution of the order appealed from or some conservatory order pending an appeal must seek it from the Court below in the first instance. In exceptional circumstances the Judicial Committee may grant a stay of execution or a conservatory order." However, this Rule does not on itself purport to confer such a power on the lower Court - it merely requires the Appellant to seek their stay or other conservatory orders from the Court below. 22. The Applicant also drew my attention to the decision of the English Court of Appeal in *Regina v Ashworth Special Hospital Authority*

[2003] 1 WLR 127 , a judicial review of decisions under the mental health legislation. In his judgment, Dyson LJ said at paragraph 42: "42. The purpose of a stay in a judicial review is clear. It is to suspend the 'proceedings' that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell LJ said that the phrase 'stay of proceedings' must be given a wide interpretation so as apply to administrative decisions. In my view it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. 45. I return, therefore, to the question whether the court has jurisdiction to grant a stay in cases B and C. As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being. 46. I now turn to the third situation, which

occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history." 23. My attention was also drawn to the decision of the English Court of Appeal in *Y D v Secretary of State for Home Department*

[2006] EWCA Civ 52 which considered whether or not the Court had an inherent jurisdiction to order the Home Secretary to refrain from moving an applicant for asylum from the country whilst that person was seeking permission to appeal. Brooke LJ said at paragraph 24 that the Court had: "...an inherent jurisdiction to protect its proceedings being set at naught and to exercise that jurisdiction in the present case by requiring the Home Secretary, as a party to the proceedings, to refrain from removing the applicant from the jurisdiction while it considers the application before it. This will not be a stay in the ordinary sense of staying further action within the proceedings (as, for instance, with a stay on the execution of a judgment), but an order in effect preserving the status quo (namely the presence of the applicant within the jurisdiction) until the Court makes determination on the application." 24. The Respondent's advocate accepted in the course of submission that transmission of the material supplied under the Notice would render the appeal nugatory if the purpose of the appeal was to prevent transmission. Had it not been for the decision from Commissioner Beloff then I might have accepted the Respondent's argument. The Respondent argued 'what is there to stay?', the Court has not made an order - simply refused to grant leave to apply for judicial review. Nonetheless, I am persuaded that the Court does have an inherent power in these circumstances to stay the effect of the order made and grant consequential orders to hold the ring pending appeal. In those circumstances I agree with the Applicant that the relevant principles are those established in *Veka v Picot*

[1999] JLR 306 as most recently accepted by the Court of Appeal in *C v Trilogy Management Limited*

[2012] JCA 113 in which McNeill QC JA said: "26. It cannot fall to me, sitting as a single judge of the Court of Appeal, to declare of new the proper approach in this jurisdiction in respect of applications for stay of execution. I therefore consider the factors put forward by the respective parties on the basis set out in *Veka A. G.-v-T. A. Picot* to the effect that the order should not prevent the appeal, if successful, from being nugatory unless I am satisfied that the appeal is not presented in good faith, has no realistic chance of success or that there are other exceptional circumstances." 25. In the circumstances, I granted a stay and made consequential orders as set out above, directing the Respondent shall not provide to the Belgian Tax Authorities any of the documentation provided pursuant to the Notice pending resolution of the Applicant's application for leave to appeal to the Privy Council

on condition that the Applicant file a Notice seeking permission to appeal within fourteen days of the 24 th May 2022, but that if the Privy Council refuses leave to appeal or gives leave and the appeal is unsuccessful then the documents may be provided to the Belgian Tax Authorities forthwith without any further order of the Court. Authorities Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008. Bennion , Bailey and Norbury on Statutory Interpretation (8 th Edition 2020). Larsen and Volaw Trust and Corporate Services v Comptroller of Taxes

[2016] (2) JLR 198. Royal Court Rules. Judicial Committee (Appellate Jurisdiction) Rules 2009. Regina v Ashworth Special Hospital Authority

[2003] 1 WLR 127 . Y D v Secretary of State for Home Department

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