

JERSEY / JUDGMENT

Imperium Trustees (Jersey) Limited v Jersey Competent Authority

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Judicial review [2024]JRC048 Royal Court (Samedi) 28 February 2024 Before : M. J. Thompson, Esq., Commissioner, sitting alone Between Imperium Trustees (Jersey) Limited Applicant And Jersey Competent Authority Respondent Advocate J. Harvey-Hills for the Applicant. Advocate G. G. P. White for Respondent.

judgment

the COMMISSIONER: 1. This judgment contains my decision for granting the Applicant (1) leave to amend its grounds of judicial review and (2) permission to rely on the additional ground in judicial review proceedings.

Background

2. The present application arises from a judgment of the Court of Appeal issued in January of this year Imperium Trustees (Jersey) Limited v Jersey Competent Authority [2024] JCA 014 (“the Court of Appeal Costs Judgment”). The Court of Appeal Costs Judgment followed on from an earlier judgment reported at Imperium Trustees (Jersey) Limited v Jersey Competent Authority [2023] 1 JLR 229 (“the Court of Appeal’s Substantive Judgment”). 3. In the Court of Appeal’s Substantive Judgment, the Court of Appeal allowed the Applicant’s appeal against a decision of the Deputy Bailiff refusing the Applicant leave to apply for judicial review. I add for the sake of completeness that the Court of Appeal’s Substantive Judgment followed on from an earlier decision of the Court of Appeal where the Court of Appeal considered whether or not it had locus to entertain an appeal against a decision by a judge of the Royal Court to refuse leave to an applicant to bring judicial review proceedings pursuant to the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 and the Taxation (Implementation) (Convention on Mutual Administrative Assistance in Tax Matters) (Jersey) Regulations 2014. I refer to these Regulations in this judgment as the 2008 Regulations and the 2014 Regulations and together as the 2008 and 2014 Regulations. 4. The detailed provisions of the 2008 and 2014 Regulations were set out in the Court of Appeal’s Substantive Judgment at paragraphs 22 to 29 and I adopt those paragraphs for the purposes of this judgment. 5. The Court of Appeal’s Substantive Judgment in the section at paragraphs 30 to 41 set out the legislative history of Regulation 3 of the 2008 Regulations. Again, I adopt these paragraphs for this judgment. The significant change made

to Regulation 3 as noted at paragraph 34 was that in 2013 the merits based right of appeal to the Royal Court was replaced with a process of judicial review to challenge a Notice issued under the 2008 and 2014 Regulations. The changes also included providing that an appeal against the decision of the Royal Court on a judicial review lay with the Judicial Committee of the Privy Council only, thus bypassing any appeal to the Court of Appeal. 6. At paragraph 38, the Court of Appeal noted that any decision of the Respondent to issue a Notice under Regulation 3 of the 2008 Regulations was susceptible to judicial review on conventional grounds as was considered by Commissioner Beloff QC in *Larsen v Comptroller of Taxes* [2015] (2) JLR 209 at paragraph 49(5). 7. The same judgment at paragraphs 39 and 40 stated as follows: “39 A notice under reg. 3(1) may also be susceptible to challenge under reference to the Human Rights (Jersey) Law 2000. The respondent has not disputed, in this case, that art. 8 is engaged. As the observations of the European Court of Human Rights in *Bernh Larsen Holding A.S. v. Norway* (4) ([2013] ECHR 220, at paras. 104-107) illustrate, art. 8 may in certain respects and in certain contexts be relied upon by non-natural persons. We proceed on the basis that art. 8 would be engaged by the compulsory disclosure of confidential information, at least where such information is personal information about natural persons, and by the onward transmission of that information to a foreign tax authority. It follows that the court must be satisfied, in the event of a judicial review relying on art. 8 which satisfies the threshold for leave, that a notice issued under reg. 3, is "in accordance with law." 40 Since the respondent has no power, under the current version of the Regulations, to require the provision of information which is not "tax information," as defined, we take the view that this means, in a case where the matter is properly put in issue, the court requires to determine for itself whether the information which the notice requires the appellant to produce is "tax information"- i.e. whether the statutory test set out in art. 1A of the 2008 Regulations (as adjusted, where appropriate, for the purposes of the application of the 2014 Regulations) is met. If the information is not, in fact, "tax information," the respondent has no power to require it to be produced, and the notice would not satisfy the legal requirements of the Jersey statutory regime.” 8. Paragraph 41 of the judgment also explored whether or not an application for leave to bring judicial review on the basis the information sought was not tax information should not create undue difficulties for the administration of the statutory regime. The Court therefore said this: “The court would, in considering any judicial review, apply the threshold test of foreseeable relevance which, as we will explain, is not unduly exacting. The court would be entitled to rely on any statement or explanation of foreign tax law provided by the requesting authority and put into evidence by the respondent. By reason of the nature of the statutory test, the court would not, as a general rule, require to adjudicate on a dispute as to the content or application of foreign tax law, which would, ultimately, fall to be determined, once any investigations have concluded, by the relevant authorities-including the courts-of the requesting jurisdiction. Both at the leave stage and if leave is granted, the respondent would require to place before the court sufficient information about the foreign tax regime and the tax purpose which has motivated the request to enable the court to adjudicate on the question. In assessing whether to accept any evidence produced by the respondent explaining why it has concluded that the link

between the information sought and the tax purpose satisfies the statutory test, the court would be entitled to take into account the respondent's expertise in matters of tax administration and enforcement. Since the respondent must itself be satisfied that the information is "tax information" and would, in any event, need to explain to the court the basis of its conclusion in compliance with the duty of candour which was discussed in *Larsen* (6) (2015 (1) JLR 430. at paras. 17-18), and in *Haskell*

- v. Comptroller of Taxes (5), the requirement to provide sufficient information to satisfy the court that it should agree with that conclusion should not impose any material additional burden on the respondent.” 9. In relation to the test for leave to apply for judicial review, the Court observed at paragraph 105 as follows: “105 There has been no dispute before us as to the test for leave to apply for judicial review. The appellant must satisfy the court that it has an arguable ground of judicial review, with realistic prospects of success, which merits investigation at a full hearing. Whether the ground of review is a good one would, of course, be the issue in the judicial review and a decision to grant leave to apply for judicial review does not prejudice that issue.”
- 10. The case then discussed at paragraphs 106 to 126 its reasons for granting the appellant leave to apply for judicial review on the first proposed ground of review relied upon by the Applicant, namely that the challenge to the conclusion of the information sought was “tax information for the purposes of the 2008 Regulation and the 2014 Regulation”. It is not necessary for the purposes of this judgment to set out that detailed reasoning.
- 11. In relation to Human Rights arguments under Article 8 of the European Convention on Human Rights (“the Convention”), the Court of Appeal at paragraph 130 of the Court of Appeal’s Substantive Judgment said this: “We doubt whether, in the circumstances of this particular case, any separate question will arise in relation to Article 8 of the European Convention on Human Rights.”
- 12. The Court then made the following observation: “There was no dispute before us that art. 8 was engaged. As we have observed above, we consider that the court must itself, when considering whether the interference in art. 8 would be "in accordance with law," determine whether the notice complies with the statutory requirements of Jersey law. If the notice in the present case is lawful, we doubt if it could be said to be disproportionate. A lawful notice under the Regulations would serve an important public policy purpose-namely, Jersey's compliance with its obligations under the treaties to which we have referred and the substantive policy objectives to which those treaties are directed.”
- 13. In the Court of Appeal Costs Judgment, the Court of Appeal made no order as to costs following on from the Court of Appeal’s Substantive Judgment. The Court made this order because of the effect of the International Cooperation (Protection from Liability) (Jersey) Law 2018 (“the 2018 Law”). The provisions of the 2018 Law are set out at paragraphs 41 to 43 of the Court of Appeal Costs Judgment. Again, I adopt this summary for the purposes of this judgment.

14. In relation to the 2018 Law, the Court of Appeal Costs Judgment also made a declaration of incompatibility under Article 5 of the Human Rights (Jersey) Law 2000. The majority (Matthews JA and W. Bailhache JA) concluded that the 2018 Law did not pursue a legitimate aim. They concluded in summary that the aim was to save the public purse. Wolffe JA disagreed on this conclusion and accepted that the 2018 Law pursued a legitimate aim. However, all three judges agreed that the costs rule in the 2018 Law was not proportionate and therefore was not compatible with Article 6 of the Convention.
15. I observe at this stage that the Respondent is currently seeking leave from the Court of Appeal to appeal the Court of Appeal Costs Judgment. However, that issue has not yet been determined. If leave to appeal is refused by the Court of Appeal, it is open to the Respondent to then make an application for special leave to the Judicial Committee of the Privy Council. As matters stand, I was informed that currently the Respondent intends to make such an application.
16. The additional ground the Applicant wished to rely upon was summarised at paragraph 28(e) of its Amended Notice as follows: “That in issuing the Notice, the Respondent has acted in a way which is incompatible with the Applicant's rights under the European Convention on Human Rights (the Convention) contrary to Article 7(1) of the Human Rights (Jersey) Law 2000 (HRL 2000).”
17. The detail behind this ground was set out at paragraphs 90 to 104, leading the Applicant to contend at paragraph 107 of its Amended Notice that: “the issuing of the Notice amounted to an act which was Incompatible with a Convention right and was therefore unlawful under Article 7(1) HRL 2000.”
18. The Applicant also sought to add in a power to award damages under Article 9(1) of the Human Rights (Jersey) Law 2000, the damages being its inability to obtain costs orders in the proceedings. Discussion
19. The issue at the heart of the application to amend was whether or not the threshold for granting leave for judicial review proceedings was met in relation to the amendments proposed by the Applicant. If the threshold was met, then it was accepted that leave to amend should be given.
20. That threshold was referred to briefly in the Court of Appeal’s Substantive Judgment at paragraph 105 set out above. I also recently explored the test for leave in *Buckley v Minister for Treasury and Resources* [2023] JRC 209 at paragraphs 106 to 110 and stated at paragraph 109 the following: “109. What I therefore draw from the previous authorities is that when considering a leave application, a judge has to be satisfied that there is an issue that requires a full hearing with the costs that that necessarily involves. In particular, where what is alleged is irrationality or procedural impropriety, the question for the judge is whether the issue raised is one that requires determination by the Jurats. In other words, does the issue raised based on all the material before the judge give rise to competing arguments, either of which might persuade the Jurats (or a judge on a pure point of law) with the benefit of all the

evidence and full argument. If so, then leave should be granted. If, on the other hand, the arguments raised are fanciful or improbable then leave should be refused.”

21. The argument Advocate Harvey-Hills wished to advance was that the effect of the Court of Appeal Costs Judgment, which ruled that the 2018 Law was incompatible with Article 6 of the Convention, meant that the Applicant now wished to argue that the entire scheme of challenging Notices issued under the 2008 Regulations and 2014 Regulations by way of judicial review proceedings was not compliant with the Convention. In other words, the conclusions of the Court of Appeal Costs Judgment were not limited to the Applicant’s inability to recover its costs of its successful appeal from the Respondent because of the 2018 Law. Rather, the mechanism to challenge the issue of Notices was also not compliant with Articles 6 and 8 of the Convention. In support of his argument, he referred to the Attorney General’s concession at paragraph 171 of the Court of Appeal Costs Judgment that the costs rule in the 2018 Law was a restriction on the right of access to the Court. The argument he wished to develop was that because the Costs rule was such a restriction, it also rendered the mechanism for challenging a decision of the Respondent to issue such a Notice as being in breach of Articles 6 and 8.
22. He accepted that his application therefore required the Royal Court to depart from its previous decision in *Larsen v Comptroller of Taxes* [2015] (2) JLR 209, which predated the enactment of the 2018 Law, in particular the conclusions at paragraph 49(v) and 50 which state as follows: “(v) In those circumstances, which further define and circumscribe the decision to be made by the Comptroller, it seems to me that judicial review is an appropriate remedy compatible with ECHR, art. 6. It is open to an applicant, if it can, to impugn the Comptroller’s judgment as unreasonable in the public law sense. (I accept that, even though the epithet reasonable has disappeared from the vocabulary of the 2008 Regulations as amended, it remains implicit in them. See the Deputy Bailiff in *Temple* (59) (2015 (1) JLR 203, at para. 38).) If the Comptroller is not obliged to verify the facts underlying the request, the person on whom the notice is served cannot complain, other than in exceptional circumstances, of his omission to do so. If he is not obliged to form a view on matters of foreign law, such person cannot compel him to do so by advancing an argument of foreign law itself said to undermine the validity of the request. 50 The fact that the scope for challenge at the suit of an applicant may be limited cannot mean per se that he is entitled to a more intrusive or wide-reaching legal remedy than judicial review; if anything the reverse must be the position, Judicial review has in any event been held to be an appropriate mechanism to resolve issues relating to the production of evidence obtained by a notice issued pursuant to the Investigation of Fraud (Jersey) Law 1991: see *Durant Intl. Corp. v. Att. Gen.*
- (22) and in cases brought by reference to a TIEA such as *Larsen No. I* and the later Jersey cases (see also *Derrin* (48) ([2014] S.T.C. 2238, at paras. 77-78)).”

23. His contention was that the conclusions reached in Larsen had to be reconsidered following the enactment of the 2018 Law and were affected by the Court of Appeal's conclusions in the Court of Appeal Costs Judgment.
24. This challenge extended to a breach of Article 8 as well as Article 6 of the Convention. Advocate Harvey-Hills referred to paragraph 53 of Larsen where Commissioner Beloff accepted that Article 8 was also relevant in support of the Applicant's reliance on Article 8.
25. He supported his contentions by reference to a decision of the English High Court in Regina Gudaviciene v Director of Legal Aid Case Work and Another [2015] 1 WLR 2247 and the discussion at paragraphs 64 to 70. The Gudaviciene case was about the validity of directions issued by the Director of Legal Aid to case workers acting on his behalf. Paragraph 65 in that case referred to the W v UK (1988) 10 EHRR 29 decision where the European Court of Human Rights said this: "In the court's view, what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of article 8."
26. Paragraph 70 stated this: "It is true that the test for article 8 as it is stated in the Strasbourg jurisprudence (whether those affected have been involved in the decision- making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests) differs from the test for article 6.1 (whether there has been effective access to court). The article 8 test is broader than the article 6.1 test, but in practice we doubt whether there is any real difference between the two formulations in the context with which we are concerned. There is nothing in the Strasbourg jurisprudence to which our attention has been drawn which suggests that the European Court of Human Rights considers that there is any such difference. In practice, the court's analysis of the facts in the case law does not seem to differ as between article 6.1 and article 8. This is not surprising. The focus of article 6.1 is to ensure a fair determination of civil rights and obligations by an independent and impartial tribunal, Article 8 does not dictate the form of the decision- making process that the state must put in place. But the focus of the procedural aspect of article 8 is to ensure the effective protection of an individual's article 8 rights. To summarise, in determining what constitutes effective access to the tribunal (article 6.1) and what constitutes sufficient involvement in a decision-making process (article 8), for present purposes the standards are in practice the same." [Emphasis added]
27. I have emphasised the final sentence because Advocate Harvey-Hills contended that it was not open to the Respondent to seek to re-argue the conclusions of the Court of Appeal Costs Judgment which bound the Respondent. While I accept that the impact of the Court of Appeal Costs Judgment means that the Applicant has met the threshold for leave to judicial review being granted because it is arguable that an applicant's inability to recover costs

renders the whole of the scheme to challenge Notices issued under the 2008 and 2014 Regulations invalid, at this stage that is only an argument.

28. The Gudnaviciene case to which Advocate Harvey-Hills referred requires the Court to evaluate whether the prevention from recovering costs denies applicants wishing to bring judicial review proceedings to challenge the issue of a Notice by the Respondent “effective access” to the Royal Court. The Royal Court may also have to consider whether an applicant wishing to challenge any Notice has sufficient involvement in a decision-making process. As it was put at paragraph 71 of the Gudnaviciene case: “the significance of the cases lies not in their particular facts, but in the principles they establish, viz (i) decision-making processes by which article 8 rights are determined must be fair; (ii) fairness requires that individuals are involved in the decision-making process, viewed as a whole, to a degree that is sufficient to provide them with the requisite protection of their interests; this means that procedures for asserting or defending rights must be effectively accessible; and (iii) effective access may require the state to fund legal representation.”
29. This principle was also recognised in the Court of Appeal Costs Judgment case itself. In exploring the question of whether the costs provision in the 2018 Law was incompatible with the principle of equality of arms, the Court of Appeal stated the following at paragraph 152: “152. Although the Court acknowledged that the applicant's access to a court was not at issue, it observed at [60] that “there may be situations” in which the issues linked to the determination of litigation costs can be of relevance for the assessment as whether the proceedings in a civil case seen as a whole have complied with the requirements of the Article 6(1). It observed at [68] that the rule gave the prosecutor a privileged position with respect to the costs of civil proceedings. Whilst such a privilege “may be justified for the protection of the legal order ... it should not be applied so as to put a party to civil proceedings at an undue disadvantage vis-à-vis the prosecuting authorities”. In the circumstances of the case, it had that effect and there was accordingly a breach of Article 6.”
30. In other words, the Court of Appeal appeared to be recognising that an inability to recover costs was of relevance to an assessment of whether the proceedings in a civil case as a whole complied with Articles 6 and 8. As I read the Court of Appeal Costs Judgment and subject to further argument, the Court of Appeal did not however appear to reach a conclusion on this point.
31. While therefore the Respondent cannot seek to re-litigate the declaration of incompatibility in relation to the 2018 Law in the judicial review proceedings permitted by the Court of Appeal in the Court of Appeal’s Substantive Judgment, as amended by this judgment, that does not prevent the Respondent from arguing that the costs provision declared incompatible by the Court of Appeal does not mean that the current judicial review mechanism contained in the 2008 Regulations is also incompatible with Articles 6 and 8 of the Convention. The argument has not been determined.

32. It is because I concluded that the effect of the Court of Appeal Costs Judgment on the substantive judicial review proceedings was arguable that I permitted the Respondent to file further evidence, if the Respondent wished to do so, in relation to the nature of requests made under the 2008 and 2014 Regulations to enable the Court to assess the likely impact of the 2018 Law on individuals bringing a challenge under the 2008 and 2014 Regulations. In making this order I recognise that the effect of the 2018 Law is that every pound spent by the Applicant on the proceedings is “dead money”. However, that does not preclude the Respondent, if it wishes to do so, from analysing the effect of the 2018 Law and the effect of the cost provisions on the mechanism for challenging the issue of such Notices under the 2008 and 2014 Regulations and whether or not the Regulations are in breach of Articles 6 and 8. The outcome of that argument and any evidence adduced is a matter for another day.
33. For these reasons I granted the Applicant leave to amend its Schedule 5 Notice and its grounds of judicial review and leave to bring judicial review proceedings in respect of the additional ground, with it being heard at the same time as the grounds in respect of which the Court of Appeal has already given leave in the Court of Appeal’s Substantive Judgment. I also set a timetable for the filing of further evidence and the filing and exchange of skeleton arguments. Finally, costs were reserved until determination of the substantive judicial review proceedings. Authorities *Imperium Trustees (Jersey) Limited v Jersey Competent Authority* [2024] JCA 014. *Imperium Trustees (Jersey) Limited v Jersey Competent Authority* [2023] 1 JLR 229. *Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008*. *Taxation (Implementation) (Convention on Mutual Administrative Assistance in Tax Matters) (Jersey) Regulations 2014*. *Larsen v Comptroller of Taxes* [2015] (2) JLR 209. *International Cooperation (Protection from Liability) (Jersey) Law 2018*. *Human Rights (Jersey) Law 2000*. *Buckley v Minister for Treasury and Resources* [2023] JRC 209. *Regina (Gudanaviciene v Director of Legal Aid Case Work and Another*

[2015] 1 WLR 2247. *W v UK* (1988) 10 EHRR 29

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