Case comment - Banks v HMRC: human rights and relief for political donations

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Banks v HMRC: human rights and relief for political donations

Introduction

Although the interaction between domestic tax laws and the European Convention on Human Rights (ECHR) was once something of a rarity, in recent decades the two have come into contact with increasing frequency. In particular, domestic taxation law impacts on property rights (real and personal), and such laws have to be respectful of such rights, avoiding disproportionate restrictions and tax encumbrances. It is, however, unusual for tax laws to come into conflict with rights to freedom of expression and association.

Recently the First-tier Tax Tribunal has decided that the requirement in section 24(2) of the Inheritance Tax Act 1984 (IHTA) for a political party to be represented in the House of Commons before donations to it were exempt from inheritance tax discriminated against parties with significant support but insufficient Parliamentary representation. This, in the Tribunal's view was contrary to Article 14 of the ECHR which prohibits discrimination, in conjunction with Article 1 of the First Protocol to the Convention, which guarantees the right to peaceful enjoyment of possessions and property. However, although the Tribunal noted that there were other means of demonstrating significant public support available to the law, which would not have a disproportionate effect, it also stressed that the choice of those less restrictive means was a matter for Parliament and not for the Tribunal. Accordingly, as the Tribunal was unable to re-write the legislation, the taxpayer's appeal against assessment to inheritance tax in respect of gifts to the political party was dismissed.

This case is relevant not only for tax lawyers, but also those interested in the law relating to political association and the regulation of political parties and their affairs. It is also of significance to human rights lawyers in terms of how those laws have to comply with principles of legality, proportionality and the prohibition of discrimination.

The facts and decision in *Banks*

The taxpayer, and companies with which he was connected, made donations of almost £1 million to the UK Independence Party (UKIP) between October 2014 and March 2015. HMRC assessed him to inheritance tax on the basis that the donations did not qualify for exemption under section 24 IHTA as gifts to qualifying political parties, because such parties are required to have at least one Member of Parliament[1] elected at the last general election preceding the transfer of value. UKIP had no candidates elected as MPs at the last general election, although it had been successful in other ways[2] and,

[1] IHTA 1984 s. 24(2).To qualify a party must have one MP and 150,000 votes or two MPs elected at the last general election.

[2] The Tribunal acknowledged that: (1) UKIP secured a greater proportion of the popular vote at the 2010 General Election than other parties that succeeded in having candidates elected; (2) at the time of some of the donations, there were two UKIP MPs i.e. two by-election wins; (3) at all material times, UKIP was a registered political party under the Registration of Political Parties Act 1998 or the Political Parties Referendums and Elections Act 2000; (4) at the time of the donations, UKIP was widely represented on

by the time of the transfer, did in fact have two MPs[3] following by-election victories in late 2014. The taxpayer maintained that the requirement of the section 24(2) exemption for a political party to be represented in the House of Commons was contrary to his rights under the Convention and relevant EU law, arguing that its application in his case involved discrimination contrary to Article 14 together with Article 1 of the First Protocol, and/or Articles 10 and 11, which guarantee, respectively freedom of expression and freedom of assembly and association.

The Tribunal held first that in principle the tax provisions fell within Article 1 of the First Protocol as they deprived the person concerned of a possession, namely the amount of money that had to be paid.[4] Thus, it was common ground that any potential discrimination arising from the application of section 24(2) fell within the ambit of that Article.[5] It then noted that there was a difference to the donor between the tax treatment of a gift made to UKIP and one made to another, qualifying, political party.[6] However, it was then necessary for the taxpayer to demonstrate that the differential treatment that he had suffered was based on one of the proscribed grounds in Article 14.[7] In this case, the differential treatment of which the taxpayer complained was discrimination on the grounds of his political opinion within Article 14.[8] As a result of this finding, the Tribunal held that it was not necessary to decide whether Articles 10 and 11 ECHR (Freedom of expression and association and assembly) were engaged or breached, nor whether UKIP's ECHR rights had been breached or whether the taxpayer could rely on such a breach. Further, the taxpayer could not rely on Article 4(3) of the EU Treaty which did not create any directly enforceable right.

The Tribunal then considered whether the discriminatory treatment was objectively justified and whether it was proportionate to any legitimate aim that the statutory provision sought to achieve. In this respect the Tribunal stated that the correct approach was to determine whether, after weighing all relevant factors, the measure adopted achieved a fair balance between the public interest being promoted and the other interests involved.[9] In the Tribunal's view, political opinion, expressly referred to in Article 14, was a sensitive ground of discrimination[10] in relation to which cogent

local councils; (5) UKIP candidates had been elected to the European Parliament at the preceding election, with the largest proportion of the popular vote of any UK party at those elections, and had more elected members of the European Parliament than any other UK political party.

[3] The successful UKIP candidates were Douglas Carswell and Mark Reckless.

[4] *Banks v Revenue and Customs Commissioners* [2018] UKFTT 617, at 24.

[5] *Banks*, above fn. 4 at 24; following *Burden and Burden v United Kingdom* (2007) 44 EHRR 51.

[6] *Banks*, above fn. 4 at 26.

[7] *Banks*, above fn. 4 at 27; following *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

[8] *Banks*, above fn. 4 at 46. It then held (at 57) that if that was wrong, the taxpayer's status as a supporter of UKIP was not some "other status" for the purposes of Article 14, because the "other status" had to exist independently of the discrimination of which the person complained, following *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54. The Tribunal also found that the taxpayer was in an analogous position to others who did not suffer the taxation on their political gifts, namely those individuals who made gifts to the Labour Party or the Conservative Party.

[9] *Banks*, above fn. 4 at 71-76, and applying the Supreme Court decision in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, Re* [2015] UKSC 3.

[10] In other words, in terms of judicial review, one which is particularly difficult to justify any differential treatment.

reasons are required for any differential treatment.[11] This notwithstanding, the Tribunal acknowledged that tax was an area in which due deference had to be shown to the legislature.[12] In the present case, the legislation pursued a legitimate aim as the exemption in section 24(2) was designed to ensure that a potentially valuable tax relief was limited to prevent abuse However, the chosen means for achieving the aim was disproportionate and the requirement for representation in the House of Commons did not strike a fair balance in the context of the provision of tax relief for the funding of political parties. This was because other means of demonstrating significant public support were available which would not have a disproportionate effect on new political parties or those without representation.[13]

Having made that determination, and considering what remedy was available to the parties, the Tribunal stated that section 24(2) could not be re-written under section 3 of the HRA 1998 so as to remove the restriction on the availability of relief. That would go against the grain of the legislation, as its legitimate aim was to limit relief to political parties that enjoyed a level of public support. Although the section could be re-written to be compliant, that was a matter for Parliament and not for the Tribunal.[14] Further, the Tribunal did not have power to make a declaration of incompatibility under section 4 of the 1998 Act,[15] and its powers were thus limited to determining whether the assessment should be upheld.[16]

Accordingly, as the Tribunal was not able to re-write the legislation, the taxpayer's appeal was dismissed.[17]

Commentary: challenging tax legislation on human rights grounds

Under the HRA 1998 domestic courts are not allowed to strike down or disallow primary legislation that cannot be reconciled with the rights laid down in the Convention. However they are allowed, under section 4 of the Act, to declare both primary and secondary legislation incompatible with the substantive rights of the ECHR. In this case, however, the Tribunal, had no power to make a declaration under the Act, as only the High Court and above have such a power. Consequently, the only remedy available to the claimants was to ask the Tribunal to re-interpret the legislation, under section 3 of the 1998 Act, to make it Convention compliant, or to make a simple determination that the legislation discriminated against the taxpayers, contrary to Article 14 in conjunction with their rights under Article 1 of the First Protocol to the Convention.

In this case, the Tribunal was unable to re-interpret s. 24 in a way which would make it Convention compliant because that would clearly have gone against the clear

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[11] *Banks*, above fn. 4 at 93. Citing *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 and *R (M) v Secretary of State for Work and Pensions* [2008] UKHL 63.
[12] *Banks*, above fn. 44 at 98; following *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158.
[13] *Banks*, above fn. 4 at 115-117.
[14] *Banks*, above fn. 4 at 128-129.
[15] Such a power is restricted to the High Court and above: s.4(5) Human Rights Act 1998.
[16] *Banks*, above fn. 4 at 129. As a result of the finding, the Tribunal held that it was not necessary to decide whether Articles 10 and 11 ECHR (Freedom of expression and association and assembly) were engaged or breached, nor whether UKIP's ECHR rights had been breached or whether the taxpayer could rely on such a breach. Further, the taxpayer could not rely on Article 4(3) of the EU Treaty which did not create any directly enforceable right.
[17] *Banks*, above fn. 4 at 161.

intention of Parliament as expressed in the words of the Act. It would amount to a legislative act and a usurpation of Parliament's duty to re-write the legislation.[18] The provision needed to be, and was capable of being, re-written (for example by applying the tax benefits to all political donations) but that task had to be performed by Parliament not the courts.

The other aspect of the decision which has relevance to human rights law is the Tribunal's approach to deciding whether a prima facie discriminatory provision was capable of being objectively justified. This, as the Tribunal correctly pointed out, is an area where the European Court of Human Rights (ECtHR) is prepared to offer a wide area of discretion, especially once it is satisfied that there is a legitimate reason for the provision's enactment.

For example, in *Burden and Burden v United Kingdom*,[19] the ECtHR stressed that states enjoyed a wide margin of appreciation in respect of levying taxes where a balance needed to be struck between the requirement to raise revenue and issues of social policy as the states themselves are in the better position to judge how that balance should be struck. It refused to interfere unless a taxation scheme was manifestly without reasonable foundation or was discriminatory under Article 14. The fact that the state could have drawn the dividing line at a different place did not in itself amount to discrimination.[20]

In the present case the Tribunal was prepared to take a less deferential approach and felt that the measure of public support for a political party should not be restricted to its representation in the House of Commons. This seems a very brave decision for a Tribunal to come to: one which questions Parliament not only on the content of taxation law, but also on exactly how it accords benefits to political parties. The Tribunal rightly refused to legislate and lead on what these new measures would be. It is certainly possible that whilst the higher courts and the ECtHR, which do possess formal powers to challenge domestic law, might nevertheless extend Parliament wider discretion here than the Tribunal is suggesting. On the basis of *Burden*, it is likely that the ECtHR would decide that Parliament was acting within its margin of appreciation by applying a criteria which matched the electoral system employed in the state. The iniquity of this system, and the lack of proportional representation in that system, is discussed below but, whether it would be the ECtHR's role to question legislation which reflects it is doubtful.[21]

The case also raises issues of democracy and political participation more broadly. New parties in particular may attract significant support, for example UKIP in recent years, but this support is too dispersed across the country to win parliamentary seats. It is of particular note that UKIP received over 900,000 votes in the 2010 General

[18] See *Bellinger v Bellinger* [2003] 2 AC 467.
[19] *Burden and Burden v United Kingdom* (2007) 44 EHRR 51.
[20] The decision was upheld by the Grand Chamber of the European Court (2008) 47 EHRR 38.
[21] Moreover, the voting system in Parliamentary elections was subject to a referendum in 2011, in which almost 68% of voters opposed changing the electoral system from first past the post to the alternative vote. See F. McGuinness and J. Hardacre, 'Alternative Vote Referendum 2011: Analysis of Results', *House of Commons Library Paper 11/44*.

Election but returned zero MPs, in contrast to seven other political parties that received fewer votes but returned at least one MP.[22]

In that respect, the Tribunal acknowledged that the fundamental requirement for parties to have had MPs elected at the previous general election, before donations to that party would be exempt from inheritance tax, had to be considered in light of the UK's electoral system. According to the Tribunal, the first past the post voting system – i.e. that the winner takes all – is "not, on its own, a reliable barometer of public support", meaning that the section 24 test is "liable to be prejudicial to supporters of new and as yet unrepresented parties even where those parties can demonstrate meaningful levels of public support."[23]

Such a test may have been easier to justify in previous decades, when the political landscape was more stable and the two main political parties were able to achieve working parliamentary majorities.[24] In the contemporary political landscape the test is more difficult to justify when the principal argument in support of the first past the post system – that it returns strong parliamentary majorities – appears harder to achieve. Moreover, with opinion polling regularly indicating that the two main parties are neck and neck, the fact that smaller parties struggle to progress has prompted some to argue that the present electoral system is in need of reform.[25] Ultimately, as the Tribunal acknowledged, the section 24 test, which has to be considered in light of the first past the post voting system, preserves the status quo, arguably frustrating the ability of individuals to realise the full extent of their political rights.

In that respect, although not considered in the *Banks* case, the obligation upon states to "hold free elections…, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature", as guaranteed by Article 3 of the First Protocol to the ECHR, is uneasy to reconcile with the resulting situation. On the one hand, the ECtHR has stressed that states are granted a wide margin of appreciation when it comes to organising and running electoral systems, which reflects the historical development, cultural diversity and varied political thought that exists throughout Europe.[26] However, on the other hand, it has also stressed that measures taken by contracting parties must not curtail the right to vote in a way that impairs its essence and effectiveness; the conditions imposed must be proportionate and pursue a legitimate aim; the free expression of the people must not be thwarted; the requirement must be concerned with the integrity and effectiveness of the election process; and, if relevant, the exclusion of any group of the public must be reconcilable with the purpose

[22] BBC News, *Election 2010: National Results* available at http://news.bbc.co.uk/1/shared/election2010/results/ [Accessed 4 January 2019].
[23] *Banks*, above fn.4 at 115.
[24] Prior to the 2010 General Election which resulted in a hung Parliament and the formation of the Conservative-Liberal Democrat Coalition Government, the last election which did not return a parliamentary majority was in February 1974 when Harold Wilson's Labour Party secured the most seats, albeit fewer votes than the Conservative Party, but not enough seats to form a majority government.
[25] See, for example, Electoral Reform Society, *The 2015 General Election: A Voting System in Crisis* (July 2015) available at https://www.electoral-reform.org.uk/latest-news-and-research/publications/the-2015-general-election-report/ [Accessed 4 January 2019] and *The 2017 General Election: Volatile Voting, Random Results* (August 2017) available at https://www.electoral-reform.org.uk/latest-news-and-research/publications/the-2017-general-election-report/ [Accessed 4 January 2019].
[26] *Mathieu-Mohin and Clerfayt v. Belgium* (1988) 10 EHRR 1 at [52]; *Labita v Italy* (2008) 46 EHRR 50 at [201]; *Hirst v. UK* (2006) 42 EHRR 41 at 60-61.

of Article 3 of the First Protocol to the Convention.[27] As such, it might be questioned whether section 24 of the IHTA, and the electoral system which is integral to that provision, can be defended in light of those fundamental principles.

Furthermore, the decision in *Banks* draws attention to questions about tax relief for donations to political parties more generally. Few reliefs exist for donations to political parties under UK tax law. Section 24 IHTA is one of only two explicit deductions from UK taxes for donations to political parties.

Further relief exists under section 260 of the Taxation of Chargeable Gains Act 1992 (TCGA). Under section 260 TCGA, donors can avoid paying capital gains tax on assets by transferring them directly to a political party. As section 260 TCGA directly imports the definition of a political party from the IHTA this provision (presumably) also falls foul of the ECHR.

Nevertheless, it is increasingly common for donations to political parties to be made via companies, with such donations being deducted from the donating company's profits, thus reducing the company's liability for corporation tax.[28] As a general rule, company expenditure must be "wholly and exclusively for the purposes of the trade" of the company,[29] and (presumably) donations to political parties are regarded as good for business. Alternatively, however, it is arguable that in circumstances in which a company is wholly or largely controlled by a single director (as is the case in *Banks*) such donations amount to benefits in kind under section 203 of the Income Tax (Earnings and Pensions) Act 2003 and ought, therefore, to be chargeable against that director's personal income tax.

The Tribunal in *Banks* acknowledged that the aim of section 24 IHTA, and its predecessors, is to provide relief for donations to political parties that meaningfully participate within national political debate and to prevent such a relief from being abused. However, the case brings the relative inconsistency of the UK's tax law with respect to donations to political parties into sharp focus.

Having concluded that section 24 IHTA is not compatible with Convention rights, the Tribunal proceeded to consider alternatives. One alternative proposed by the claimant was the inclusion of all parties registered under the Political Parties, Elections and Referendums Act 2000, however, the Tribunal considered that this approach would go "against the grain" of the legislation.[30] The question of which parties should qualify for tax relief was considered by the Neill Committee in 1998. The Committee concluded that the existing test was the correct one, recognising that

> "[i]f tax relief is given to all registered parties, some organisations might register as parties simply to be able to claim tax relief. In our view, the inheritance tax

[27] See in particular *Mathieu-Mohin and Clerfayt* (1988) 10 EHRR 1; *Hirst* (2006) 42 EHRR 41; *Yumak & Sadak v Turkey* (2009) 48 EHRR 4; *Sitaropoulos & Giakoumopoulos v Greece* (2013) 56 EHRR 9; *Scoppola v Italy (No. 3)* (2013) 56 EHRR 19.

[28] This, presumably, was the rationale for the fact that most of the value of Banks' donations being made through his company, Rock Services Ltd, and not as an individual.

[29] s54 Corporation Tax Act 2009.

[30] *Banks*, above fn.4 at 127.

> test provides a mechanism for ensuring that a tax relief scheme for political parties is not abused."[31]

In 2016, the Chancellor of the Exchequer announced in his Autumn Statement that

> "[f]rom Royal Assent of the Finance Bill 2017-18, inheritance tax relief for donations to political parties will be extended to parties with representatives in the devolved legislatures, as well as parties that have acquired representatives through by-elections."[32]

The Chancellor acknowledged that the measure is necessary to achieve consistent and fair treatment for all national political parties with elected representatives.[33] Nevertheless, the Finance Bill 2017-18 was introduced on 1 December 2017 and contained no such measure.

Conclusions

The decision of the Tribunal in *Banks* is noteworthy for a number of reasons. First, it is comparatively rare for tax laws to come into conflict with Convention rights, given the wide margin of appreciation usually present with respect to fiscal matters. Second, it illustrates how the relief under section 24 IHTA has not kept pace with the development of UK politics in the decades that have followed its enactment, as the Chancellor acknowledged in 2016. Third, and most significantly, it requires the Treasury to redraft section 24 IHTA in order to comply with the decision of the Tribunal.

If the Treasury does, indeed, revise section 24 IHTA, it may, in doing so, be worth re-examining the question of tax relief for donations to political parties more broadly. At present, relief is only available from a very limited range of taxes which are normally only ever paid by a small minority of taxpayers. Relief for donations to a broader range of political parties, against a broader range of taxes, may prove to be a more equitable basis for supporting donations towards legitimate political activity.

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[31] Committee on Standards in Public Life, *Standards in Public Life: The Funding of Political Parties in the United Kingdom* (HMSO, 1998) Cm 4057 at 99.
[32] HM Treasury, *Autumn Statement 2016* (HMSO, 2016) Cm 9362 at 37.
[33] HM Treasury, above fn. 32.
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