[2018] UKFTT 0617 (TC)

TC06768

Appeal number: TC/2017/03763

INHERITANCE TAX – exemption from IHT for gifts to political parties – section 24 Inheritance Tax Act 1984 – whether breach of European Convention on Human Rights – whether breach of European Union law

FIRST-TIER TRIBUNAL
TAX CHAMBER

ARRON BANKS **Appellant**

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Taylor House, Rosebery Avenue, London on 5 and 6 March 2018

Imran Afzal, counsel, for the Appellant

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

Provisions of the HRA

17. The provisions of the ECHR are given effect under English law by the HRA. Section 1 HRA provides, so far as relevant:

> **1. The Convention rights**
>
> (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in —
>
> (a) Articles 2 to 12 and 14 of the Convention,
>
> (b) Articles 1 to 3 of the First Protocol, and
>
> (c) Article 1 of the Thirteenth Protocol,
>
> as read with Articles 16 to 18 of the Convention.
>
> (2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).
>
> (3) The Articles are set out in Schedule 1.
>
> …

Rights under Article 14 and under A1P1 are therefore "Convention rights" for the purposes of the HRA as are the rights under Article 10 and Article 11.

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

> **3. Interpretation of legislation.**
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section —
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

The approach to questions of discrimination

19. As regards the correct approach to such issues, I was referred by the parties to the judgment of Lord Steyn in *R(S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196. The case concerned the retention by the police of fingerprints and DNA samples taken from suspects in the course of criminal investigations. On the issue of whether the retention of fingerprints and samples

could amount to discrimination under Article 14 ECHR, Lord Steyn set out the approach to be followed in form of five questions (at [42]):

> "**42** Based on the approach of Brooke LJ in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 , 625, para 20, as amplified in *R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), para 52; [2003] 3 All ER 577 , five questions can be posed as a framework for considering the question of discrimination. (1) Do the facts fall within the ambit of one or more of the Convention rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (3) If so, was the difference in treatment on one or more of the proscribed grounds under article 14? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?

20. At [43], he referred to the caveat to this approach explained by Baroness Hale in *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113 ("*Ghaidan*") at [134]:

> "**43** But a caveat must be mentioned. In *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113, 157, para 134, Baroness Hale of Richmond explained:
>
> > "the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."
>
> That is how I will approach the matter."

21. The parties structured their submissions to address the five questions as set out by Lord Steyn *R(S) v Chief Constable of South Yorkshire Police*. I will adopt the same structure in this decision, whilst bearing in mind the warning of Baroness Hale in *Ghaidan* against the adoption of a too rigidly formulaic approach.

Question1: Do the facts fall within the ambit of one or more of the Convention rights?

22. The parties were in agreement on this point.

23. Article 14 ECHR is not a free-standing prohibition. It prohibits discrimination in the enjoyment of other ECHR rights. However, it is not necessary for an individual to establish a breach of another ECHR right in order to meet the requirements of Article 14. It is sufficient that the facts at issue fall "within the ambit" of one or more of the

other ECHR rights (*Burden v. United Kingdom* Application No. 13378/05 (2008) ("*Burden*") at [58]).

24. Tax provisions in principle fall within A1P1 because they deprive the person concerned of a possession, namely the amount of money that must be paid (*Burden* [59]).

25. In the present case, the parties agreed that any potential discrimination arising from the application of s24(2) IHTA fell within the ambit of A1P1.

Question 2: Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?

26. Once again, there was no disagreement between the parties on this point.

27. The parties accepted that there was a difference in treatment in respect of the tax treatment of a gift made by Mr Banks to UKIP and a gift made by another person to a political party which met the conditions in s24(2), for example, the Labour Party or the Conservative Party.

Question 3: If so, was the difference in treatment on one or more of the proscribed grounds under Article 14?

The parties' submissions

28. The parties disagreed on this point.

29. For Mr Banks, Mr Afzal's first submission was that the application of the conditions in s24(2) IHTA to the donations made by Mr Banks amounted to discrimination against Mr Banks on the grounds of his "political opinion" contrary to Article 14.

30. In summary, Mr Afzal says that this question has to be determined in the real world. The aim of the ECHR is to guarantee rights that are practical and effective (see the decision of the European Court of Human Rights ("*ECtHR*") in *Clift v. United Kingdom* Application No. 72205/07 ("*Clift ECtHR*") at [60]). Mr Banks's donations to UKIP were a clear manifestation of his political opinion in much the same way as membership of a political party, which is referred to by Lord Hoffman in *R (Carson) v. Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 ("*Carson*") at [15] as one of the characteristics which "are seldom, if ever, acceptable as grounds for difference in treatment". The ECHR would not be providing a practical and effective guarantee against discrimination on the grounds of political opinion if it was read so narrowly as not extend to protection against discrimination in relation to one of the clearest expressions of a political opinion, namely the making of a donation to a political party.

31. In response to this point, Mr Stone says that the reason for any difference in treatment was not Mr Banks's political opinion or his membership of a political party.

Mr Banks was not taxed because he supported UKIP or because he was a member of UKIP. The reason for any difference in treatment was that Mr Banks chose to donate to a party which did not qualify for the exemption from IHT. Article 14 is concerned with discrimination on the grounds of status – a person's personal characteristics, who or what he or she is – not about discrimination on the grounds of what a person does.

32. I will deal with these submissions in conjunction with those which arise from Mr Afzal's second submission on this question, as the issues overlap to some extent.

33. Mr Afzal's second submission on this question was that the application of the conditions in s24(2) IHTA to the donations made by Mr Banks amounted to discrimination against Mr Banks on the grounds of "other status" contrary to Article 14. Mr Banks's "other status" in this respect was his status as a supporter of UKIP.

34. Mr Afzal says that "other status" for these purposes can be any "identifiable, objective of personal characteristic or status" (*Clift ECtHR* [55], *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 ("*Mathieson*") per Lord Wilson at [22]). The political party which Mr Banks chose to support was, in his submission, a personal characteristic (*Carson* [15]), but even if it was not, the concept of status was not limited to personal characteristics. Any identifiable or objective characteristic is sufficient.

35. Mr Afzal challenges Mr Stone's assertion (below) that the party which Mr Banks supported was simply a matter of personal choice – he says it was dictated by his political opinion – but, in any event, the fact that a characteristic involves an element of personal choice does not prevent it being a "status" for the purposes of Article 14 (see the facts of *Darby v Sweden* Application No. 11581/85 (1990) ("*Darby*") and *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 ("*RJM*") per Lord Neuberger at [47]).

36. Mr Stone reiterates his point made in relation to the first of Mr Afzal's submissions on this issue - that the difference in treatment that Mr Banks suffered was not due to his political opinion or the political party of which he was a member, but because of something he chose to do - to donate to a party which did not meet the conditions for exemption from IHT.

37. Mr Stone says that to meet the conditions of Article 14, Mr Banks must be able to identify a "status", which is afforded protection by Article 14, by reference to which the differential treatment has been applied. The categories of "other status" within Article 14 cannot be unlimited. A "status" for the purposes of Article 14 must be "a personal characteristic... by which persons... are distinguishable from one another" (*Kjeldsen, Busk Madsen and Pedersen v Denmark* [1976] EHRR 711 ("*Kjeldsen*")). The making of a donation to UKIP is not a "status" for the purposes of Article 14. It is something that Mr Banks did, not a characteristic that was personal to him.

38. Furthermore, Mr Stone submits that "other status" cannot be defined by reference to the differential treatment of which a person complains. He refers to various judgments of members of the House of Lords in *R (Clift) v Secretary of State for the*

Home Department [2007] 1 AC 484 ("*Clift HL*") in support of this submission (see for example, Lord Bingham at [28]). He says that is what Mr Banks is seeking to do in this case by asking the Tribunal to treat persons who donate to parties that do not qualify for exemption from IHT as having a separate "status" for the purposes of Article 14.

The requirement for a proscribed ground

39. The first issue that I should address is the requirement for the differential treatment to be based on one of the proscribed grounds.

40. The traditional approach, as can be seen from the structure of Lord Steyn's questions in the *South Yorkshire Police* case is that it is necessary for a person who complains of discrimination within Article 14 ECHR to show that the differential treatment of which he or she complains was on one of the proscribed grounds in Article 14.

41. There is some discussion in the case law authorities to which I was referred as to whether the jurisprudence of the ECtHR requires a complainant to establish that he or she falls within a proscribed ground or whether it is sufficient for a complainant to demonstrate differential treatment, which would then be treated as discriminatory if it had no objective and reasonable justification (see for example, the discussion of the ECtHR case law in the judgment of Baroness Hale in *Clift HL* at [51] to [60] and *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 ("*AL (Serbia)"*) at [24]). In *RJM*, Lord Neuberger (with whom all of the other members of the House of Lords agreed) referred to this line of cases (and also to the analysis of Baroness Hale to which I have referred), but preferred to adopt the traditional approach (*RJM* [41]). Lord Wilson in the later Supreme Court decision in *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47 ("*Mathieson*") also referred to the ECtHR case law and acknowledged at [22] the reluctance of the ECtHR to conclude that an appellant was precluded from bringing a claim for discrimination within the scope of a Convention right simply on the grounds that he or she had no relevant status. However, he decided the case on the basis that the complainant did have relevant status (see [23]). Three of the other members of the House of Lords agreed with Lord Wilson. I am bound by those decisions and will therefore follow the traditional approach that it is necessary for the appellant to demonstrate that the differential treatment that he has suffered is based on one of the proscribed grounds.

42. I must then turn to the proscribed grounds.

43. As I have described above, Mr Afzal submitted that Mr Banks had suffered the differential treatment in his contributions to UKIP on one of two proscribed grounds: first, his political opinion, which is expressly referred to as a proscribed ground within Article 14 ECHR, and second, his status as a supporter of UKIP, which should be treated as some "other status" within Article 14.

(a) Political opinion

44. As regards Mr Azfal's first submission – that the relevant proscribed ground is "political opinion" – Mr Banks is not taxed just because he holds certain political views. As Mr Stone points out, he is taxed on his contributions to UKIP because he makes a donation to a political party which does not meet the conditions in s24(2) IHTA.

45. I acknowledge Mr Stone's point, but, that having been said, I agree with Mr Afzal on this point. As the ECtHR points out in *Clift ECtHR*, the aim of the ECHR is "to guarantee not rights that are theoretical and illusory but rights that are practical and effective" (*Clift ECtHR* [60]). If the ECHR is intended to offer real protection against discrimination on certain grounds (in this case, a person's political opinion) in respect of matters falling within the ambit of ECHR rights (in this case, rights to enjoyment of possessions under A1P1), that protection would become almost illusory if it does not also extend to discrimination in relation to those actions which a person would naturally take as an outward expression of that protected characteristic.

46. For this reason, in my view, the differential treatment of which Mr Banks complains – the taxation of his contributions to UKIP – is discrimination on the grounds of his political opinion within Article 14. It does not seem to me to be particularly relevant that Mr Banks had an element of choice about whether or not he made the contribution to UKIP. The protection offered by Article 14 for Mr Banks's political views should also extend to the actions that he takes as direct consequence of them, including making a donation to a political party that shares his opinions. If a person cannot express a protected characteristic in a most natural way by virtue of differential treatment, the protection is essentially meaningless.

47. The parties did not refer me to any specific authorities on the scope of the protection offered by Article 14 for a person's political opinion other than on the question of the justification required for discrimination of that nature (to which I shall turn later). And so, while my conclusion on Mr Afzal's first submission decides this question in favour of Mr Banks, I will also address the points raised by the parties on Mr Afzal's second submission in case this appeal proceeds further.

(b) Other status

48. Mr Afzal's second submission was that the conditions in s24(2) IHTA discriminated against Mr Banks on the grounds of his status as a supporter of UKIP and that status was some "other status" for the purposes of Article 14.

49. From their submissions, there are several points on which the parties take issue in relation to this submission: whether the term "other status" is limited to "personal" characteristics and if so the extent of that term as used in the case law; whether the element of choice that is involved in making a donation to a political party precludes it from being a "status" for the purposes of Article 14; whether a status can be derived from the differential treatment itself. I will deal with each of these in turn.

Is "other status" limited to personal characteristics?

50. I was referred to a significant number of authorities on the meaning of "other status" both before the English courts and the ECtHR. I will attempt to summarize the principles that I derive from them.

51. Many of those authorities refer as a starting point to a decision of the ECtHR in *Kjeldsen* in which the ECtHR explained at [56] of its judgment:

> "The Court first points out that Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other. However, there is nothing in the contested legislation which can suggest that it envisaged such treatment."

52. The reference in that passage to a "personal characteristic" seems to have given rise to suggestions in some cases that a status within Article 14 must be an innate characteristic of a person "which a person did not choose and either cannot or should not be expected to change" (Baroness Hale in *AL (Serbia)* [26]) or concentrate on "what somebody is rather than what he is doing or what is being done to him" (Lord Neuberger in *RJM* [45]). However, it is clear that the concept of status in Article 14 is not limited in this way.

53. As an initial point, even those judgments to which I have just referred permit of the possibility that "status" should be given a wider interpretation: the quotation from the judgment of Baroness Hale in *AL (Serbia)* to which I have just referred begins with the words "in general"; and Lord Neuberger in his judgment in *RJM* decides that "homelessness" can be a "status" within Article 14 when it is clearly not an innate personal characteristic.

54. Furthermore, the ECtHR in its decision in *Clift ECtHR* has explained that "other status" should be given a wide meaning and should not be limited to innate personal characteristics. That case involved an application by a long term prisoner who complained about the differential treatment of long term prisoners serving fixed terms in relation to access to parole as compared with those serving life sentences. In deciding that long term prisoners serving fixed sentences did have a separate status for the purposes of Article 14, the ECtHR said at [56]:

> "**56** The Court recalls that the words "other status" (and a fortiori the French "toute autre situation") have generally been given a wide meaning (see *Carson*, cited above, § 70). The Government have argued for a more limited interpretation, calling in particular for the words to be construed ejusdem generis with the specific examples listed in Article 14. The Court observes at the outset that while a number of the specific examples relate to characteristics which can be said to be "personal" in the sense that they are innate characteristics or inherently linked to the identity or the personality of the individual, such as sex, race and religion, not all of the grounds listed can be thus characterised. In this regard, the Court highlights the inclusion of property as one of the prohibited grounds of discrimination. This

ground has been construed broadly by the Court: in James and Others v. the United Kingdom, 21 February 1986, § 74, Series A no. 98, the difference in treatment of which the applicant complained was between different categories of property owners; in *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 90 and 95, ECHR 1999 III, the difference was between large and small landowners. In both cases, the Court accepted that the provisions of Article 14 were applicable."

55. And having summarized its case law on this issue, it set out its conclusion at [59] as follows:

"**59** The Court therefore considers it clear that while it has consistently referred to the need for a distinction based on a "personal" characteristic in order to engage Article 14, as the above review of its case-law demonstrates, the protection conferred by that Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent. Accordingly, even if, as the Government contended, a ejusdem generis construction were appropriate in the present case, this would not necessarily preclude the distinction upon which the applicant relies."

56. This approach is adopted by the Supreme Court in *Mathieson*. In his judgment (with which three of the other four members agreed), Lord Wilson said this at [21] and [22].

"**21** In *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, Baroness Hale of Richmond addressed at para 26 the list of prohibited grounds in article 14 and suggested that "[in] general, the list concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change." In *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] AC 311, Lord Neuberger of Abbotsbury expanded at para 45 on Baroness Hale's analysis of the nature of the prohibited grounds by suggesting that they generally required concentration "on what somebody is, rather than what he is doing or what is being done to him." But, by its very decision in the *RJM* case, namely that the appellant's homelessness conferred on him a status prohibited by article 14, the House of Lords demonstrated that the prohibited grounds extended well beyond innate characteristics. The House held that they included not only the "suspect" grounds, or, to use a less ambiguous word, the "core" grounds, which, according to Lord Walker of Gestingthorpe at para 5, included gender, sexual orientation, pigmentation of skin and congenital disabilities. Lord Walker offered the simile of a series of concentric circles and suggested that these core grounds fell within the circle of the narrowest diameter. But then there was a wider circle which included acquired characteristics, such as nationality, language, religion and politics. Indeed, so Lord Walker suggested, there was an even wider circle which included, for example, the homeless appellant then before the House; which also included the complainant in the *Carson* case 51 EHRR 369, who had chosen a particular country of residence; and which even included the

complainant in *Sidabras v Lithuania* (2004) 42 EHRR 104 , who had previously been employed by the KGB. The value of Lord Walker's simile lies in what he then added [2009] AC 311, para 5:

"The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

22 The *RJM* case in the House of Lords was soon followed by *Clift v United Kingdom* (Application No 7205/07) The Times, 21 July 2010 in the Court of Human Rights. Mr Clift had been sentenced in England to a term of imprisonment of 18 years for crimes including attempted murder. The Parole Board recommended his release on licence once he had served half of his sentence. The Secretary of State rejected its recommendation. Had the recommendation been made in relation to a prisoner serving a sentence of a term of less than 15 years or a life sentence, the Secretary of State would have had no power to reject it. Mr Clift alleged that in such circumstances the Secretary of State's rejection of the Board's recommendation discriminated against him, contrary to article 14, in the enjoyment of his right to liberty under article 5 of the Convention. He contended that the discrimination was on the ground of his "status" as a person sentenced to a term of at least 15 years. In the domestic courts his contention had failed: *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 . The House of Lords had articulated an inhibition, less keenly felt by this court nowadays, about extending the meaning of Convention terms beyond what the Court of Human Rights had "authorised": see Lord Bingham of Cornhill at para 28 and also Lord Hope at para 49. In the Court of Human Rights, however, Mr Clift's claim to have had a status within in the meaning of article 14 (and to have suffered discrimination on that ground) prevailed: *Clift v United Kingdom* The Times, 21 July 2010. The court said, at para 60:

"The question whether there is a difference of treatment based on a personal or identifiable characteristic … is … to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective …" (Emphasis supplied.)

It is clear that, if the alleged discrimination falls within the scope of a Convention right, the Court of Human Rights is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed."

57. In passing, I note that, in the extract from Lord Wilson's judgment in *Mathieson* to which I have just referred, Lord Wilson refers (at [21]) to Lord Walker's judgment in *RJM*. In that judgment, at [5], Lord Walker also expresses the view that "other status" for the purposes of Article 14 should be given a broad meaning and should not be limited to innate personal characteristics, but that the nature of the characteristic may determine the degree of scrutiny which differential treatment must bear when it comes to the question of whether that treatment can be justified. I have set out the paragraph from Lord Walker's judgment at [89] below as it becomes relevant to the issue of justification.

58. I therefore propose to adopt the wider view as set out by the ECtHR in *Clift ECtHR* and endorsed by the Supreme Court in *Mathieson*.

Is it relevant that a characteristic is adopted by choice?

59. As I have mentioned, there were two more specific points which were raised in argument that I should address before seeking to apply the relevant principles to the facts of this case. I can deal with these briefly.

60. The first was whether the fact that a particular condition or characteristic is adopted by choice is a relevant factor in deciding whether that characteristic is a "status" for the purpose of Article 14. This issue is referred to in the judgment of Lord Neuberger in *RJM*. In that case, the House of Lords decided that homelessness could be a relevant status for these purposes. In doing so, Lord Neuberger, with whom the other members of the House of Lords agreed, expressed the view, that the fact that a condition is adopted by choice is unlikely to be of much significance in determining whether that characteristic is a status for the purpose of Article 14. He said this at [47]:

> "Ignoring the point that in some cases it may not be voluntary, I do not accept that the fact that a condition has been adopted by choice is of much, if any, significance in determining whether that condition is a status for the purposes of article 14. Of the specified grounds in the article, "language, religion, political or other opinion, … association with a national minority [or] property" are all frequently a matter of choice, and even "sex" can be. (And it is noteworthy that in the recent case *AL (Serbia)* [2008] 1 WLR 1434, being parentless was unhesitatingly accepted as being an "other status" under article 14.)"

61. Accordingly, I do not regard the fact that Mr Banks has a choice whether or not to be a supporter of UKIP or whether or not to make donation to UKIP as of particular significance to this issue. I reject Mr Stone's submission in this respect.

Does the characteristic have to exist independently of differential treatment?

62. The final issue is whether the condition or characteristic in respect of which differential treatment is applied has to exist independently of the discrimination of which the person complains.

63. This issue is referred to by several of the members of the House of Lords in *Clift HL*. By way of example, Lord Bingham at [28] says expressly:

> "I do not think that a personal characteristic can be defined by the differential treatment of which a person complains."

64. There is a statement to similar effect in the judgment of Lord Hope (at [45]). All of the other members of the House of Lords expressed agreement with Lord Bingham's judgment.

65. The ECtHR in *Clift ECtHR* disagreed with this view. This can be seen at [60] in the Court's decision, where the Court says this:

> "Further, the Court is not persuaded that the Government's argument that the treatment of which the applicant complains must exist independently of the "other status" upon which it is based finds any clear support in its case-law. In *Paulík*, cited above, there was no suggestion that the distinction relied upon had any relevance outside the applicant's complaint but this did not prevent the Court from finding a violation of Article 14."

66. As I have explained, the Supreme Court in *Mathieson* expressed agreement with the general approach of the ECtHR in *Clift ECtHR* to the question of relevant status for the purposes of Article 14. However, the leading judgment of Lord Wilson does not address this particular question and does not refer to the passage in the ECtHR decision to which I have just referred. I have not been referred to any other authority on this issue, and in the absence of such authority, I consider myself bound by the statements of the House of Lords in *Clift HL* on this point.

67. If I am wrong in relation to Mr Afzal's first submission – that political opinion is the appropriate ground for the purposes of Article 14 – and if I were to apply the approach adopted by the ECtHR in *Clift ECtHR*, it may be possible to reach the conclusion that Mr Banks's support for UKIP as opposed to another political party could be a relevant status for the purpose of Article 14 on the facts of this case.

68. The difficulty with that approach in this case is that Mr Banks's status is derived from the very differential treatment of which he complains. The only relevant distinction between the political parties is that some meet the conditions in s24(2) IHTA and others (like UKIP at the time) do not. As I have mentioned, in this respect, I am bound by the decision of the House of Lords in *Clift HL* to find that, if the relevant ground is not political opinion, Mr Banks does not have a relevant status for the purpose of Article 14.

Question 4: Were those others in an analogous situation?

69. For an issue to arise under Article 14 ECHR, there must be a difference in treatment of persons in "analogous or relevant similar situations" (*Clift ECtHR* [66]).

70. Mr Afzal submitted that the Mr Banks 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. At the hearing, Mr Stone accepted Mr Afzal's submission on this point.

Question 5: Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?

71. The parties divided this final question into two parts: (i) whether or not the differential treatment had a legitimate aim; and (ii) whether or not the differential treatment was reasonably proportionate to that aim.

72. There are differences between the parties on this final question.

The burden of proof

73. As a preliminary point, Mr Afzal submits that the burden of proof on both parts of this question falls on HMRC and HMRC has not discharged that burden. He refers to the judgment of Lord Bingham in *Clift HL* (at [29]) in support of this submission.

74. It is clear from that passage that it was common ground in *Clift HL* that the burden of demonstrating that the differential treatment could be objectively justified falls on the respondent. But Mr Stone, for HMRC, did not contest this point. He did, however, take issue with Mr Afzal's submission that HMRC had not discharged that burden. I will address that issue later in this decision notice when I address the parties' specific arguments on the aim of the legislation and its proportionality. First I should deal with an issue of principle which applies to this question as a whole.

The degree of deference to the decision-maker

75. The parties adopted different approaches to the degree of deference which a court or tribunal should show to the decision-maker (in this case, Parliament) in assessing whether or not the differential treatment could be objectively justified.

76. The parties agreed that the references in much of the ECtHR jurisprudence to the "wide margin of appreciation" that should be afforded to national legislatures, governments and courts, are not relevant to the process of a national court or tribunal considering whether differential treatment arising from decisions of national legislatures or governments was contrary to ECHR rights. (If authority is required for this proposition, it can be found in the judgment of Lord Mance in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] 2 All ER 899 ("*Asbestos*") at [44].)

(a) The parties' submissions

77. The parties, however, disagreed on the approach to be taken to the two parts of this question.

78. Mr Afzal says that, in looking at the first part of the question, the court or tribunal should respect the view of the decision-maker as to whether there was a legitimate aim which could justify a restriction of the relevant protected right unless that view was "manifestly without reasonable foundation". However, the "manifestly without reasonable foundation" test should be limited to the first part of the question, namely whether or not the differential treatment pursues a legitimate aim. The question of the proportionality of the differential treatment, he says, has to be decided by reference to all of the facts and circumstances of the case and whether or not the measure adopted provides a "fair balance" between the rights of the individual and the interests of the community. He refers, in particular, to the judgment of Lord Mance in *Asbestos* at [44] to [47] and at [52] to [54] in support of this submission.

79. Mr Stone, for HMRC, took a different approach. He argued that the same test should be applied to both parts. In each case, the question for the Tribunal was whether the aim and the means adopted to address that aim were "manifestly without

reasonable foundation". In support of this submission, he referred to the decision of the Supreme Court in *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16 ("*SG*"), in particular, the judgments of Lord Reed at [93] and Baroness Hale at [210].

(b) Discussion

80. On this point, I will turn first to the judgment of Lord Mance in *Asbestos*. At [44] in his judgment he deals with the margin of appreciation which the ECtHR applies to the domestic application of the ECHR, to which I referred at [76] above. He then continues at [45]:

> "**45** The general principles according to which a court will review legislation for compliance with the Convention rights scheduled to the Human Rights Act 1998 have been comprehensively reviewed in recent case law, particularly *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 , paras 68-76 per Lord Reed, with whose observations in these paragraphs Lord Sumption, Lady Hale, Lord Kerr and Lord Clarke agreed at para 20 and Lord Neuberger agreed at para 166, and *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2014] UKSC 38, [2014] 3 WLR 200 . There are four stages, which I can summarise as involving consideration of (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right, (ii) whether the measure adopted is rationally connected to that aim, (iii) whether the aim could have been achieved by a less intrusive measure and (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right. The European Court of Human Rights has however indicated that these stages apply in relation to A1P1 with modifications which have themselves been varied over the years."

81. Lord Mance therefore identifies four stages in the consideration of whether or not the breach of an ECHR right may be objectively justified rather than the two into which the parties have divided this question in this case. He then reviews the relevant ECtHR authorities (at [46] to [50]). That review begins (at [46]) as follows:

> "**46** Initially, in *Handyside v United Kingdom* (1976) 1 EHRR 737, para 62, followed in *Marckx v Belgium* (1979) 2 EHRR 330, para 63, the court said that the State was the sole judge of necessity for the purposes of deciding whether a deprivation of property was "in the public interest". That no longer represents the position on any view. But the Counsel General for Wales and Mr Michael Fordham QC disagree as to the current position. The Counsel General submits that the court will at each of the four stages of the analysis "respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123 , para 46. Mr Michael Fordham QC on the other hand submits that this passage was or, at least in subsequent authority, has been restricted in application to the first or at all events the first to third stages. In my opinion, Mr Michael Fordham

> QC is basically correct on this issue, at least as regards the fourth stage which presently matters, although that does not mean that significant weight may not or should not be given to the particular legislative choice even at the fourth stage."

82. The question of the relevant test to be applied to the question of proportionality – the fourth stage in Lord Mance's analysis – was therefore directly at issue in *Asbestos*. Lord Mance concludes on the point, in relation to the ECtHR cases, at [52] of his judgment:

> "**52** I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness". In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker."

83. He then reviews the domestic case law briefly at [51]. His conclusion in relation to the domestic authorities is found at [54]:

> "**54** At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level: *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173; *R (Nicklinson) v Ministry of Justice* [2014] 3 WLR 200, at paras 71, 163 and 230, per Lord Neuberger, Lord Mance and Lord Sumption. However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis: see *AXA* , para 131, per Lord Reed, *R (Huitson) v Revenue and Customs Comrs* [2011] EWCA Civ 893, [2012] QB 489 , at para 85. But again, and in particular at the fourth stage, when all relevant interests fall to be evaluated, the domestic court may have an especially significant role."

84. The *Asbestos* case, and Lord Mance's judgment clearly support Mr Afzal's submission. In that case, Lord Neuberger and Lord Hodge agreed with Lord Mance. Lord Thomas reached the same conclusion, but for different reasons. However, he agreed with the basic approach to the tests which should be applied when analysing

the two parts of the question of objective justification (*Asbestos* [114]). Baroness Hale agreed with Lord Thomas.

85. I therefore agree with Mr Afzal that the correct approach is to determine whether, after weighing all relevant factors, the measure adopted achieves a "fair balance" between the public interest being promoted and the other interests involved. The authorities to which Mr Stone referred me on this point do not conflict with that conclusion. In particular, the references in the judgments of Lord Reed and Baroness Hale in *SG* to the application of the "manifestly without reasonable test" to both parts of the analysis is either a product of the context of the case (Lord Reed: *SG* [93]) or to the fact that it had been accepted by the parties as the appropriate test (Baroness Hale: *SG* [210]).

The approach to proportionality

(a) The parties' submissions

86. That is not, however, the end of the matter. Mr Stone says that, even in the context of a "fair balance" test, the Tribunal should, in any event, be slow to interfere with the conditions for a tax relief that have been set by Parliament for the following reasons:

(1) the measure relates to taxation and the authorities consistently stress the wide margin of appreciation that should be afforded to the State in tax matters (*National & Provincial Building Society v UK* (1997) 25 EHHR 127; [1997] STC 1466 ("*National & Provincial*") at [80] and [81]; *R (on the application of Rowe) v Commissioners of Revenue and Customs* [2017] EWCA 2105 ("*Rowe*"), per McCombe LJ at [197] and [200]);

(2) the courts should give greater deference to the decisions of Parliament where the subject matter is one for political decision-making (*International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 ("*International Transport Roth*"), per Laws LJ at [81] to [87]);

(3) the degree of scrutiny required of the courts depends upon the grounds of discrimination; discrimination on the grounds of "political opinion" or "other status" is not one of the core protected or more sensitive grounds such as race, sex or sexual orientation (*Ghaidan* per Lord Nicholls at [19], per Baroness Hale at [130] to [132]; *RJM* per Lord Mance at [14], per Lord Neuberger at [56]);

(4) the discrimination in this case is indirect discrimination which requires a lower level of justification (*AL (Serbia)* per Baroness Hale at [48]);

(5) the conditions for a tax exemption have to be defined and, even if the conditions are open to criticism, it does not mean that they cannot be justified (*RJM* per Lord Neuberger at [57]).

87. Mr Afzal takes a different approach. He agrees that the degree of the scrutiny that should be applied to the relevant legislation should be driven by the nature of the discrimination, but he makes the following submissions:

> (1) politics is a sensitive issue requiring particular scrutiny (*Carson* per Lord Hoffman at [15]);
>
> (2) even if the discrimination in this case is on the grounds of "other status" for the purpose of Article 14, an "other status" can be regarded as a sensitive ground. For example, sexual orientation is not one of the listed grounds in Article 14, but it is regarded as a sensitive ground for which it is particularly difficult to justify any differential treatment (*RJM* per Lord Walker at [5]);
>
> (3) the discrimination in this case is not indirect, but, in any event, indirect discrimination can still require weighty reasons to justify differential treatment (*DH and others v Czech Republic* Application No. 57325/00 (2007), (2008) 47 EHRR 3 at [176] ("*DH*"));
>
> (4) although, in setting the conditions for exemption from IHT, a line may have to be drawn somewhere, it still has to be justified.

88. The approach that I should take to the question of the degree of scrutiny to be applied to the differential treatment clearly depends upon a number of factors. Before I turn to the application of the test in this case, I will outline the approach that I take on some of the points that have been raised by the parties.

(b) Is political opinion a sensitive ground?

89. Both parties referred to the nature of the discrimination in this case and both referred to the judgment of Lord Walker in *RJM*. In that case, Lord Walker said this at [5].

> "**5** The other point on which I would comment is the expression "personal characteristics" used by the European Court of Human Rights in *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, and repeated in some later cases. "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military

> status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify. There is an illuminating discussion of these points (contrasting Strasbourg jurisprudence with the American approach to the Fourteenth Amendment) in the speech of Baroness Hale of Richmond in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 , paras 20-35."

90. I have referred to this passage above in the context of the question of whether the difference in treatment was on one or more of the proscribed grounds under Article 14. But Lord Walker's judgment also refers to a connection between the nature of the grounds of discrimination and the degree of scrutiny which must be applied to any justification, with discrimination on the grounds of the most "innate" characteristics being the most difficult to justify.

91. Mr Stone sought to argue that "political opinion" was not one of the "core protected grounds"- i.e. it was not within the innermost of the concentric circles of "personal characteristics" that Lord Walker describes - the implication being that discrimination on the grounds of political opinion did not require the degree of scrutiny which might be applied to discrimination on other grounds such as sex, race, or sexual orientation. He referred me, by way of example, to judgment of Lord Nicholls in *Ghaidan* where he lists sex, race and sexual orientation as grounds of discrimination which will always require "cogent" reasons (*Ghaidan* [19]).

92. I do not agree with Mr Stone's submission.

93. The lists of core grounds in the cases to which Mr Stone refers are not intended to be exclusive. Furthermore there is good authority for political opinion or political affiliation being treated as one of the more sensitive grounds of discrimination. In the passage from Lord Walker's judgment in *RJM*, he refers to a person's politics as being "almost innate" and so close to the centre of concentric circles of characteristics, discrimination on the grounds of which will be more difficult to justify. In his judgment in *Carson*, Lord Hoffman refers to membership of a political party as one of the characteristics which "are seldom, if ever, acceptable as grounds for difference in treatment" (*Carson* [15]).

94. To my mind, political opinion is a sensitive ground of discrimination. There is good reason why political opinion is expressly referred to in Article 14. The tolerance of the political views of others – particularly those with whom we might disagree – is central to democracy. I will treat it as a ground which requires cogent reasons for any differential treatment.

(c) The effect on the level of deference

95. The next issue that I should address is whether the nature of the discrimination has any bearing on the level of deference that should be given to the decision-maker. Mr Stone referred me to the judgment of Laws LJ in *International Transport Roth* in which he sets out (at [80] to [87]) the principles which should govern the deference given by domestic courts to decisions of the national legislature and executive. In summary, Laws LJ identifies four principles:

> (1) the first principle is that greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure (*International Transport Roth* [83]);
>
> (2) the second principle is that there is more scope for a deference "where the [ECHR] itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified" (*International Transport Roth* [84]);
>
> (3) the third principle is that greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts (*International Transport Roth* [85]);
>
> (4) the fourth principle is that greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential exercise of the democratic powers or the courts (*International Transport Roth* [87]).

96. Mr Stone says that the differential treatment in this case arises from an Act of Parliament. So in accordance with the principles set out by Laws LJ an increased level of deference is required. Furthermore, as Laws LJ's third and fourth principles make clear, certain subject matter is uniquely within the competence of the legislature and not the competence of the courts. He puts high level socio-economic policy in this category (see Lord Hughes in *SG* [135]). But, he says, tax issues should be treated in the same way. Mr Stone refers to the decision of the ECtHR in *National & Provincial* and the decision of the Court of Appeal in *Rowe* to demonstrate this latter point.

97. Mr Afzal criticised Mr Stone's reliance upon these cases. He noted that *National & Provincial* is a ECtHR case and as a result, one would expect a wide margin of appreciation to be shown to the decisions of the national legislature and executive. The *Rowe* case is a case under A1P1, not a discrimination case within Article 14. He says the considerations are different where a court or tribunal is dealing with discrimination on the grounds of a protected status.

98. I acknowledge all of these points. However, I agree with Mr Stone that tax is an area in which due deference has to be shown to the legislature. The second paragraph in A1P1 demonstrates this. However, discrimination still has to be justified and, as I have concluded above, that involves the court or tribunal considering where the balance should be struck between the interests of the complainant and the interests of

the community as a whole. On that basis, it seems to me that, consistent with the principles outlined by Laws LJ in *International Transport Roth*, the level of deference to be shown to the national legislature and executive has to be taken into account as part of that balance. To use the words of Lord Mance in *Asbestos*, I must ensure that I attach "appropriate weight to informed legislative choices" (*Asbestos* [54]). This is in essence the approach taken by Laws LJ in *International Transport Roth* (as evidenced by his comments at [109]).

(d) Direct or indirect discrimination?

99. I accept Mr Stone's submission that the discrimination in this case is indirect. This is a case where the relevant provision is not specifically targeted at persons with a given political opinion or who support a particular political party. The rule does, however, have a particular effect on new political parties with broad national support.

100. I also accept Mr Azfal's submission that indirect discrimination still requires to be justified. From the cases to which I was referred (most particularly, *DH*), it would appear that the level of that weight again turns on the underlying nature of the discrimination concerned and, in appropriate circumstances, may still require "weighty reasons".

Legitimate aim

(a) The parties' submissions

101. I should then apply these principles to the facts of this case. The first question is whether s24(2) IHTA pursues a legitimate aim. As I have mentioned above, the aims of the legislature should be respected unless the differential treatment is manifestly without reasonable foundation.

102. Mr Afzal's first point on this question is that the burden of proof is on HMRC. HMRC has not discharged that burden. It has not produced any evidence to demonstrate the aims of the legislation. Having failed to do so, the Tribunal should take a critical view of any differential treatment arising from the legislation.

103. Mr Afzal says that the Parliamentary debates introducing the relevant legislation in 1975 do not demonstrate any legitimate aim. The original legislation which is currently in s24 IHTA is part of the legislation on the introduction of CTT. The conditions for relief from CTT for donations to political parties were drawn from the conditions for "short funding" of the Parliamentary affairs of opposition parties; they were not tailored to meet the requirements of CTT (House of Commons Debates 5 February 1995, columns 925-927). If and to the extent there was any aim in the proposal, it was to exclude funding from two independent MPs (House of Commons Debates 5 February 1975, column 932). That is not a legitimate aim.

104. The justification for any discrimination has to be tested at the time at which the events took place – in the case, the time at which Mr Banks made his donations – not at the time at which the legislation was introduced. The conditions in s24(2) have not

kept pace with developments such as the registration of political parties (initially in the Registration of Political Parties Act 1998) and the introduction of direct elections to the European Parliament. They are no longer required to prevent abuse. HMRC now has at its disposal other means to prevent abuse (for example, the general anti-abuse rule) which were not available at the time.

105. Mr Stone says that there is a legitimate aim for the legislation. He says that the aim of the legislation is to support the private funding of political parties that are participating in Parliamentary democracy.

106. Mr Stone dismisses Mr Afzal's points regarding the lack of relevant evidence and HMRC's reliance upon submissions. He says that, for the purpose of assessing the compatibility of legislation with the ECHR, the court or tribunal will often determine the policy objective of a statute from the wording of the legislation itself. As Lord Nicholls points out in *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816 (at [63]) ("*Wilson*"), "the facts will often speak for themselves". In addition, the court or tribunal may obtain assistance from background material, such as government white papers or information provided in the course of debates on a Bill (*Wilson* [64]). In the present case, it can be seen from the Parliamentary debates that the aim of the legislation is to promote the private funding of political parties (House of Commons Debates 5 February 1975, columns 925-927). That is a legitimate aim.

107. It is natural to place limits upon the relief in order to prevent abuse. Once again, that is a legitimate aim. It is not irrational for those limits to be based on electoral success and public support. Nor was it irrational for relief to be directed towards parties that are participating in Parliamentary democracy through the House of Commons. In this respect, Mr Stone referred to the report of the Committee of Standards in Public (1998) which was chaired by Lord Neill (the "Neill Report") which discussed in Chapter 8 the possibility of income tax relief being made available for political donations. It concluded (in paragraph 8.23) that the IHT test would be the correct test of eligibility for any income tax relief on political donations.

(b) Discussion

108. The Human Rights Act 1988 requires courts and tribunals to evaluate the effect of legislation in terms of ECHR rights. As Lord Nicholls describes in *Wilson* (at [61] to [67]), this process requires courts and tribunals to compare the impact of the legislation on ECHR rights with the policy objective of the legislation which may justify infringement of an ECHR right. In doing so, the courts and tribunals may have regard to additional information such as Parliamentary material and debates when identifying the policy objective of the legislation or assessing the proportionality of a particular provision for the limited purpose of providing the background and context for the legislation.

109. That said, I do not need to resort to other evidence in this case. I agree with Mr Stone that the aim of the legislation is evident from the words of the statute, namely to promote private funding of political parties. The definition of political parties that qualify for exemption in s24(2) IHTA is designed to ensure that what may be a

valuable tax relief is limited to prevent abuse of the relief. It does so by restricting donations to those political parties that play a meaningful role within national political debate.

110. I agree with Mr Stone that these are legitimate aims. Given the degree of deference which should be given in relation to this part of the test, it cannot be said that those aims are manifestly without reasonable foundation.

Proportionality

111. The second question is whether the differential treatment bears a reasonable relationship of proportionality to those aims. As I have described, for this purpose it is necessary to determine whether the measure adopted achieves a "fair balance" between the public interest being promoted and the other interests involved.

(a) The parties' submissions

112. Mr Afzal says that, even if the legislation does pursue a legitimate aim in requiring a minimum level of public support before donations to a political party qualify for exemption from IHT, the means chosen of identifying relevant political parties in s24(2) are disproportionate in the context of the achievement of that aim.

(1) The existing definition is biased in favour of established parties. Its effect is skewed by the first past the post system for elections to Parliament. It is, for example, quite possible for a party to have a substantial proportion of the popular vote but not have any members of Parliament as in UKIP's case, whilst other parties with a minimal level of public support qualify.

(2) The issue could be addressed in any number of other ways. Qualifying political parties could have been identified by reference to elections other than general elections to the House of Commons, for example, by reference to "relevant elections" as defined in s22(5) PPERA or elections to the European Parliament or elections to the devolved parliaments. Alternatively qualifying parties could have been identified by a proportion of votes cast at the last election without any reference to the number of elected members of Parliament.

(3) The definition has not changed with the times. It has not taken into account the introduction of elections to the European Parliament in 1979, the registration of political parties in 1998, or the establishment of devolved assemblies and parliaments.

(4) The existing definition takes no account of the results of by-elections. Some of Mr Banks's donations were made after UKIP candidates were successful in by-elections so at a time when UKIP did have elected members of Parliament but not MPs elected at the last general election as required by the definition in s24(2).

(5) The existing definition is contrary to the guidance set out in guidelines published by the European Commission for Democracy through Law (better known as the "Venice Commission" of the Council of Europe) and guidelines

published by the Office for Democratic Institutions and Human Rights ("ODIHR") of the Organisation for Security and Co-operation in Europe ("OSCE") together with the Venice Commission. Those guidelines accept that it is appropriate to limit state funding of political parties (of which, tax relief for donations is a form) to those parties which play a meaningful role in parliamentary democracy. However, they make equally clear the need for public funding and support not to be given in a manner which disadvantages new political parties or those not already represented in the legilsature.

113. Mr Stone says that it is quite clear that it is legitimate to require a minimum level of public support to be demonstrated before donations to a political party qualify for exemption from IHT.

(1) There are many ways in which this could be addressed. The reports and guidelines to which Mr Afzal refers – in particular the guidance produced by the Venice Commission and the OSCE – are not prescriptive about the manner in which appropriate support for political parties should be structured. There is not one common model. It is not irrational for the legislation to require political parties to demonstrate a level of electoral success (i.e. elected MPs) and/or a certain level of votes cast in their favour at the previous election in much the way that s24(2) currently does.

(2) A system which allows tax relief for donations to all registered political parties would clearly be open to abuse. Also, although the definition could have been amended to take into account elections to the European Parliament or to the devolved assemblies and parliaments, it does not render the existing definition - which limits public funding of political parties through tax relief to those that participate in the national legislature - disproportionate.

(b) Discussion

114. I accept most, if not all, of Mr Stone's points. But to my mind, they do not address the main point. The question is whether the chosen means for addressing the legitimate aim – that political parties should be able to demonstrate a minimum level of public support before donations to the party qualify for tax relief – is proportionate in the context of the differential treatment that it causes.

115. To my mind it is not.

(1) I have accepted that it is a legitimate to place some restrictions on tax relief for donations to political parties in order to prevent abuse. Tax relief after all is a form of public funding for political parties.

(2) A balance has to be struck between achieving that legitimate aim and the impact on Mr Banks's rights not to be discriminated against on the grounds of his political opinion.

(3) I have also accepted that it is not irrational for those limits to be based on electoral success and/or public support. There are of course many ways in which it would be possible for a political party to demonstrate a level of

> electoral success or political support. They may include: reference to votes cast at various elections, whether to the House of Commons, local authorities, the European Parliament and/or the devolved parliaments and assemblies; or reference to the collection of signatures as suggested in the OSCE/ODIHR and Venice Commission guidelines...
>
> (4) The choice that Parliament has made (in s24(2)) focusses to a significant extent (although not exclusively) on past success in elections to the House of Commons. I must give due deference to that legislative choice, which I do.
>
> (5) The difficulty with that choice is that those elections take place on a "first past the post" system which, as Mr Banks's case illustrates, is not, on its own, a reliable barometer of public support. The resulting test in s24(2) is liable to be prejudicial to supporters of new and as yet unrepresented parties even where those parties can demonstrate meaningful levels of public support.
>
> (6) Whilst I appreciate that wherever a line is drawn it may throw up some anomalies, I cannot agree that the current test is an appropriate one to apply to tax relief for donations. There are a number of other options available to Parliament to achieve that aim which would not have such a disproportionate effect on supporters of new political parties or parties that, despite being able to demonstrate a meaningful level of public support, are not represented in a parliament elected under that system.

116. Against that background, in my view, the concentration in s24(2) on MPs elected at the previous general election under a first past the post system does not strike a fair balance in the context of the provision of tax relief for the funding of political parties – whatever the advantages and disadvantages of that electoral system for the purposes of representative democracy.

117. For those reasons, in my view, the differential treatment of Mr Banks's donations to UKIP cannot be objectively justified by reference to the current conditions in s24(2) IHTA.

Remedy and interpretation

(a) The parties' submissions

118. Mr Afzal refers me to s3 HRA. He says that it is the duty of the Tribunal to give effect to legislation in a manner that is consistent with ECHR rights. He points out under s3 HRA, a court or tribunal can be required to give legislation an interpretation which is consistent with ECHR rights even if the relevant legislation is not itself ambiguous. Section 3 enables existing language to be interpreted restrictively or expansively but it also allows a court or tribunal to read in words which change the meaning of enacted legislation so as to make it compliant with the ECHR (Lord Nicholls, *Ghaidan* [29] – [33]).

119. He put forward various ways in which s24 IHTA could, in his view, be rewritten in order to make the provision ECHR compliant. These included:

> (1) by substituting a reference to all parties registered under the PPERA in substitution for all of the words after "a political party qualifies for exemption under this section if" in s24(2);
>
> (2) by including a reference to "the European Parliament" after the words "House of Commons" each time they appear in s24(2)(a) and (b); or
>
> (3) by replacing the reference in s24(2) IHTA to "the last general election preceding the transfer of value" with "the general election preceding or following the transfer of value".

All of these suggestions would, of course, conveniently allow Mr Banks's donations to qualify for exemption.

120. Mr Afzal also referred to a number of other potential amendments to s24 IHTA in his argument and in his skeleton argument. These included:

> (1) that s24(2) could refer to success at any of the "relevant elections" defined in s22(5) PPERA;
>
> (2) that the exemption from IHT could be available to political parties that received a certain number of votes at a general election;
>
> (3) that s24 could extend to the election of MPs at by-elections as well as general elections.

121. Mr Stone rejects all of these suggestions.

122. He points out that there are limits on the ability of the court or tribunal to interpret legislation in a way that is compatible with ECHR rights under s3 HRA. In particular, a court or tribunal will not interpret legislation in a manner which is incompatible with the "underlying thrust of the legislation" or which goes "against the grain" of the legislation (Lord Nicholls, *Ghaidan* [33]). Furthermore, where there are several ways to make a provision ECHR-compliant, the choice may involve issues calling for legislative deliberation (Lord Nicholls, *Ghaidan* [33]). Such matters should be determined by Parliament and not by the Tribunal.

(b) Discussion

123. The parties accept that the provisions of s3 HRA are very wide. As Lord Nicholls puts it in *Ghaidan* at [32]:

> "**32** From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it

> Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is possible, a court can modify the meaning, and hence the effect, of primary and secondary legislation."

124. This does not, however, mean that there are no limits on the court or tribunal's powers. As Mr Stone points out s3 HRA begins with the words "so far as it is possible to do so". The relevant limits are set out by Lord Nicholls in *Ghaidan* at [33]:

> "**33** Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

125. As I have mentioned above, it is, in my view, a legitimate aim of the legislation to place some limits on the availability of relief under s24 to ensure that political parties that qualify for relief on their donations enjoy a level of public support. The question is therefore whether it is possible for the Tribunal to interpret or re-write s24 in a manner which sets conditions which are compliant with ECHR rights.

126. Mr Afzal has set out various ways in which, he says, it might be possible to re-write s24 in an ECHR-compliant manner.

127. I will deal briefly with his suggestion that relief could be extended to donations to all parties that are registered under PPERA. On this point, I agree with Mr Stone. If s24 was to be re-written in this way, it would not impose any real restriction at all. Such a change would "go against the grain" of the legislation and so would not be an appropriate use of power of the Tribunal under s3 HRA.

128. As regards the other possibilities put forward by Mr Afzal, it is clear that some of the changes that he puts forward or a combination of them could be used to make the legislation compliant with ECHR rights. However, the court or tribunal is in no position to make the choice as to which of the options should be chosen or, for example, to set the level, in terms of the number of representatives which a political party has in a particular parliament or the number of votes which a political party must achieve at any given elections, in order to qualify. It seems to me that these are matters for Parliament and not matters for the Tribunal. In the words of Lord Nicholls, they are decisions which the tribunals "are not equipped to make" and Parliament could not have intended that the tribunals should make such decisions under s3 HRA.

129. The Tribunal does not have powers to make a declaration of incompatibility under s4 HRA. The powers of the Tribunal are limited to determining whether or not the assessment should be upheld. Accordingly, as I am not able to re-write the legislation for the reasons that I have given, I must dismiss this ground of appeal.

ARTICLES 10 AND 11

130. Mr Banks's main argument under the ECHR was that the differential treatment of his donations to UKIP amounted to discrimination under Article 14 ECHR taken with A1P1. His second and third arguments are that there has also been a breach of Article 14 taken together with Article 10 and Article 11 or a breach of Mr Banks's rights under Articles 10 and 11 alone.

131. I will take these two grounds of appeal together.

ECHR provisions

132. Article 10 provides for freedom of expression. It provides:

> **Article 10**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

133. Article 11 provides for freedom of association. It provides:

> **Article 11**
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of

these rights by members of the armed forces, of the police or of the administration of the State.

The parties' submissions

134. Mr Afzal's submission on the second argument is that Article 14 can also apply when taken together with Articles 10 and/or 11 ECHR. This is on the basis that a tax provision that treats people differently according to the political party to which they make donations, treats people differently by reference to the political party which they support. That, he says, amounts to discrimination within the ambit of Article 10 and/or Article 11.

135. On the third argument, Mr Afzal says that there has been a breach of Articles 10 and 11 taken alone on the grounds that the imposition of a tax charge on Mr Banks's donations to UKIP self-evidently deterred and interfered with Mr Banks's freedom to support UKIP. If the restriction of tax relief on donations to political parties does pursue a legitimate aim, which he contests, Mr Afzal says that the restrictions imposed by s24(2) are disproportionate.

136. Mr Stone says that there is no arguable breach of Article 10 or Article 11 and that the case does not fall within the ambit of Article 10 or Article 11 so as to found any claim for discrimination under Article 14.

Discussion

137. For the reasons that I have given at [123] to [129] above regarding the interpretation of s24(2) IHTA and the remedies available to Mr Banks in this Tribunal, I must also dismiss this appeal in relation to the second and third arguments.

138. The parties' arguments in this case concentrated on Mr Banks's first argument. This reflects the fact that the appeal falls more naturally within Article 14 taken together with A1P1. From the arguments as put to me, it was not clear to me that Article 10 or Article 11 was engaged on the facts of this case. However, I do not need to decide this point and do not do so.

UKIP'S RIGHTS UNDER ECHR

139. Mr Afzal also argues that s24 IHTA represents a breach of UKIP's rights under ECHR in two respects.

(1) First, there has been a breach of Article 14 taken together with Articles 10 and/or 11 in that donations to UKIP were not exempt from tax whereas donations to more established political parties were exempt.

(2) Second, there has been breach of Articles 10 and 11 taken alone in that s24 had the effect of reducing funds available to UKIP and so restricted UKIP's political activities.

In neither case could the interference with UKIP's rights under ECHR be justified.

140. Mr Banks's case is founded on s3 HRA, that is, on the need for the court or tribunal to adopt an ECHR-compliant interpretation of s24 IHTA. It was not necessary for UKIP to be a party in order to make that case.

141. Mr Stone says simply that it is not open for Mr Banks to rely on a breach of UKIP's rights before the Tribunal. UKIP is not a party to the appeal and UKIP has not given any evidence of a breach of its ECHR rights.

142. For the reasons that I have given at [123] to [129] above in relation to Mr Banks's main argument, I must also dismiss the appeal on this ground.

143. Once again, the parties' arguments on this appeal concentrated on the alleged breach of Mr Banks's rights under Article 14 taken together with A1P1 reflecting the fact that this case falls most naturally within that provision. It is not necessary for me to determine the issue as to whether s24 amounts to a breach of UKIP's rights under the ECHR or whether it is possible for Mr Banks to rely on a breach of UKIP's rights. I do not do so.

EU LAW

144. Mr Banks's final argument on this appeal is that s24 IHTA is in breach of the UK's obligations pursuant to Article 4(3) of the Treaty of European Union ("TEU"), which requires member states to "refrain from any measure which could jeopardize the attainment of the [EU]'s objectives".

Relevant provisions of the TEU

145. Article 4(3) TEU provides:

> **Article 4**
>
> 1. …
>
> 2. …
>
> 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

146. I have also been referred by Mr Afzal to the following provisions of TEU:

> **Article 2**
>
> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human

rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 9

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

Article 10

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

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

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

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

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

Article 13

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

The Union's institutions shall be:

- the European Parliament

…

Article 14

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

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

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

The parties' submissions

147. Mr Afzal says that the UK is in breach of its obligations under Article 4(3) TEU.

(1) The EU is founded, inter alia, on principles of democracy and equality (Articles 2, 9 and 10 TEU). The EU Parliament is a central part of representative democracy of the EU (Article 10 TEU). The EU institutions, including the European Parliament, aim to promote its values and objectives (Article 13 TEU).

(2) UK law (s24 IHTA) discriminates against those political parties that are successful in elections to the European Parliament as opposed to those who are successful in elections to the House of Commons. In doing so, the UK is jeopardizing the EU's aims of democracy and equality and the proper functioning of the European Parliament in breach of its obligations under Article 4(3) TEU (*Hurd v Jones* (Case 44/84) [1986] STC 127, *Lord Bruce of Donnington v Aspden* (Case 208/80) [1981] STC 761 and *Luxembourg v European Parliament* (Case 230/81) [1983] 2 CMLR 726).

(3) The UK's obligations under Article 4(3) TEU are directly enforceable (*R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, both in the High Court, [2013] EWHC 1502, and in the Court of Appeal, [2014] EWCA Civ 708 [2015] 1 All ER 185 ("*Bancoult*"))

(4) If there is a breach of EU law, the obligation of the Tribunal is to construe the legislation in a manner which is consistent with EU law or, if a conforming construction is not possible, disapply the offending provision.

148. Mr Stone rejects Mr Afzal's submissions. He says:

(1) There is no evidence that the lack of exemption for donations to UKIP jeopardizes the functioning of the European Parliament.

(2) The taxation of political donations is a matter that rests within the competence of member states. Unless a matter falls within the competence of the EU, it cannot be a directly enforceable right.

(3) Article 4(3) TEU on its own does not create directly enforceable rights: Article 4(3) does not meet the requirements for a measure to have direct effect that are set out in *NV Algemene Transport – en Expetie*

Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration (Case 26/62) [1963] CMLR 105 ("*van Gend & Loos*").

(4) Mr Banks has not identified any other right or obligation which gives rise to a directly enforceable right.

Discussion

149. On this final point, I agree with Mr Stone.

150. The first question that I need to address is whether or not s24 IHTA could have any effect on the achievement of the EU's objectives contrary to Article 4(3) TEU. Mr Afzal presents no evidence in support of his assertion that the differential tax treatment of donations made to parties that are successful in elections to the European Parliament as opposed to those that are successful in elections to the House of Commons jeopardizes the functioning of the European Parliament and the EU's principles of democracy and equality.

151. For my own part, I question whether or not the availability of tax relief on donations to UK political parties is too remote and any potential effect too indirect to be regarded as a breach of the UK's obligations under Article 4(3) not to jeopardize the functioning of the European Parliament and the EU's principles of democracy and equality. I do not, however, need to decide this point.

152. In order for Mr Afzal to succeed on this ground he has to demonstrate that there are relevant obligations owed by the UK under Article 4(3) or under Article 4(3) taken together with other provisions that are directly effective and enforceable in this Tribunal. In my view, there are not.

153. There is no disagreement between the parties that the basic test for a treaty obligation to have direct effect is whether the obligation in question is sufficiently clear, precise and unconditional (*van Gend & Loos*). However, it is clear from the decision of the Court of Appeal in *Bancoult* that the question of whether a particular treaty provision has direct effect is a more complex question.

154. As Lord Dyson MR put it at [140]:

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

155. The question of whether a particular provision has direct effect therefore turns on the nature of the provision. If it is of a general nature and simply imposes obligations on member states between themselves or if the measure allows a material discretion to member states in the manner in which it is implemented (so that there are likely to be material differences between member states in steps that they take to give effect to the provision), the inference will be that the relevant provision is not intended to have direct effect.

156. The authorities suggest that Article 4(3) TEU itself is simply an expression of the more general rule imposing on member states and EU institutions mutual duties of cooperation and assistance in relation to the duties owed under relevant EU treaties (*Luxembourg v European Parliament* [37], *Hurd v Jones* [38]). Those duties do not apply to "agreements between member states outside that framework" (*Hurd v Jones* [38], *Bancoult* in the Court of Appeal [138]).

157. So in *Hurd v Jones* itself - a case concerning the taxation of supplements paid to teachers at European Schools, which were established under statutes which were not part of the treaties establishing the European Communities - the Court of Justice of the European Union ("CJEU") found that the obligations arising from Article 5 of the EEC Treaty (the equivalent of Article 4(3) TEU in the EEC Treaty) itself was not sufficiently specific to have direct effect. The CJEU said this at [48]:

> "**48** Those requirements are not fulfilled with regard to the obligation at issue in these proceedings, namely the obligation arising from Article 5 of the EEC Treaty to refrain from any unilateral measure that would interfere with the system adopted for financing the Community and apportioning financial burdens between the Member States. The differences which exist in that respect between the practices of the Member States concerning the detailed rules and procedures for exempting teachers from domestic taxation show that the substance of that obligation is not sufficiently precise. It is for each Member State concerned to determine the method by which it chooses to prevent its tax treatment of teachers at the European schools from producing detrimental effects for the system of financing the Community and apportioning financial burdens between the Member States."

158. Mr Afzal also suggested that Article 4(3) when read with the other provisions to which he referred might give rise to obligations which are directly enforceable in this Tribunal. If Article 4(3) is to give rise to any obligation which has direct effect and can be enforced in the Tribunal in this way, regard must be had to the nature of the treaty obligation to which it is applied and whether it meets the *van Gend & Loos* tests. So in the Court of Appeal in *Bancoult*, the Court held that the relevant obligations arising from Article 4(3) when taken with Articles 198 and 199 Treaty for the Functioning of the European Union did not have direct effect because the obligations under Articles 198 and 199 were not sufficiently clear.

> "**142** We have formed the view that it would be surprising if the objectives stated in articles 198 and 199 could properly be regarded as sufficiently clear, precise and unconditional to be regarded as directly effective. This is not because one cannot spell a clear obligation out of

> the words of article 4(3) read together with articles 198 and 199. It is because articles 198 and 199 are all about the attainment of objectives of association between OCTs and the European Union, not about the detailed ways in which that association and those objectives should be fulfilled. Simply adding to the statement of the objectives the words of article 4(3) requiring Member States to "refrain from any measure which could jeopardise the attainment of the Union's objectives" does not seem to us to turn what are statements of aspiration into directly effective provisions of EU law."

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

160. Article 4(3) TEU does not give rise to any directly enforceable right in this case. I dismiss this ground of appeal.

Decision

161. For the reasons that I have given above, I dismiss this appeal.

Rights to appeal

162. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ASHLEY GREENBANK
TRIBUNAL JUDGE

RELEASE DATE: 15 OCTOBER 2018

Appendix

Statement of Facts

UK Independence Party ("UKIP")

1. UKIP was originally founded in 1991 under the name Anti-Federalist League. The party changed its name to the UK Independence Party in 1993.

2. The Registration of Political Parties Act 1998 introduced a system of registration of political parties in the United Kingdom. Previously there had been no such register. The register is maintained by the Electoral Commission.

3. UKIP was registered as a political party with the Electoral Commission on 25 February 1999 following the entry into force of the Registration of Political Parties Act 1998.

4. In 1999 the party achieved its first Members of the European Parliament ("MEPs") when it won three seats in the European Parliament (see below).

5. In 2007 Young Independence (YI) was formed as the youth wing of UKIP to represent all UKIP members under the age of 30. The constitution of YI states at item X1.2 that "Young Independence shall be a recognised organisation of the United Kingdom Independence Party ("the Party"), and be responsible for representing party members aged 30 and under. Furthermore, under item X3.3 of the constitution of YI, membership in YI is contingent on being a member of UKIP. Finally, under X3.1 of the constitution all UKIP party members under the age of 30 automatically become members of YI.

6. In March 2014 Ofcom recognised UKIP as having 'major party status' for the purpose of the UK Parliamentary election in May 2015.

7. In October 2014 the Party achieved its first Member of Parliament ("MP") in the UK Parliament when Douglas Carswell won the seat of Clacton in a by-election (see below). UKIP gained a second MP when Mark Reckless won Rochester and Strood in a by-election in November 2014 (see below).

UKIP's Election Results

8. UKIP contested the 1994 European Parliamentary Election, securing 150,251 votes (1% of the overall vote in the UK).

9. In the 1997 UK General Election UKIP fielded 193 candidates across the country, obtaining 105,722 votes (0.3% of total votes cast).

10. In the 1999 European Parliamentary Elections UKIP obtained 696,057 votes (6.5% of the total votes cast in the UK). The party secured three European

Parliamentary seats — South East England, South West England and East of England. The results for the eight highest-polling parties were as follows:

Party	Votes	Percentage of vote	MEPs
Conservative	3,578,218	35.5	36
Labour	2,803,821	26.3	29
Liberal Democrat	1,266,549	11.9	10
UKIP	696,057	6.5	3
Green	625,378	5.9	2
Scottish National	268,528	2.5	2
Plaid Cymru	185,235	1.7	2
Democratic Unionist	192,762	1.8	1

11. In the 2001 UK General Election UKIP fielded 428 candidates across the country, securing 390,563 votes (1.5% of total votes cast). The results for the eight highest-polling parties were as follows:

Party	Votes	Percentage of vote	Seats
Labour	10,724,953	40.7	412
Conservative	8,357,615	31.7	166
Liberal Democrats	4,814,321	18.3	52
Scottish National	464,314	1.8	5
UKIP	390,563	1.5	0
Ulster Unionist	216,839	0.8	6
Plaid Cymru	195,893	0.7	4
Democratic Unionist	181,999	0.7	5

12. In the 2004 European Parliamentary Elections UKIP secured 2,650,768 votes (15.6% of the vote in the UK) and secured twelve European Parliamentary seats. The results for the eight highest-polling parties were as follows:

Party	Votes	Percentage of vote	MEPs
Conservative	4,397,090	25.9	27
Labour	3,718,683	21.9	19
UKIP	2,660,768	15.6	12
Liberal Democrat	2,452,327	14.4	12
Green	948,588	5.6	2
British National	808,201	4.8	0
Respect	252,216	1.5	0
Scottish National	231,505	1.4	2

13. In the 2005 UK General Election UKIP fielded 496 candidates across the country, and it won 605,973 votes (2.2% of total votes cast). The results for the eight highest-polling parties were as follows:

Party	Votes	Percentage of vote	Seats
Labour	9,552,436	35.2	355
Conservative	8,784,915	32.4	198
Liberal Democrats	5,985,454	22.0	62
UKIP	605,973	2.2	0
Scottish National	412,267	1.5	6
Green	283,414	1.0	0
Democratic Unionist	241,856	0.9	9
British National	192,745	0.7	0

14. In the 2009 European Parliamentary Elections UKIP secured 2,498,226 votes (16% of the vote in the UK) and secured thirteen European Parliamentary seats. The results for the eight highest-polling parties were as follows:

Party	Votes	Percentage of vote	MEPs
Conservative	4,198,394	27.7	26
UKIP	2,498,226	16.5	13
Labour	2,381,760	15.7	13
Liberal Democrat	2,080,613	13.8	11
Green	1,303,745	8.6	2
British National	943,598	6.2	2
Scottish National	321,007	2.1	2
English Democrat	279,801	1.9	0

15. In the 2010 UK General Election UKIP fielded 558 candidates across the country, securing 919,471 votes (3.1% of the total votes cast). The results for the eight highest-polling parties were as follows:

Party	Votes	Percentage of vote	Seats
Conservative	10,703,654	36.1	306
Labour	8,606,517	29.0	258
Liberal Democrats	6,836,248	23.0	57
UKIP	919,471	3.1	0
British National	564,321	1.9	0
Scottish National	491,386	1.7	6
Green	285,612	1.0	1
Independent	182,299	0.6	1

16. In the 2013 local council elections UKIP's number of councillors increased from 8 to 147 (138 county council seats and 9 seats in Unitary Authorities).

17. In the 2014 local council elections UKIP won 163 council seats.

18. In the 2014 European Parliamentary Elections UKIP secured 4,376,635 votes (26.6% of the vote in the UK) and secured twenty four European Parliamentary seats. The results for the eight highest-polling parties were as follows:

Party	Votes	Percentage of vote	MEPs
UKIP	4,376,635	26.6	24
Labour	4,020,646	24.4	20
Conservative	3,792,549	23.1	19
Green	1,255,573	7.6	3
Liberal Democrat	1,087,633	6.6	1
Scottish National	389,503	2.4	2
Sinn Fein	159,813	1.0	1
Democratic Unionist	131,136	0.8	1

19. In October 2014 UKIP achieved its first MP in the UK Parliament when Douglas Carswell won the seat of Clacton in a by-election. Mr Carswell obtained 21,113 votes, 59.7% of the votes cast in that constituency.

20. UKIP gained a second MP in the LTK Parliament when Mark Reckless won Rochester and Strood in a by-election in November 2014. Mr Reckless obtained 16,867 votes, 42.1% of the votes cast in that constituency.

21. In the General UK Election which took place on 7th May 2015 UKIP secured 3,881,099 votes (12.6% of the total in the UK). One Member of Parliament was elected. The results for the eight highest-polling parties were as follows:

Party	Votes	Percentage of vote	Seats
Conservative	11,334,226	36.9	331
Labour	9,347,273	30.4	232

UKIP	3,881,099	12.6	1
Liberal Democrat	2,415,916	7.9	8
Scottish National	1,454,436	4.7	56
Green	1,157,630	3.8	1
Democratic Unionist	184,260	0.6	8
Plaid Cymru	181,704	0.6	3

Donations by the Appellant

22. The following table sets out a list of all donations by the Appellant and by Rock Services Ltd (a company wholly owned indirectly by the Appellant) to UKIP in the period from 7th October 2014 to 31st March 2015 (prior to the General Election which took place on 7th May 2015) :

Date	Donation To:	Donated By:	Donor Status	Donation Type	Value
31/03/2015	UKIP Central Party	Rock Services Limited	Company	Non Cash	£13,440.00
31/03/2015	UKIP Central Party	Rock Services Limited	Company	Non Cash	£22,680.00
31/03/2015	UKIP Central Party	Rock Services Limited	Company	Non Cash	£13,440.00
31/03/2015	UKIP Central Party	Rock Services Limited	Company	Non Cash	£13,440.00
29/03/2015	UKIP Central Party	Rock Services Limited	Company	Non Cash	£86,977.68
27/03/2015	UKIP Central Party	MrArron Banks	Individual	Cash	£550.00
17/03/2015	UKIP Central Party	Rock Services Limited	Company	Cash	£200,000.00
09/02/2015	Young Independence	MrArron Banks	Individual	Cash	£15,000.00
31/12/2014	UKIP Central Party	Rock Services Limited	Company	Non Cash	£394,253.70
01/12/2014	Young Independence	Rock Services Limited	Company	Cash	£10,000.00
20/11/2014	UKIP Central Party	MrArron Banks	Individual	Cash	£50,000.00
20/11/2014	UKIP Central Party	Rock Services Limited	Company	Non Cash	£7,000.00
06/11/2014	UKIP Central Party	MrArron Banks	Individual	Cash	£50,000.00
07/10/2014	UKIP Central Party	Rock Services Limited	Company	Cash	£100,000.00
					£976,781.38

23. The last UK general election preceding each of the transfers referred to in paragraph 22 was that which took place in 2010. At that general election no members of UKIP were elected to the House of Commons.