

TIEAs: a tale of two courts, two time periods, two appeals and an acquittal

UPDATE

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Mourant Ozannes Partner Justin Harvey-Hills and Mathew Cook, who are highly regarded as Jersey's leading experts on tax-related litigation, examine the implications of the Court of Appeal's judgment on tax information exchange agreement (TIEA) requests in the Larsen case.

TIEAs are inter-state agreements by which the tax authorities of one state can request tax information from another state that is relevant to an investigation being undertaken and are a useful means of tackling tax evasion. However, fishing expeditions are not permitted and care has to be taken of requests that seek wide-ranging disclosure of confidential information.

Following the amendment in November 2013 of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations (the **Regulations**), the legislation which implements TIEAs into Jersey law, the process of issuing and challenging notices was tightened considerably with a view to limiting and/or preventing challenges. This has given rise to a plethora of new issues and a cat's cradle of appeals.

Since November 2014, judicial review proceedings have been on foot in the second *Volaw and Larsen* case. In November 2015, the Royal Court dismissed the judicial review which was brought both on substantive and procedural grounds, the latter including a challenge to the legality of the Regulations.

Before the Court of Appeal could hear the appeal, it had to determine whether it had jurisdiction as Regulation 14A purported to oust it and to require any appeal to be made to the Judicial Committee of the Privy Council (the **Judicial Committee**). As a precaution, appeals were issued both to the Court of Appeal and to the Judicial Committee.

Regulation 14A purported to apply to any judicial review to which Regulation 14 applied. Regulation 14 was the provision that purported to require a judicial review against the requirements of a notice to be brought within 14 days and ousted the jurisdiction of the court in relation to certain matters. So, the Court of Appeal first had to consider whether Regulation 14 was unlawful.

The Regulations are secondary legislation which can only be made under a power given in primary legislation. In this case, the primary legislation is Article 2 of the Taxation Implementation (Jersey) Law 2004 (the **2004 Law**). Article 2 contained a general power to make regulations to implement TIEAs. However, such legislation has to be construed subject to the principle of legality which says that where the legislature intends to confer authority to infringe fundamental rights, it must use express words or this must arise by necessary implication. The principle is also a democratic principle. If the legislature intends to infringe fundamental rights, it must be clear with the electorate and accept the political cost. The fundamental right in question was that of access to the court.

In its decision of 28 November 2015, the Royal Court found that Regulation 14 was lawful on the basis that, although it infringed a fundamental right, the right was at the lower end of the scale of fundamental rights and that the States had approved the Regulations. The Royal Court therefore saw no reason to suppose that the States was unaware of what it was doing when it passed the 2004 Law and the 2008 Regulations and deduced from this that it must have intended to infringe fundamental rights. As we said at the time, the Royal Court was right to acknowledge that a fundamental right was being infringed. However, it was,

in our view, wrong to find that Regulation 14 was valid for three main reasons. Firstly, there is no 'sliding scale' of fundamental rights. Secondly, the question was not whether the States knew what they were doing when they passed the 2004 Law but whether the 2004 Law clearly authorised the infringement of fundamental rights. Thirdly, the passing of the Regulations by the States was irrelevant since Article 2 of the 2004 Law, properly construed by reference to the principle of legality, was a general power which did not confer the power to make regulations that infringed fundamental rights.

The Court of Appeal departed from the Royal Court's reasoning and found that Article 2 of the 2004 Law had to be construed by reference to the principle of legality. However, the Court of Appeal went on to find that Regulation 14 did not infringe the right of access to the court. Again, it is difficult to follow this since, on any view, filing a full judicial review application from a standing start in 14 days, in circumstances where an applicant has been given no reasons for the issuance of the notice, would seem to affect seriously the fundamental right of access to the court. Indeed, the whole idea of Regulation 14 was to make appeals more difficult. It did not need to be an absolute bar for the principle to be engaged. The Court of Appeal added that it might be possible to 'read in' to Regulation 14 an ability to extend the 14 day timeline in circumstances where it effectively operated as a bar. However, Regulation 14 is of general application and this would seem contrary to the gist of the legislation which admits of no exceptions.

So why does this difference matter? The reason is that the Royal Court used its application of the principle of legality as a means for finding that the Regulations were lawful, notwithstanding that they infringed another fundamental right, that to a fair procedure. They did this by prescribing a procedure which did not meet the requirements of 'elementary fairness' set out in the earlier *Volaw and Larsen* case ([2013] (2) JLR 499). In that case, the Court of Appeal had to read into a much more generous version of the Regulations a procedure by which the persons affected by a potential notice had the right to make prior representations. The fact that the Court of Appeal has found that the principle of legality applies normally to Article 2 of the 2004 Law undermines the Royal Court's finding that the Regulations could legally allow the Comptroller to follow an unfair procedure. But because the Court of Appeal found that it had no jurisdiction, it never went on to consider the unfair process arguments.

The other major point to emerge is that it now appears that there are time limits for applying for judicial review. Under Article 8(3) of the Human Rights (Jersey) Law 2000, anyone wishing to bring proceedings in relation to a right arising under the European Convention on Human Rights (the **Convention**) has a period of one year in which to do so save where 'Rules of Court made by the Royal Court impose a stricter time limit in relation to the procedure in question'. The Royal Court Rules do provide a stricter time limit for judicial review – namely that an applicant must act promptly subject to an overall time limit of three months which the court has discretion to extend.

The Court of Appeal correctly rejected an argument that Regulation 14 could either amend the Rules of Court (under Article 13 of the Royal Court (Jersey) Law 1948 they have to be passed by the Superior Number of the Royal Court) or that it could amend the Human Rights Law (which is a constitutional statute). The obvious conclusion would have seemed to have been that Regulation 14 was incompatible with the Royal Court Rules and, by extension, the Human Rights Law and therefore that it was unlawful. However, the Court of Appeal instead found that there had been an 'incomplete drafting process' which resulted in there now being two timelines. One was the period of 14 days in Regulation 14. The other was the one year period for challenges based on Convention grounds. But the latter was of little practical value since, in the absence of a challenge within 14 days under Regulation 14, the Comptroller would simply send out the documents to the foreign tax authority.

The existence of two time periods, one of which is of questionable practical value, would seem rather unsatisfactory. Of considerable concern is that delegated legislation can now apparently neuter primary legislation and, in particular, primary legislation that is as fundamental as the Human Rights Law.

So, the validity of the TIEA Regulations and the legality of the process of issuing TIEA notices remain questionable. Meanwhile, the Judicial Committee is faced with two appeals, one from the decision of the Royal Court and the other from the decision of the Court of Appeal. It will have to consider whether to grant special leave to appeal.

In the meantime, Mr Larsen's conviction in Norway for tax evasion, which was the justification for the issuance of the notices, has been overturned by the Norwegian Court of Appeal and he has been acquitted.

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