



17 June 2019

PRESS SUMMARY

Volaw Trust and Corporate Services Ltd and its Directors and others (Appellants) v The Office of the Comptroller of Taxes and another (Respondents)

Volaw Trust and Corporate Services Ltd and its Directors and others (Appellants) v Her Majesty's Attorney General for Jersey (Respondent) [2019] UKPC 29

On appeals from the Royal Court of Jersey and the Court of Appeal of Jersey

JUSTICES: Lord Reed, Lord Kerr, Lord Sumption, Lord Carnwath, Lord Hodge, Lady Arden, Lord Kitchin

BACKGROUND TO THE APPEALS

Volaw Trust and Corporate Services Ltd (“**Volaw**”) is a company incorporated in Jersey and authorised to carry on trust company business by virtue of its registration under the Financial Services (Jersey) Law 1998.

There are two appeals. For the purposes of both appeals, the parties agree that, at the time the relevant notices were issued, the appellants were the subject of a criminal investigation in Norway and were ‘charged’ with a criminal offence for the purposes of Article 6 of the European Convention on Human Rights (“**ECHR**”).

The first appeal concerns notices issued by the Comptroller of Taxes in response to a request by Norwegian tax authorities to obtain information concerning companies and trusts administered by Volaw, which they suspected were being used by a Norwegian national, Mr Larsen, to evade tax payable in Norway. The requests were made under the Agreement between Jersey and the Kingdom of Norway for the Exchange of Information relating to Tax Matters, concluded on 28 October 2008 (“**TIEA**”). Although the Comptroller has meanwhile withdrawn his notices, the parties asked the Board to determine the appeal on the basis that the issues raised remained of general public importance.

The second appeal concerns a notice issued with the authority of the Attorney General of Jersey (“**AG**”) under the Investigation of Fraud (Jersey) Law 1991 (“**1991 Law**”), in response to a request by the Office of the Public Prosecutor in Norway seeking assistance in obtaining further documents from Volaw. In the meantime, Mr Larsen’s appeal against his conviction in Norway has been successful, but the AG has now opened his own investigation. The appellants’ submissions concerned both the lawfulness of the AG’s notice at the time it was issued, when any risk of prosecution was under Norwegian law, and its lawfulness currently, when any such risk arises under Jersey law.

JUDGMENT

The Board will humbly advise Her Majesty that the appeals should be dismissed. Lord Reed gives the advice of the Board.

REASONS FOR THE JUDGMENT

Although six issues arose in the appeals, Issues (3), (4) and (5) did not, in the end, require separate consideration due to the Board’s disposal of Issues (1) and (2). [36], [79]-[81]

Issue (1): Compatibility with article 6 of the ECHR

The first issue is whether the notices violated the privilege against self-incrimination under Article 6 of the ECHR in so far as they required the production of pre-existing documents. The appellants rely on decisions of the European Court of Human Rights beginning with *Funke v France*, which indicate that the prosecution and punishment of a person for failing to produce pre-existing documents can in some circumstances violate the privilege against self-incrimination under Article 6. In so far as some decisions of the Court of Appeal of England and Wales have held Article 6 is not engaged by compulsion to produce pre-existing documents, a more nuanced approach should be adopted. [45] The present case does not, however, fall within the ambit of the *Funke* line of decisions, since it is not a case in which the appellants were prosecuted and punished for their failure to produce self-incriminating evidence. [60] The appeals need to be considered in light of the four factors identified by the European Court of Human Rights in its recent case-law: the nature and degree of compulsion used to obtain the documents in question, the weight of the public interest in the investigation and punishment of the offences at issue, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained may be put. [61] The compulsion used did not involve physical or psychological pressure, which has been treated as important in relation to the production of real evidence. [63] The public interest in the investigation of international tax evasion and fraud was considerable, and it was not unreasonable to expect licensed providers of financial services to cooperate with investigations into offences of that character by producing information about their clients' affairs. [64]-[65] Since the only potential incriminatory use of the documents would be in proceedings in Norway or Jersey, both of which adhere to the Convention, it cannot be said that the fairness of any trial was likely to be seriously prejudiced by the production of the documents at the pre-trial stage. [67]-[68] The complaint based on Article 6 is therefore rejected. [70]

Issue (2): Compatibility with Jersey customary law

The parties agree that the privilege against self-incrimination under Jersey customary law has been impliedly abrogated by the 1991 Law, with the consequence that no such privilege applies to the notice issued under that law. The question is, therefore, whether such a privilege applies to pre-existing documents falling within the scope of the notices issued by the Comptroller of Taxes. [73] In *Brannigan v Davison*, the Board held on an appeal from New Zealand that the common law privilege has no application where the relevant sanctions arise under a foreign law. The submissions in the present case do not lead the Board to question the decision in that case, and no material differences between New Zealand and Jersey have been drawn to its attention which would diminish the persuasiveness of Lord Nicholls' reasoning. Accordingly, the privilege does not apply. [77]-[78]

Issue (6): Article 6(4) of the TIEA

In the first appeal, the question arises as to whether the Comptroller is obliged to consider whether the documents specified in the notices could be obtained under Norwegian law, and, if they could not be, to refuse a request under Article 6(4) of the TIEA. [82] The short answer to this submission is that Jersey adopts a dualist approach to international law. The TIEA does not form part of the domestic law of Jersey, and Article 6(4) does not, therefore, provide a basis for challenging the validity of the TIEA notices under Jersey law. The TIEA has been implemented in Jersey law by the 2008 Regulations, and it is not argued that those regulations impose an obligation of the kind for which the appellants contend. Furthermore, even if the Comptroller had been obliged to satisfy himself that the request complied with Article 6(4), he would have been entitled to treat the Norwegian tax authorities' statement that the information would be obtainable under its laws and the normal course of its administrative practice in similar circumstances as satisfactory evidence of compliance. [83]

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html