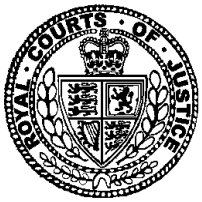

Neutral Citation Number: [2021] EWCA Civ 1439

Case No: A3/2020/1249

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
MRS JUSTICE FALK AND UPPER TRIBUNAL JUDGE TIMOTHY HERRINGTON
[2020] UKUT 0101 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2021

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HENDERSON
and
LADY JUSTICE NICOLA DAVIES

- - - - - - - - - - - - - - - - - - - -

Between :

ARRON BANKS	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Mr Jason Coppel QC and Mr Imran Afzal (instructed by **Kingsley Napley LLP**) for the **Appellant**
Sir James Eadie QC and Mr Christopher Stone (instructed by **the General Counsel and Solicitor for HMRC**) for the **Respondents**

Hearing dates: 26 and 27 May 2021
(further written submissions received on 21 and 27 July 2021)

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Approved Judgment

Lord Justice Henderson:

Introduction and Background

1. Between 7 October 2014 and 31 March 2015, the Appellant, Mr Arron Banks, made a series of 14 political donations with a total value of £976,781.38. Some of the donations were made by him in his personal capacity, and others through a company of which he was indirectly the sole beneficial owner, Rock Services Limited. The recipient of the donations was the UK Independence Party ("UKIP"), or (in two instances) UKIP's affiliated youth wing, Young Independence.

2. We were informed that UKIP has at all material times been a limited company. It was founded in 1991 under the name Anti-Federalist League, but changed its name to UKIP in 1993. Following the entry into force of the Registration of Political Parties Act 1998, it was registered as a political party with the Electoral Commission on 25 February 1999.

3. UKIP achieved its first electoral success in the 1999 European Parliamentary Elections, when it won three seats in the European Parliament and 6.5% of the total votes cast in the UK. This success was augmented in the European Parliamentary Elections of 2004 and 2009, and reached a peak in the European Parliamentary Election of 2014 when UKIP won 24 seats and 26.6% of the UK popular vote. This was a greater measure of success than that achieved by any other UK political party, both in terms of the number of seats won and in terms of the number of votes cast.

4. By contrast, UKIP's success in obtaining representation in the UK Parliament at Westminster came more slowly, and to a much lesser extent. UKIP contested the UK General Elections in 1997, 2001, 2005 and 2010, but without winning any seats, and with a share of the popular vote which rose from 0.3% in 1997 to 3.1% in 2010. It was not until 2014 that UKIP achieved its first successes, in each case at a by-election. On 9 October 2014, Mr Douglas Carswell won the seat of Clacton, obtaining 59.7% of the votes cast, and on 20 November 2014, Mr Mark Reckless won the seat of Rochester and Strood, with 42.1% of the votes cast in that constituency.

5. In the next General Election, which took place on 7 May 2015, UKIP secured 3,881,099 votes (12.6% of the total in the UK), and one Member of Parliament ("MP") was elected.

6. It can be seen from this narrative that, when Mr Banks made the donations summarised in [1] above, UKIP had no MP at Westminster who had been elected at the 2010 General Election, although during the period when the donations were made UKIP won the two by-election victories which I have mentioned. In fact, only the first of the donations (a gift in cash of £100,000 made by Rock Services Ltd on 7 October 2014) was made before the election of Mr Carswell as UKIP's first MP, and all but the first four of the donations were made at a time when UKIP had two MPs at Westminster.

7. It has at all stages been common ground that the donations made by Mr Banks personally constituted transfers of value made by him for the purposes of inheritance tax ("IHT"), and that the donations made by Rock Services Ltd are to be treated in the same way by virtue of the charge imposed on participators in close companies by section 94 of the Inheritance Tax Act 1984 ("IHTA 1984" or "the 1984 Act").

8. Section 2(1) of IHTA 1984 provides that:

> "A chargeable transfer is a transfer of value which is made by an individual but is not (by virtue of Part II of this Act or any other enactment) an exempt transfer."

9. The exemption with which we are concerned is contained in section 24 of the 1984 Act. Under the heading "Gifts to political parties", the section (as in force in the tax year 2014/15) provided materially as follows:

> "(1) Transfers of value are exempt to the extent that the values transferred by them—
>
> (a) are attributable to property which becomes the property of a political party qualifying for exemption under this section; …
>
> (b) …
>
> (2) A political party qualifies for exemption under this section if, at the last general election preceding the transfer of value—
>
> (a) two members of that party were elected to the House of Commons, or
>
> (b) one member of that party was elected to the House of Commons and not less than 150,000 votes were given to candidates who were members of that party."

10. As a matter of construction of the statutory wording, and leaving aside for the moment any impact of the Human Rights Act 1998 ("HRA 1998"), it is clear (and has never been disputed by Mr Banks) that the donations which he made to UKIP in the 2014/15 tax year cannot qualify for exemption under section 24 of the 1984 Act. The reason for this is that at the last general election preceding the transfers of value, i.e. the 2010 General Election, no member of UKIP was elected to the House of Commons: see [4] above. It follows that neither of the alternative qualifying conditions contained in paragraphs (a) and (b) of section 24(2) was satisfied. The elections of Mr Carswell and Mr Reckless in the course of the year cannot assist Mr Banks, because they were elected at by-elections and not at the previous general election.

11. Accordingly, by a notice of determination dated 5 February 2017 and given by the respondent Commissioners for HM Revenue and Customs ("HMRC") under section 221 of IHTA 1984, it was determined that the donations made by Mr Banks were chargeable transfers within section 2 of the 1984 Act. The IHT chargeable in respect of those transfers was stated as being £162,945.34 to the best of HMRC's judgment. Although nothing turns on the precise figures, it may reasonably be inferred that this figure was arrived at by applying the lifetime rate of 20% to the value transferred in excess of the unused portion of Mr Banks' nil-rate band (which was then £325,000): see section 7(1), (2) of, and Schedule 1 to, IHTA 1984.

12. Mr Banks appealed against this notice of determination to the First-tier Tribunal (Tax Chamber) (Judge Ashley Greenbank), which dismissed his appeal for the reasons given

in a decision released on 15 October 2018 ("the FTT Decision": see [2018] UKFTT 617 (TC), [2019] STFD 304). In summary, Mr Banks (who was then represented by Mr Imran Afzal of counsel) argued that the application of section 24 in accordance with its terms breached his human rights, or alternatively breached UKIP's rights, under the European Convention on Human Rights and Fundamental Freedoms ("the ECHR"), as incorporated into UK domestic law by HRA 1998; and that section 24 could, and therefore should, be construed, or "read down", in accordance with section 3 of HRA 1998 in such a way as to secure compatibility with those rights. Mr Banks also advanced a further argument based on alleged breach of European Union law, which is no longer pursued.

13. The main argument advanced by Mr Banks was that section 24, as it stands, unlawfully discriminated against him contrary to Article 14 of the ECHR read with Article 1 of the First Protocol to the ECHR ("A1P1") (protection of property). The discrimination claim under Article 14 was also put in conjunction with either Article 10 (freedom of expression) or Article 11 (freedom of assembly) of the ECHR. In the further alternative, Mr Banks alleged that there had been a direct infringement of his own rights under Articles 10 or 11.

14. Although Mr Banks' appeal was dismissed, he achieved a considerable measure of success before the FTT. Judge Greenbank held that Mr Banks had established a case on the basis of indirect discrimination against him under Article 14, on the grounds of his political opinions, and that the defence of justification failed. Nevertheless, no remedy could be granted to him, because it was not possible to construe section 24 of IHTA 1984, pursuant to section 3 of HRA 1998, in a Convention-compliant manner. It is material to note at this point that it was not open to the FTT to make a declaration of incompatibility under section 4 of HRA 1998, because that remedy may only be granted by a "court" as defined in section 4(5). The definition does not include tribunals.

15. Mr Banks appealed against the outcome of the FTT Decision to the Tax and Chancery Chamber of the Upper Tribunal. By a respondent's notice, HMRC challenged the FTT's conclusions that there had been less favourable treatment on the ground of Mr Banks' political opinions, and (if there had been) that any less favourable treatment was not justified. By its decision released on 1 April 2020 ("the UT Decision"), the Upper Tribunal (Falk J and Judge Timothy Herrington) dismissed Mr Banks' appeal: see [2020] UKUT 0101 (TCC), [2020] STC 996. Furthermore, all of the issues on which Mr Banks had succeeded before the FTT were comprehensively rejected by the Upper Tribunal.

16. The Upper Tribunal identified the issues which it had to decide in the UT Decision at [54]. Leaving aside the EU law arguments that are no longer pursued, the remaining five issues were in summary as follows:

    i) Whether the difference in treatment between Mr Banks, and an individual who did receive an exemption under section 24 of the 1984 Act, amounted to discrimination under Article 14 ECHR taken with A1P1.

    ii) Whether (a) any difference in treatment was in pursuit of a legitimate aim and (b) whether the chosen means for addressing any legitimate aim identified was proportionate in the context of the differential treatment that it caused, and

accordingly whether it could be objectively justified by reference to the current conditions contained in section 24(2).

iii) Whether there had been a breach of Article 14 ECHR taken together with Article 10 and/or Article 11 ECHR, or a breach of Mr Banks' rights under those Articles alone.

iv) Whether the current conditions in section 24(2) represent a breach of UKIP's rights under the ECHR which can be relied upon by Mr Banks.

v) Whether section 24 of IHTA 1984 can be interpreted under section 3 of HRA 1998 in a way that is compliant with Mr Banks' Convention rights.

The Upper Tribunal decided each of the above issues in favour of HMRC.

17. Mr Banks now appeals to this court, with permission granted by Arnold LJ on all of the grounds which he wishes to pursue. In the brief written reasons which he gave for granting permission, Arnold LJ noted that the grounds of appeal "raise an important point of principle" concerning the compatibility of section 24 of the 1984 Act with Convention rights. He also noted that this court would be able to make a declaration of incompatibility, which the two Tribunals were unable to do.

18. In this court, Mr Jason Coppel QC has appeared for Mr Banks, leading Mr Afzal, while Sir James Eadie QC has appeared for HMRC, leading Mr Christopher Stone (who represented HMRC before the Tribunals). We are grateful to all counsel for the high quality of the written and oral submissions which we received.

19. Before coming to the grounds of appeal, I will first say a little more about the history of the exemption in section 24 of the 1984 Act, and what conclusions may safely be drawn about its purpose.

The history and purpose of the section 24 exemption for gifts to political parties

20. The exemption now contained in section 24 of IHTA 1984 has been in materially the same form since the introduction of capital transfer tax (the precursor of IHT) in the Finance Act 1975: see paragraph 11 of Schedule 6 to that Act. Under estate duty, which was abolished and replaced by capital transfer tax, there had been an exemption in relation to lifetime gifts made within seven years of death in respect of gifts for "public or charitable purposes", provided that the gifts were not made within 12 months of the date of death: see section 38(2)(a) of the Customs and Inland Revenue Act 1881, as amended (in particular) by the Finance Act 1968. It appears from the brief discussion of this subject in Dymond's Death Duties, 15th edition (1973), vol.I, at p.317 that the expression "public purposes" was understood to cover gifts to a political party, even though such gifts would not be "charitable": see Blair v Duncan [1902] AC 37 at 48 (per Lord Robertson) and Bowman v Secular Society [1917] AC 406 at 442 (per Lord Parker). When the Finance Bill 1975 was published, however, its proposals for capital transfer tax did not include any exemption for public purposes. This was the subject of a debate in the House of Commons Standing Committee A on 5 February 1975 at which a number of proposed amendments were discussed. One such amendment, tabled by a Conservative (opposition) MP, Mr Nigel Lawson, was to insert an exemption for gifts to political parties subject to the conditions now found in section 24(2) of IHTA 1984.

21. The record of the debate in Hansard shows that Mr Lawson explained that the wording of the amendment had its origin in proposals then made by the Leader of the House (Mr Edward Short MP) under the heading of "Financial Assistance to Opposition Parties", but with the difference that the formula would apply to the party in government as well as to opposition parties: see column 926. Mr Lawson also said (column 927):

> "The Government must be consistent. It is right to encourage the flow of funds to the political parties for the strengthening of parliamentary democracy."

22. The Chief Secretary to the Treasury (Mr Joel Barnett MP) then explained why he was unable to accept the amendment. He pointed out that it would mainly favour large donors, because the vast majority of people who subscribe to political parties would be able to take advantage of the exemptions from capital transfer tax for normal expenditure out of income or annual amounts of capital under £1,000 (column 929). He said he could not believe "that the way to help political parties in our democracy, and to make democracy work, is to do it through the tax system" (column 930).

23. Despite this rejection at the Committee stage, Mr Lawson's amendment was nevertheless subsequently introduced at the report stage of the Finance Bill, and was incorporated (as I have said) in the final legislation. The researches of counsel have been unable to uncover the reasons which led to this change of mind on the part of the Labour Government of the day, but the will of Parliament, as expressed in the legislation itself, is clear. Paragraph 11 of Schedule 6 to the Finance Act 1975 stated that:

> "(1) Subject to the provisions of Part II of this Schedule, transfers of value are exempt to the extent that the values transferred by them—
>
> (a) are attributable to property which becomes the property of a political party qualifying for exemption under this paragraph; and
>
> (b) so far as made on or within one year of the death of the transferor, do not exceed £100,000.
>
> (2) A political party qualifies for exemption under this paragraph if, at the last general election preceding the transfer of value—
>
> (a) two members of that party were elected to the House of Commons; or
>
> (b) one member of that party was elected to the House of Commons and not less than one hundred and fifty thousand votes were given to candidates who were members of that party."

The exemption formed part of the list of exempt transfers contained in Part I of Schedule 6 to the 1975 Act. Other exemptions included gifts to charities (again subject to an upper limit of £100,000 if made on or within one year of death) in paragraph 10,

gifts to various specified national institutions (in paragraph 12) and gifts for public benefit made to certain non-profit making bodies if the Treasury so directed (paragraph 13).

24. Certain points are clear from the language of the exemption itself, which (as I have said) has remained materially unchanged for over 45 years since its first enactment in 1975 (apart from the removal, by amendment in 1988, of the £100,000 upper limit).

25. First, in order to qualify for exemption, the gift must be made to a political party which is represented in the House of Commons by at least one MP elected at the last general election preceding the gift. There is no definition of "political party", but this is unlikely to cause any practical difficulty because the results of the last general election, and the affiliations of the MPs elected at it, will be a matter of public record.

26. Secondly, if the party in question has only one MP who was so elected, the popular vote threshold in section 24(2)(b) must also be satisfied. The minimum of 150,000 comfortably exceeds the number of voters on the electoral register for any single constituency, so a party with only one MP will not in practice be able to qualify unless its candidates at the last general election obtained a significant measure of popular support in several constituencies.

27. Thirdly, the restriction to MPs elected at a general election excludes those elected at by-elections, unless and until they are elected at a subsequent general election. The requirement also serves to exclude those MPs who defect from one party to another during the course of a Parliament.

28. Fourthly, if the gift qualifies for exemption, there is no restriction on the uses to which the gift may be put by the recipient political party. In particular, there is no requirement that it should be devoted to its activities at Westminster or in campaigning for general elections.

29. Fifthly, the section says nothing at all about the nature or objects of the political party which benefits from the gift, or about the political views or personal characteristics of the donor. Indeed, it is not even a requirement that the donor should be a member or other recognised supporter of the party in question, although it is reasonable to assume that the donor will normally be a committed supporter of the party to which his gift is made. As to the party itself, it may lie anywhere on the political spectrum, and the only relevant requirement is that it should be represented at Westminster by at least one MP elected at the last general election.

30. Sixthly, the negative point may be made that no changes have been made to the qualifying conditions in section 24(2) of the 1984 Act, despite various significant developments in the role of political parties in the UK's democratic system. In their written submissions, counsel for Mr Banks single out three such developments: the introduction of direct elections to the European Parliament in 1979; the introduction of direct elections to the devolved legislatures in Scotland, Wales and Northern Ireland in 1998 and 1999; and the introduction of a system of registration of political parties in the UK in 1998 (now contained in the Political Parties, Elections and Referendums Act 2000, sections 22, 23, 28 and Schedule 23). This does not necessarily mean, however, that the question has been ignored or overlooked. The explanation may, rather, be that the question of funding for political parties, and the extent to which it should be

encouraged through fiscal incentives, is an inherently political one on which widely differing views are held. All that can safely be said, in my view, is that no political consensus has emerged since 1975 for any change to the existing criteria. In the absence of any change, implemented by way of amendment to the relevant legislation, the intention of Parliament as expressed in the language of section 24 of the 1984 Act must be taken to have remained the same as it was at the date of first enactment.

31. Nor, in my judgment, is it legitimate for us to infer, as Mr Coppel QC submitted, that section 24 must now be regarded as an outmoded or obsolete piece of legislation, which this court should be more ready to hold infringes the human rights of Mr Banks because it long pre-dated the enactment of HRA 1998 and has never been reviewed by Parliament so as to test its compatibility with the ECHR. Whatever merit this submission may arguably have had at the date of the hearing before us in late May 2021, it is now clearly shown to be untenable by the unanimous decision of the Supreme Court in R (SC) v Secretary of State for Work and Pensions and others [2021] UKSC 26, [2021] 3 WLR 428, in which judgment was delivered on 9 July 2021 and on which we subsequently received written submissions from both parties. Giving the leading judgment, with which the other six members of the court agreed, Lord Reed PSC discussed the use of Parliamentary materials when considering whether primary legislation is compatible with Convention rights. The discussion runs from [163] to [185]. While the whole of that passage is important, I would single out for present purposes the following points.

32. First, as Lord Reed explained at [167]:

> "… the will of Parliament finds expression solely in the legislation which it enacts. Parliament does not give reasons for enacting legislation: it simply votes on a motion to approve a proposed legislative text. There is no corporate statement of reasons, and the individual members of Parliament do not give their reasons for voting in a particular way."

A consequence of this, as Lord Reed went on to say at [172], "is that the intention of Parliament, or (otherwise put) the object or aim of legislation, is an essentially legal construct, rather than something which can be discovered by an empirical investigation."

33. Secondly, Lord Reed endorsed and repeated the valuable guidance given by Lord Bingham and Lord Nicholls in the Countryside Alliance case about the care which has to be taken when considering the use of Parliamentary materials in connection with HRA 1998: see R (Countryside Alliance) v Attorney General [2007] UKHL 52, [2008] AC 719, reviewed by Lord Reed in R (SC) at [172] to [176]. Lord Reed emphasised in particular this passage from the speech of Lord Nicholls in the Countryside Alliance case at [67]:

> "Lack of cogent justification in the course of parliamentary debate is not a matter which "counts against" the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his

> explanations to Parliament. The latter would contravene article 9 of the Bill of Rights."

34. Thirdly, Lord Reed drew a distinction between cases where Parliament has recently formed a judgment that the legislation in question was appropriate notwithstanding its potential impact upon protected Convention rights, in which case that may be a relevant factor in the court's assessment, and cases where there is no indication that the issue was considered by Parliament, in which case that factor will be absent: see [179] to [184]. As Lord Reed said at [182], of cases where recent Parliamentary scrutiny is absent:

> "That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying appropriate respect to the will of Parliament as expressed in the legislation."

Lord Reed added, at [184]:

> "… the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility."

35. With this guidance in mind, I return to the question of the statutory aim or purpose of section 24 of IHTA 1984. In my judgement, the only purpose which can safely be inferred from the terms of section 24 is the provision of a fiscal incentive for the funding of political parties which have achieved a specified minimum level of representation in the UK Parliament at Westminster, and thereby to promote the functioning of Parliamentary democracy in the UK. Further than that I would not wish to go.

36. In the FTT Decision, Judge Greenbank dealt with this question at [109]. He said:

> "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."

While I agree that the general purpose is indeed "to promote private funding of political parties", I respectfully think that Judge Greenbank went too far in saying that the reason for the qualifying conditions was "to prevent abuse of the relief". There was no evidence of which I am aware to support the inference that avoidance of abuse was a material factor in the framing of the section. On the other hand, it would in my view be fair to say that the qualifying conditions were deliberately intended to limit the availability of the exemption to cases where the party has an established presence in the House of Commons, measured in one or other of the ways specified, and thus in the functioning of Parliamentary democracy in the UK through the Westminster Parliament.

37. The Upper Tribunal dealt with the issue of the aim of section 24(2) in the UT Decision at [140] to [150]. It stated its conclusion at [150]:

> "We have therefore concluded that the FTT was in error in its description of the aim of the legislation at [109] of the Decision. Whilst the legislation does indeed promote private funding of political parties, it is not correct to describe the conditions as being intended to prevent "abuse" of the relief by restricting donations to parties that "play a meaningful role within national political debate". The aim is much more specific. It is to provide tax relief on donations to political parties that are participating in Parliamentary democracy by being represented in the House of Commons, and not in respect of individual independent MPs. That is a rational and legitimate aim. The focus is on Parliamentary activity. The conditions do not prevent "abuse" but instead describe the type of organisation that is intended to benefit from relief: in other words, something that is a recognisable political party that is represented at Westminster. In our view that is apparent from the language of s24 IHTA, but it is also supported by the Hansard material and by an understanding of the relevant context, namely the introduction of the Short Money arrangement. That additional material explains the inclusion of the conditions contained in s24(2) IHTA."

38. It will be apparent from what I have already said that I agree with the Upper Tribunal's criticism of the FTT's identification of the aim of the legislation. I also agree with the Upper Tribunal's more specific statement of the aim, namely "to provide tax relief on donations to political parties that are participating in Parliamentary democracy by being represented in the House of Commons". My only slight disagreement is that I respectfully question whether any support for this conclusion can legitimately be drawn from the terms of the debate in Standing Committee A on 5 February 1975, although I would accept that reference to the debate is helpful in explaining the link between the wording of the qualifying conditions and the "Short money" rules for the funding of opposition parties which were also introduced in 1975. As the Upper Tribunal noted at [147], the "Short money" rules have remained unchanged since their introduction in 1975, and have therefore continued to match the requirements of section 24(2) (save for being restricted to opposition parties). There is also some force in the point made by the Upper Tribunal at [148]:

> "It is clear that Short Money is focussed on providing funding to parties that are represented at Westminster and is intended to support their Parliamentary business. It is not aimed at parties that are not represented at Westminster."

The link with Short money cannot be pressed too far, however, partly because the exemption in section 24 is not confined to gifts to opposition parties, but also because the legislation places no restrictions on how the donation may be used by the recipient party, provided that the qualifying conditions are met. Indeed, I doubt whether the relevance of the Short money rules goes beyond providing a historical explanation for

the terms in which the qualifying conditions in what is now section 24(2) were originally framed in 1975.

39. I would add, for completeness, that we were taken, as was the Upper Tribunal, to a number of discussion papers and proposals for possible extension or reform of the rules relating to the funding of political parties in the UK over the last thirty years, but as none of them was implemented, they can shed no useful light on the interpretation of section 24 in its existing form. As the Upper Tribunal rightly said, at [153] of the UT Decision:

> "In summary, while there have been a number of proposals and reports commissioned in relation to the reform of political funding, changes have not been made to the conditions either for Short Money or for IHT relief. We were taken to several of the reports in some detail. We do not propose to comment on them save to note, overall, they serve to emphasise that this is a sensitive political area where proposals for change have been put forward, but, for whatever reason, the legislature has not resolved to implement them."

The Grounds of Appeal

40. An appeal to this court from the Upper Tribunal lies only on a point of law: see section 13(1) of the Tribunals, Courts and Enforcement Act 2007. Six grounds of appeal are advanced by Mr Banks. The first three grounds rely on Article 14 ECHR taken with A1P1:

(1) Ground 1 is that the Upper Tribunal erred in law in failing to hold that section 24 of IHTA 1984 *directly* discriminated against Mr Banks on the grounds of his political opinion in breach of Article 14 taken with A1P1.

(2) Ground 2 is the same as Ground 1, save that it relates to Mr Banks' alternative claim that section 24 *indirectly* discriminated against him on the grounds of his political opinion in support of UKIP.

(3) Ground 3 is that the Upper Tribunal erred in law in dismissing Mr Banks' claim that he was discriminated against on the grounds of being a supporter of a party which did not have any MPs following the 2010 General Election, or alternatively that there was discrimination against *UKIP* on the grounds that it had no MPs following the 2010 General Election, and that Mr Banks was a victim of such discrimination or was in any event entitled to rely upon it.

41. Ground 4 takes issue with the approach in law of the Upper Tribunal to the question whether any discrimination in breach of Article 14 ECHR taken with A1P1, if established, was justified. In particular, it is said that the Upper Tribunal erred:

(1) in identifying the relevant aim for the purposes of the justification test;

(2) in failing to rule that there was no rational connection between the relevant aim and the conditions for exemption of donations in section 24 of the 1984 Act;

(3) in failing to consider whether the relevant aim could have been achieved by less intrusive means; and

(4) in ruling that section 24 struck a fair balance between the rights of Mr Banks and UKIP and the wider public interest.

42. Ground 5 alleges that the Upper Tribunal erred in law in rejecting Mr Banks' claim that section 24 breached either his or UKIP's rights to freedom of expression and association under Articles 10 and/or 11 ECHR, and also in not holding that his Article 14 claim fell within the ambit of Articles 10 and/or 11 ECHR as well as A1P1.

43. Finally, Ground 6 alleges that the Upper Tribunal was wrong to conclude that it was not possible to interpret section 24 in conformity with Convention rights pursuant to section 3 of HRA 1998.

Grounds 1 and 2: did section 24 of IHTA 1984 discriminate either directly or indirectly against Mr Banks on the grounds of his political opinion, contrary to Article 14 ECHR and A1P1?

44. Article 14 ECHR is headed "Prohibition of discrimination" and provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

45. A1P1 is headed "Protection of property", and provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

46. In R (SC), Lord Reed has very recently described the general approach to Article 14 adopted by the European Court of Human Rights:

> "37. The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 ("*Carson*"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:

> (1) "The court has established in its case law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of article 14."
>
> (2) "Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations."
>
> (3) "Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."
>
> (4) "The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.""

47. In the present case, the FTT dealt with this issue by adopting the five questions set out by Lord Steyn in R (S) v Chief Constable of South Yorkshire Police [2004] UKHL 39, [2004] 1WLR 2196, at [42]:

> "(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?"

48. For its part, the Upper Tribunal was content to analyse the issue of whether there was a breach of Article 14 ECHR by reference to those five questions, while pointing out that they are often replaced in more recent cases by the four questions posed by Baroness Hale of Richmond PSC in R (Stott) v Secretary of State for Justice [2018] UKSC 59, [2020] AC 51, at [207].

49. For present purposes, the precise form in which the relevant questions are posed does not matter. Taking the five questions addressed by the FTT, the starting point is that it was common ground that:

(a) tax provisions in principle fall within A1P1, because they deprive the person concerned of a possession, namely the amount of tax that must be paid;

(b) any potential discrimination arising from the application of section 24(2) of IHTA 1984 fell within the ambit of A1P1;

(c) there was a difference in treatment between 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 section 24(2); and

(d) Mr Banks was in an analogous position to others who did not suffer taxation on their political gifts, such as individuals who made gifts to the Labour Party or the Conservative Party.

Accordingly, it was common ground that questions (1), (2) and (4) in Lord Steyn's list should be answered in favour of Mr Banks. The areas of controversy were, first, whether the difference in treatment was based on Mr Banks' political opinions, or upon some "other status" falling within Article 14; and secondly, (if so) whether the test of justification set out in question (5) was satisfied. Under the grounds of appeal which I am now considering, the question of "other status" does not arise, so the focus is on "political opinion" as the relevant proscribed ground under Article 14.

50. In considering whether section 24 discriminated *directly* against Mr Banks on the ground of his political opinion, a convenient starting point is again provided by the judgment of Lord Reed in R (SC). At [47], Lord Reed referred to the statement of the European court in Guberina v Croatia [2016] 66 EHRR 11 ("Guberina") at paragraph 69 that:

> "Generally, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations."

Lord Reed continued:

> "That is the situation in an ordinary case of direct discrimination: there is an actual difference in the treatment between comparable cases, directly based on a prohibited ground of discrimination."

51. The need for the difference in treatment between comparable cases to be "directly based" on a prohibited ground imports a test of causation. There must be a causal link between the protected characteristic (in the present case, freedom of political opinion) and the difference in treatment complained of. This was explained by Lady Hale (with whom the other members of the court agreed) in a case concerning alleged indirect discrimination on grounds of race and age under the Equality Act 2010, Essop v Home Office [2017] UKSC 27, [2017] 1 WLR 1343. In paragraph [1] of her judgment, Lady Hale described direct discrimination as "comparatively simple: it is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has". At [17], she observed that:

> "The characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment: an example is *Preddy v Bull (Liberty intervening)* [2013] 1 WLR 3741, where reserving double-bedded rooms to "heterosexual married

> couples only" was directly discriminatory on grounds of sexual orientation. At other times, it will not be obvious …"

Lady Hale then stated explicitly, at [25], that:

> "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic."

52. To similar effect, the jurisprudence of the European court requires the difference of treatment to be "based on" a status under Article 14: see the decision of the Grand Chamber in Biao v Denmark [2017] 64 EHRR 1 at paragraph 89. The Court there said (with my emphasis):

> "The Court has established in its case-law that only differences in treatment *based on* an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of art.14."

In order for a difference in treatment to be "based on" a status, the status must in my judgment be the reason, or at least a reason with some real causative force, for the difference in treatment.

53. If that approach is applied to the facts of the present case, it seems clear to me, as it did to the Upper Tribunal, that there was no causal link between Mr Banks' political views, manifested in his support for UKIP and the substantial donations which he made to that party, and the failure of the donations to qualify for exemption under section 24. The reason for the non-exemption of the donations made in the 2014/15 tax year had nothing to do with Mr Banks' political opinions. As I have already explained, section 24 applies in the same way to parties all across the political spectrum, from the far right to the far left. The political views of the donor are completely irrelevant to the question whether or not the donation qualifies for relief under the section. Nor can it be said that the qualifying conditions are in any way a proxy for discrimination against Mr Banks on the grounds of his political opinions. The conditions apply in exactly the same way to all political parties. There is accordingly no scope for application of the principle described by Lady Hale in Essop at [17], where she said with reference to the well-known case of James v Eastleigh Borough Council [1990] 2 AC 751 that:

> "even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it."

54. The reasons which the Upper Tribunal gave for rejecting Mr Banks' claim of direct discrimination on the ground of his political opinions are at [72] to [74] of the UT Decision, where they said:

> "72. … On its face, the legislation can apply to any political party. In order to qualify for the exemption, the political party concerned must meet the conditions laid down in s24(2) IHTA. Donations to UKIP, or to a party of any other political persuasion, can meet the conditions, provided it has been

> successful in obtaining at least one MP and the requisite number of votes at the last general election.
>
> 73. Thus, for example, prior to the 2010 general election a supporter of UKIP wishing to make a donation to that party was in the same position as a supporter of the Green Party wishing to make a donation to that party. Neither party at that time had an MP in Parliament. Following the 2010 general election, there would have been a difference in treatment between a supporter of UKIP and a supporter of the Green Party, for the simple reason that the Green Party had been successful in having an MP elected whereas UKIP had not.
>
> 74. It is obvious that there is no distinction on the face of the legislation between (in this example) a donor to UKIP and a donor to the Green Party. But there is also no indissociable link between the criteria in the legislation and Mr Banks' status as the holder of a particular political opinion or a supporter of UKIP. It was possible for a donation to any political party to meet the conditions at any time, as donations to UKIP would have done if made after the 2015 general election (and before the following general election in 2017), since UKIP had two MPs elected at the 2015 general election. That is in contrast with the position described in *James*, … where there was an indissociable link between the criterion in the legislation, namely the requirement to have reached state pension age to qualify for free use of a swimming pool, and the sex of the individual, because of the differential pension ages at the time. All men in the age group 60-64 necessarily suffered discrimination, and it was no answer to this to say that any discrimination fell away once the age of 65 was reached. In this case, for the reasons that we have stated, it was possible for donations made by supporters of UKIP to meet the criteria at any time, depending on the measure of its electoral success."

55. The reasoning in those paragraphs is criticised by counsel for Mr Banks, essentially on the ground that the question of discrimination has to be assessed at the time the donations were made, and during the period in question it was not possible for donations to UKIP to meet the conditions of section 24.

56. In my view, however, this criticism misses the point. The Upper Tribunal was clearly well aware that the question of discrimination had to be addressed at the time when the relevant donations were made. The point it was making was a different one, namely that the lack of any causal connection between Mr Banks' political views and the failure of his donations in 2014/15 to qualify for exemption is illustrated by a comparison with the potential application of the same criteria to donations made by a supporter of the Green Party, or to donations made by Mr Banks himself after the 2015 General Election. In other words, the criteria for exemption have nothing to do with the political views of the donor, except in the trivial "but for" sense that, in the absence of a donation to a political party by a donor within the charge to IHT, no question of exemption could

arise. In my view, it was both legitimate and helpful for the Upper Tribunal to illustrate the absence of the necessary causal connection with the examples which they gave.

57. In his oral submissions, Mr Coppel QC suggested that the fallacy in the Upper Tribunal's approach could be shown by supposing that the parties which failed to satisfy the test for exemption after a general election were set out in a schedule to the 1984 Act. It would then be clear, he said, that the legislation discriminated directly against donors to parties included in the list. I did not find this a helpful analogy. On the assumption that the statutory conditions for exemption remained the same, the list would amount to no more than a statement of the effect of those criteria after the relevant general election. If, however, the list were envisaged as a replacement for the statutory criteria, then the basis upon which it was compiled would not be transparent, and the analogy would cease to have any explanatory force. In truth, Mr Coppel's suggestion is in my view no more than another way of making the obvious point that the statutory criteria, as applied from time to time, will mean that some donations to political parties of any complexion will qualify for exemption, while others will not. That is a form of discrimination, but it is not discrimination based on the political views of the donors.

58. I now turn to the question of *indirect* discrimination. As Lord Reed explained in R (SC) at [49], after referring to Guberina at paragraph 71, indirect discrimination "can arise in a situation where a general measure or policy has disproportionately prejudicial effects on a particular group". He then said:

> "It is described as 'indirect' discrimination because the measure or policy is based on an apparently neutral ground, which in practice causes a disproportionately prejudicial effect on a group characterised by a salient attribute or status."

59. After pointing out, at [50], that "[t]he concept of indirect discrimination has only gradually come to be recognised by the European Court", and giving three examples from the case law, Lord Reed explained at [53] what has to be shown by a claimant who wishes to rely on indirect discrimination:

> "Following the approach laid down in these and other cases, it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be a ground of discrimination, so as to give rise to a presumption of indirect discrimination. Once a prima facie case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means (see, in addition to the authorities already cited, the judgment of the Grand Chamber in *Biao v Denmark* [2016] 64 EHRR 1, paras 91 and 114)."

60. In the light of this very recent and authoritative restatement of the law, it is unnecessary for me to refer to earlier statements of the relevant law, to similar effect, in the European case law. I should, however, mention one point upon which Mr Banks places particular reliance. Although the burden lies on the person claiming discrimination to establish that the measure in question affects a disproportionate number of members of a group sharing the protected characteristic before a presumption of indirect discrimination can arise, and although this will often need to be established by evidence (for example of a statistical nature), the case law recognises that in certain cases the question will be a matter of common sense which does not require proof by statistical evidence. For example, in Biao v Denmark the Court was willing to proceed on the basis of reasonable assumptions about the ethnic origin of those who were able to benefit from a "28-year rule" of Danish nationality in the context of applications for family reunification: see paragraphs 108, 109 and 112.

61. The argument for Mr Banks under this heading proceeds broadly as follows. It is a matter of common sense that most, if not all, donors to UKIP have political opinions which support UKIP. At the material time, all donations to UKIP by those donors were excluded from the exemption, even though the exemption was not specifically aimed at that group. The fact that holders of certain other political opinions were also disadvantaged by section 24 at the same time does not prevent there being discrimination against UKIP supporters, all of whom were disadvantaged. Thus persons holding a political opinion in support of UKIP (which is the relevant protected characteristic) were disproportionately affected by section 24 because they were unable to make a significant donation to their preferred political party which was exempt from IHT, whereas the population of persons not holding a political opinion in support of UKIP was disadvantaged to a much lesser extent, because many or most of them (e.g. Conservative and Labour supporters) were able to give even very substantial amounts to their preferred political party without incurring liability to IHT.

62. The difficulty with this argument, in my opinion, is essentially the same as the difficulty which is fatal to the claim of direct discrimination. It lies in the absence of any causal link between the terms of section 24, which as I have explained are entirely neutral, and the particular disadvantage suffered by Mr Banks, either alone or in conjunction with other donors to UKIP. I have already referred to Lady Hale's statement in Essop at [25] that "[d]irect discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic". She then said:

> "Indirect discrimination does not. Instead it requires a causal link between the PCP [*i.e. the apparently neutral provision, criterion or practice*] and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of result in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

See too the recent decision of this court in R (Delve) v Secretary of State for Work and Pensions [2020] EWCA Civ 1199, [2021] ICR 236, at [71] of the judgment of the court, where the approach of Lady Hale in Essop was applied in the context of a claim of indirect discrimination under Article 14.

63. In my view, it cannot be inferred, as a matter of common sense or otherwise, that the requirements of section 24 had any particular disproportionate effect on supporters of UKIP in general, or Mr Banks in particular, as compared with their impact on supporters of any other political party which did not qualify for exemption at the material time. There is nothing about UKIP or its supporters which places them in a different category from all other supporters of political parties who are denied exemption for their gifts by the criteria of section 24. If a case were to be made that there is something special about UKIP or its supporters which would justify placing them in a separate category, then it would have been necessary for Mr Banks to adduce specific evidence directed to the point. It is certainly not something that can be assumed as a matter of common sense.

64. On this point, I respectfully agree with the way it was put by the Upper Tribunal at [85] of the UT Decision:

> "Although it might be argued that it is obvious that the conditions in s.24(2) IHTA had a disproportionately prejudicial effect on UKIP supporters in that donors to UKIP did not obtain tax relief, whereas donors to other parties such as the Labour Party or Conservative Party did, the conditions equally disadvantaged other parties not represented in the Westminster Parliament in the manner required by the conditions, whatever their political persuasion. The fact that donations to UKIP did qualify between 2015 and 2017 illustrates the absence of direct discrimination and in our view is relevant to the absence of indirect discrimination, even though the question of whether there is discrimination has to be assessed at the time the donations were made."

65. The Upper Tribunal went on to say, at [87]:

> "In this case, the only relevant differential impact is between supporters of parties which met the conditions for exemption as set out in s.24 IHTA at the time the relevant donations were made and those who did not. Those donors who were supporters of UKIP were simply part of the second group before 2015 and again after 2017. In other words, any disproportionately prejudicial effect was on all of those who were supporters of parties that did not meet the conditions at the relevant time. There was no evidence before the FTT to suggest that UKIP supporters were particularly adversely affected as a group."

66. Finally, the Upper Tribunal explained why the conclusion of the FTT that there was indirect discrimination against Mr Banks on the grounds of his political opinion could not stand: see the UT Decision at [88] and [89]. The FTT had made no findings as to whether the provisions of section 24 had a disproportionately prejudicial effect on

supporters of UKIP. The FTT had found, at [99] of the FTT Decision, that the conditions "have a particular effect on new political parties with broad national support", but that was not the basis on which the issue was argued before the FTT. Mr Banks' case before the FTT was that he was discriminated against on the basis that he was a supporter of UKIP. The FTT's finding was therefore irrelevant to the political opinion that Mr Banks relied on, namely his support of UKIP. Accordingly, the FTT's conclusion was erroneous in law.

67. With regard to the FTT's finding, it is also pertinent to note the cogent points made by the Upper Tribunal at [99] of the UT Decision, when discussing the issue of "other status":

> "The findings of fact in this case demonstrate that UKIP was founded in 1991, so that it had been in existence for 23 years at the time that Mr Banks made his donations. There are no identifiable objective criteria for determining what is a 'new party'. On the evidence before the FTT, it is impossible to determine, for example, at what age a party stops being a new party and what level of national support would be needed, if the additional criterion of having broad national support, as suggested by the FTT, was a defining characteristic of the group."

68. For all these reasons, I would dismiss the first and second grounds of appeal. Section 24 of IHTA 1984 did not discriminate against Mr Banks, either directly or indirectly, on the basis of his political opinions, and there was accordingly no breach of Article 14 ECHR read with A1P1 on that basis.

Ground 3: did section 24 discriminate against Mr Banks on the grounds of an "other status"?

69. Ground 3 has two separate limbs, although each limb relies on Article 14 ECHR taken with A1P1. The first limb claims that Mr Banks was discriminated against on the grounds of supporting a party which did not have any MPs elected to the House of Commons following the 2010 General Election. The second limb alleges discrimination against UKIP on the same grounds, and that Mr Banks was a victim of that discrimination or in any event entitled to rely upon it.

70. I will begin by considering Mr Banks' direct claim. Before the FTT, the only "other status" upon which Mr Banks had relied was that of being a supporter of UKIP, but that did not differ in any material respect from his identified political opinion of favouring UKIP. Before the Upper Tribunal, Mr Banks sought for the first time to rely on two different "other statuses": the first was being a supporter of a "new party", while the second was being a supporter of a party that did not have an MP. Both these new ways of putting the claim were rejected by the Upper Tribunal. As to the first, I have already quoted a passage from the UT Decision explaining that there are no identifiable objective criteria for determining what is a "new party": see [67] above. For that reason, the Upper Tribunal concluded at [101] that Mr Banks had failed to identify any characteristic of a "new party" or a "new party having broad national support" which would qualify a supporter of such a party as having an "other status" for the purposes of Article 14. There is no appeal by Mr Banks against that conclusion. He does,

however, appeal against the Upper Tribunal's further conclusion, at [124], that he did not have an "other status" for the purposes of Article 14 on the basis of being a supporter of a party without an elected MP. Put shortly, the Upper Tribunal's reason for rejecting this contention was that the suggested "other status" falls foul of the "independent existence condition" recognised in the authorities, whereby "a personal characteristic cannot be defined by the differential treatment of which a person complains": see the UT Decision at [102].

71. The independent existence condition was clearly recognised in domestic case law by Lord Hughes JSC in R v Docherty [2016] UKSC 62, [2017] 1 WLR 181. Giving the judgment of the court, Lord Hughes dealt briefly with the discrimination issues which arose at [63], in terms which are conveniently summarised in the headnote at 182E:

> "… assuming that status as a prisoner subject to a particular regime could in some circumstances amount to sufficient status to engage Article 14 of the Convention, it could not do so if the suggested status were defined entirely by the alleged discrimination …"

72. There was then further interesting, but ultimately inconclusive, discussion of the independent existence condition in the judgments of Lady Black JSC, Lady Hale and Lord Mance in R (Stott) v Secretary of State for Justice [2018] UKSC 59, [2020] AC 51: see, in particular, the judgment of Lady Black at [72] to [75], where she identified three difficulties with the independent existence condition and recommended caution "about spending too much time on an analysis of whether the proposed status has an independent existence, as opposed to considering the situation as a whole"; the judgment of Lady Hale at [209] to [212]; and the judgment of Lord Mance at [228] to [233].

73. In Haringey London Borough Council v Simawi [2019] EWCA Civ 1770, [2020] PTSR 702, ("Simawi") the issue was whether the defendant, Mr Simawi, had a valid defence to possession proceedings of a property held on a secure tenancy of which his mother had become the sole tenant by succession following the death of his father. As a second successor, Mr Simawi was not eligible to succeed to the tenancy under sections 87 and 88 of the Housing Act 1985, but he sought to argue that the "one succession rule" imposed by those sections discriminated against him unlawfully, contrary to Article 14 ECHR read with Article 8. The argument was that the rule treated a person whose spouse had died, and that person's qualifying family members, less favourably than a person who was divorced, and that person's qualifying family members, because a divorced person who took over the former spouse's secure tenancy by assignment pursuant to a property adjustment order made by the court was not regarded as a successor, with the consequence that such a person's family members could succeed to the tenancy. The leading judgment in this court was delivered by Lewison LJ, with whom Bean and Baker LJJ agreed.

74. Lewison LJ discussed the issue of discrimination on the ground of "other status" at [27] to [48], and the independent existence condition specifically at [33] to [41]. After a valuable review of the judgments of the Supreme Court in Stott, Lewison LJ said at [41]:

> "Where does that leave us? The observations of all the Justices in *Stott* [2020] AC 51 were obiter; because (with the exception of Lord Carnwath JSC) they all decided that Mr Stott satisfied the "independent existence condition". As Lady Black JSC said, the "independent existence condition" lives on in *R v Docherty (Shaun)* [2017] 1 WLR 181. *Docherty* was a decision of the Supreme Court in which *Clift v United Kingdom* was considered. The decision that Mr Docherty did not have "other status" because "the suggested status is defined entirely by the alleged discrimination" (para 63) was part of the ratio of the decision. *Stott* does not depart from *Docherty* in that respect. It therefore binds us. Mr Simawi is entitled to rely on a status provided that it is not defined entirely by the alleged discrimination."

75. Lewison LJ proceeded to consider the "other statuses" upon which Mr Simawi relied. He explained at [44] that one way in which counsel for Mr Simawi put his case was to say that there was direct or indirect discrimination against his mother, because (a) she was a widow rather than a divorcee and (b) she was a woman; and that Mr Simawi was the son of such a person. Lewison LJ then said:

> "That formulation seems to introduce the question of discrimination into the definition of the "other status" itself. So, too, does the pleaded "other status" which is defined by what kind of tenancy was originally granted, and what happened to it. In my judgement that is impermissible, even after the decision of the Supreme Court in *Stott* …"

On the other hand, the conclusion of the judge below that being the child of a widowed parent rather than a divorced parent is capable of amounting to an "other status" was a tenable conclusion, and Lewison LJ was content to proceed on that basis: see [45].

76. In my view, the conclusions stated by Lewison LJ in Simawi at [41] form part of the ratio of that case, and as such are binding on us. The Upper Tribunal appears to have taken the view that all of Lewison LJ's reasoning on this subject was obiter, because he held at [45] that being the child of a widowed rather than a divorced parent is capable of amounting to an "other status": see the UT Decision at [118]. I do not agree. The conclusion that the formulation of the independent existence condition in the Docherty case lives on, and formed part of the ratio of that decision, is itself an essential part of the reasoning of this court in Simawi, and it explains why the statuses advanced on Mr Simawi's behalf in oral argument were rejected at [44]. In any event, the Upper Tribunal went on to say in [118] of the UT Decision that they found the reasoning of Lewison LJ "persuasive", and even if we were not technically bound by it, I would for my part follow it because (subject to a minor qualification which I mention at [80] below) I too find it persuasive.

77. For completeness, I should also mention that Leggatt LJ (as he then was) made some helpful observations about the independent existence condition in the course of his valuable review of the law on what constitutes a status for the purposes of Article 14 when delivering the only reasoned judgment of the Court of Appeal in the R (SC) case. The judgment of this court in R (SC) was delivered on 16 April 2019, a few months before Simawi, and it is reported as R (C) v Secretary of State for Work and Pensions

[2019] EWCA Civ 615, [2019] 1 WLR 5687. It does not appear to have been cited in Simawi, but the observations of Leggatt LJ are entirely consistent with Lewison LJ's subsequent analysis. After referring to Stott at [67], Leggatt LJ said:

> "The judgments of Lady Black JSC, Baroness Hale PSC and Lord Mance include valuable discussion of whether a status must exist independently of the difference in treatment of which the claimant complains. As Lady Black JSC observed (at para 74), such a requirement is not at all easy to grasp. Clearly, as Baroness Hale PSC pointed out, the words "on any ground such as … or other status" are intended to add something to the requirement of discrimination in Article 14. It follows that the status cannot be defined solely by the difference in treatment complained of: it must be possible to identify a ground for the difference in treatment in terms of a characteristic or classification which is not merely a description of the difference in treatment itself (see paras 209-212). On the other hand, there seems no reason to impose a requirement that the status should exist independently in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of. As Lord Mance put it, at para 231: "There is no reason why a person may not be identified as having a particular status when the or an aim is to discriminate against him in some respect on the ground of that status.""

78. In upholding the decision of this court in R (SC), the Supreme Court referred in some detail to the discussion of status in the context of Article 14 by Leggatt LJ, and agreed with his reasoning and conclusion that being a child living in a household containing more than two children constituted an "other status" for the purposes of Article 14: see the judgment of Lord Reed at [69] to [71]. Lord Reed did not deal specifically with the independent existence condition, but there is no indication that he disagreed with anything Leggatt LJ had said about it, or which might appear to call into question the continued application of the condition. Lord Reed did, however, add at [71] that "the issue of "status" is one which rarely troubles the European court", and that "cases where the court has found the "status" requirement not to be satisfied are few and far between." That is clearly correct, if I may respectfully say so, but does not invalidate the basic point that the status condition will not be satisfied in those rare cases where the alleged status is in substance nothing more than a reformulation of the discrimination complained of.

79. With the benefit of this guidance in the authorities, I return to the question whether Mr Banks had the "other status" of being a supporter of a party which did not have any MPs following the 2010 General Election. The first point to note is that this alleged status is not a precise reflection of the qualifying criteria in section 24(2) of IHTA 1984, which depend on the party in question having either at least two MPs elected at the last general election, or one MP so elected and a specified minimum share of the popular vote. Moreover, as Stott has shown, it is not necessarily an objection to a status under Article 14 that it is an artificial construct which has no social or legal significance outside the context of the relevant legislation, or apart from the fact that it represents the ground on which the allegedly discriminatory treatment is based: see the judgment

of Leggatt LJ in the Court of Appeal in the R (SC) case at [67], quoted above. In so far as the independent existence condition does still continue to exist, it must therefore be narrowly confined to cases where the status is "defined entirely by the alleged discrimination" (as Lewison LJ in effect recognised in Simawi, at [41], also quoted above).

80. This is an area of the law where fine distinctions abound, and the underlying principles are elusive. I have found the question a difficult one, but in the end I am persuaded that the alleged status does not fall foul of the independent existence condition. It is not just a restatement in other words of the criteria in section 24(2), but is generalised to a simpler test of whether the party in question had no MPs elected to the House of Commons at the last general election. Nobody would have thought of enunciating such a test were it not for the distinctions drawn by section 24(2), and the desire to secure an exemption which is denied by those distinctions. But, as the case law shows, those are not sufficient reasons to dismiss a claim for want of "other status", and the analysis should therefore proceed to the next stage of justification. I am fortified in taking this view by the acknowledged fact that cases which have been held to fail on the ground of lack of status by the European court are few and far between, and also by the unanimous endorsement by the seven members of the Supreme Court in R (SC) of the reasoning of Leggatt LJ in that case on the issue of status.

81. It follows that I find myself in respectful disagreement with the Upper Tribunal, which held that the alleged status "defines the characteristic in terms that is merely a description of the difference in treatment": see the UT Decision at [124]. In so concluding, I suspect that the Upper Tribunal may have been influenced by the approach of Lewison LJ in Simawi to the formulations which he rejected at [44] on the basis that they seem "to introduce the question of discrimination into the definition of the "other status" itself. That part of the decision in Simawi was, however, obiter, and is perhaps open to the criticism that the test there applied was slightly more relaxed than the correct test identified in [41], namely that a status may not be relied upon if it is "defined *entirely* by the alleged discrimination" (my emphasis).

82. Accordingly, I would accept the argument for Mr Banks that section 24(2) did discriminate against him directly on the basis that he was a supporter of a party that secured no seats in the House of Commons at the 2010 general election.

83. In the light of this conclusion, it is unnecessary to consider the alternative argument in the second limb of Ground 3, that is to say a claim of "associative discrimination" (as Sir James Eadie QC termed it) which would enable Mr Banks to rely on discrimination against UKIP itself. The European court expressly recognised in Guberina, at paragraph 78 of its judgment, that Article 14 "also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics". On the assumption, however, that Mr Banks in his personal capacity had no "other status" upon which he could rely for Article 14 purposes, there are obvious difficulties in the way of any argument that the necessary status could be found on the basis of the status of UKIP as a party with no elected MPs at the 2010 General Election. There is also a procedural objection that the argument was not run in any recognisable form before the Upper Tribunal. But leaving that aside, I find it hard to see how an argument by association of this nature could add anything of substance to Mr Banks' case, in circumstances where (as I have held) he can rely on his own status as a supporter of a party with no elected MPs at the 2010 General Election.

Ground 5: did section 24 discriminate against Mr Banks by breaching his or UKIP's rights to freedom of expression and association under Article(s) 10 and/or 11 ECHR?

84. Before I come on to the question of justification, it is convenient to consider Ground 5, as Mr Coppel QC did in his oral submissions to us.

85. Articles 10 and 11 ECHR provide as follows:

> "**Article 10**
>
> **Freedom of expression**
>
> 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.
>
> 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.
>
> **Article 11**
>
> **Freedom of assembly and association**
>
> 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.
>
> 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."

86. As the Upper Tribunal observed at [202], it is obvious "that the freedom to support a political party potentially falls within Articles 10 and 11". They referred to the decision of the European court in Parti Nationaliste Basque v France (2008) 47 EHRR 47, ("PNB") which concerned a French rule prohibiting the funding of a political party by a foreign legal entity, the relevant entity being a Spanish party established to promote

Basque nationalism. In paragraph 33 of its judgment in that case, the Court reiterated that political parties come within the scope of Article 11, and held that Article 11 must be considered in the light of Article 10 (because the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association enshrined in Article 11). The Court could see no evidence to suggest that the French measure in question sought to penalise the applicant party on account of the political views it promoted, with the consequence that the issues raised by the case related essentially to Article 11. The Upper Tribunal considered that the same applied in the present case, so the primary focus should be on Article 11, although they had also considered Article 10 (ibid).

87. The Upper Tribunal went on to find, in agreement with the submissions of HMRC, that the conditions in section 24(2) of IHTA 1984 do not breach Mr Banks' rights under either Article, reasoning as follows:

> "204. It is not apparent that the conditions place any restrictions on Mr Banks' freedom of expression within Article 10(1), or his freedom of association under Article 11(1). The existence of a tax charge does not obviously restrict the expression of any opinion or the ability to associate, whether with UKIP or anyone else. There was also no evidence to support the argument that Mr Banks was in fact deterred from expressing opinions or supporting UKIP, whether by making donations or otherwise.
>
> 205. Mr Afzal suggested that it was self-evident that the imposition of a tax charge on donations deterred and thus interfered with Mr Banks' freedom to support UKIP. In response to the argument that Mr Banks did not declare the donations to HMRC, so that it should be inferred that he did not consider the tax position when deciding to donate, Mr Afzal relied on *Ezelin v France* (1992) 14 EHRR 362 and *Lingens v Austria* (1986) 8 EHRR 407 to support the proposition that interference can come after the event.
>
> 206. However, the facts of *Ezelin* and *Lingens* were very different. In the former case there was found to be a breach of Article 11 where a member of the Guadeloupe bar was disciplined for participating in a public demonstration. That was a clear interference with the exercise of freedom of assembly. In *Lingens* a magazine publisher was convicted of criminal defamation following the publication of articles critical of the Austrian Chancellor, and that was found to be a breach of Article 10. Again, the interference with the relevant freedom was clear. In both cases, while the sanction was imposed after the event, it related directly to the exercise of the freedom in question.
>
> 207. In contrast, there is no clear link between the imposition of a tax charge on donations to UKIP and the freedoms protected by Articles 10 and 11. In the absence of any evidence to demonstrate that Mr Banks was in fact deterred from expressing his opinions or from supporting UKIP it is not possible to

> conclude that there was any interference with his rights under Article 10 or 11.
>
> 208. *PNB* is readily distinguishable. The Court found in that case that there was an interference with Article 11 rights in respect of the party, but this was because the prohibition on donations was found to have a significant impact on its resources and thus its ability to engage in political activities: see paragraphs [37] and [38] of the judgment (albeit that the conclusion of the majority was that the interference was justified)."

88. Counsel for Mr Banks criticised some aspects of this reasoning, but in my view the Upper Tribunal was correct for the reasons it gave. I would accept the starting point of the argument for Mr Banks, which is that the making of donations to a political party is a natural way for a person to express his political views in support of that party. Indeed, the FTT found as much in the FTT Decision at [46]. However, it does not follow from this that the imposition of a tax charge on such donations automatically constitutes an interference with the Article 10 rights of the donor, or is liable to discourage him from that form of the expression of his political views. The tax charge in section 24 is neutral in its impact on political parties and donors of all political persuasions, and the criteria for exemption have nothing to do with the political views of the donor. The criteria are directed instead to the level of representation at Westminster obtained by the party at the preceding general election. It cannot simply be assumed that criteria of that nature have a deterrent effect, and I agree with the Upper Tribunal that evidence would have been needed to establish any adverse impact on Mr Banks' Article 10 rights. The authorities relied on by Mr Banks are in my view clearly distinguishable, for the reasons given by the Upper Tribunal. At the simplest level, Mr Banks was free to give as much money as he chose to UKIP, and those gifts were prima facie liable to IHT in the same way as any other lifetime chargeable transfers which he made. If the conditions in section 24 are satisfied, the gift will be exempt; but in view of the politically neutral terms in which the exemption is framed, it seems to me fanciful to argue that it discriminated against Mr Banks in the expression of his political views.

89. For similar reasons, it seems to me equally implausible to argue that Mr Banks can mount a discrimination claim based on his own rights under Article 11 or those of UKIP. There was absolutely no evidence that the existence of the charge to IHT in cases where the exemption was not available had any impact on donors to UKIP or on the finances of UKIP itself, or that (for example) there was any significant increase in the level of donations to UKIP after the 2015 General Election when the exemption became available for the first time. It is worth recalling, in this connection, that ordinary donations made out of income would not fall within the scope of IHT at all, and that only donations in excess of the donor's available nil-rate band would result in an immediate charge to IHT on the donor. Moreover, there is nothing to suggest that the impact of IHT was taken into account by Mr Banks when he made his gifts in 2014/15, or by any other donor to UKIP.

90. For these short reasons, I consider that the Upper Tribunal was clearly right to reject Mr Banks' claim that there was any direct discrimination against him under either Article 10 or Article 11. Similarly, I can see no basis for holding that Mr Banks' Article 14 claim fell within the ambit of either of those Articles as well as A1P1, or that there

was any breach of UKIP's rights under either Article of which Mr Banks was entitled to take advantage.

Ground 4: justification.

91. Taking stock at this point, I have concluded that the only relevant respect in which section 24 discriminated against Mr Banks was on the ground of his status as a donor supporting a party without an MP at Westminster elected at the last general election before the donations were made. The discrimination falls within the scope of Article 14 ECHR read with A1P1. Because it is direct discrimination, it is the discriminatory effect of section 24 on Mr Banks and other donors to parties without an MP at Westminster which has to be justified by HMRC, not the terms or structure of the impugned measure itself: see, for example, A L (Serbia) v Secretary of State for the Home Department [2008] UKHL 42, [2008] 1 WLR 1434, at [38], per Lady Hale.

92. As the Grand Chamber of the European court explained in its seminal judgment in Stec v United Kingdom (2006) 43 EHRR 47, at paragraph 51:

> "Article 14 does not prohibit a Member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.
>
> 52. The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'".

93. These principles have been developed and refined in a large body of case law, both European and domestic. We now have the great benefit of the detailed and authoritative review of this jurisprudence by the Supreme Court in R (SC). Lord Reed began his analysis by considering the approach of the European court, at [98] to [142]. While the

whole of that passage repays careful study, it will be sufficient for present purposes if I quote from Lord Reed's summary at [142]:

> "In summary, the European court has generally adopted a nuanced approach, which can be understood as applying certain general principles, but which enables account to be taken of a range of factors which may be relevant in particular circumstances, so that a balanced overall assessment can be reached. As I have explained, there is not a mechanical rule that the judgment of the domestic authorities will be respected unless it is "manifestly without reasonable foundation". The general principle that the national authorities enjoy a wide margin of appreciation in the field of welfare benefits and pensions forms an important element of the court's approach, but its application to particular facts can be greatly affected by other principles which may also be relevant, and of course by the facts of the particular case. Indeed, this approach is not confined to cases concerned with article 14, but can be seen in other contexts where the state generally enjoys the wide margin of appreciation signified by the "manifestly without reasonable foundation" formula, but where other factors may indicate a narrower margin of appreciation, and the court accordingly balances the relevant factors … In the context of article 14, the fact that a difference in treatment is based on a "suspect" ground is particularly significant. The recent cases …, like many earlier cases, indicate the general need for strict scrutiny, focused on the requirement for very weighty reasons, where the difference in treatment is based on a suspect ground … unless the issue concerns the timing of reform designed to address historical inequalities, where a wider margin is likely to be appropriate."

94. The "suspect" grounds currently recognised by the European court were discussed by Lord Reed at [101] to [113]. Those paragraphs provide no support for the proposition that a difference of treatment based on the provision of financial support for a party without an MP has been recognised, or should be regarded, as a suspect ground. On the contrary, as Lord Reed noted at [115(2)]:

> "[*Another general point*], repeated in many of the judgments already cited, sometimes alongside a statement that "very weighty reasons" must be shown, is that a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy. That was said, for example … in *Guberina*, para 73, in relation to taxation; …"

It can be seen, therefore, that taxation has been expressly recognised by the European court as an area where a wide margin is usually allowed to the state. That is hardly surprising, and it also chimes with the express provision in A1P1 that the protection of property under that article "shall not … in any way impair the right of a State … to secure the payment of taxes …"

95. Having reviewed the approach of the European court, Lord Reed then considered the approach of domestic courts at [143] to [156]. He began this part of his analysis as follows:

> "143. The concept of the margin of appreciation is specific to the European court. Nevertheless, domestic courts have generally endeavoured to apply an analogous approach to that of the European court. They have done so for two reasons. The first was explained by Baroness Hale in *R (Countryside Alliance) v Attorney General* [2008] AC 719, para 126:
>
> "But when we can reasonably predict that Strasbourg would regard the matter as within the margin of appreciation left to the member states, it seems to me that this House should not attempt to second guess the conclusion which Parliament has reached. I do not think that this has to do with the subject matter of the issue, whether it be moral, social, economic or libertarian; it has to do with keeping pace with the Strasbourg jurisprudence as it develops over time, neither more nor less: see *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20."
>
> Accordingly, where the European court would allow a wide margin of appreciation to the legislature's policy choice, the domestic courts allow a correspondingly wide margin or "discretionary area of judgment" (*R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 380).
>
> 144. The second reason is that domestic courts have to respect the separation of powers between the judiciary and the elected branches of government. They therefore have to accord appropriate respect to the choices made in the field of social and economic policy by the Government and Parliament, while at the same time providing a safeguard against unjustifiable discrimination."

96. An important theme in this part of Lord Reed's analysis is that the criterion of "manifestly without reasonable foundation" is not a test that should be rigidly or mechanically applied to certain categories of case, although a significant strand of domestic authority at the highest level, stemming from Humphreys v Revenue and Customs Commissioners [2012] UKSC 18, [2012] 1 WLR 1545, had proceeded on that basis. While not doubting the correctness of the decision in Humphreys, Lord Reed said at [151]:

> "… it now appears to me that the reasoning on justification, following the submissions made, did not reflect the Strasbourg jurisprudence entirely correctly. First, it seems to me that the "manifestly without reasonable foundation" formulation, as used in the Strasbourg judgments, does not express a test, in the sense of a requirement whose satisfaction or non-satisfaction will in itself necessarily be determinative of the outcome. The phrase indicates the width of the margin of appreciation, and hence the

> intensity of review, which is in principle appropriate in the field of welfare benefits, other things being equal. As I have explained, however, a number of other factors may also be relevant in the circumstances of particular cases, some of which may call for a stricter standard of review. One might then ask, for example in a case concerned with "suspect" grounds, whether "very weighty reasons" have been shown, having regard to the wide margin generally available in that field … However it is put, the question is more complex than a "test" of whether the policy choice is "manifestly without reasonable foundation" might appear to be if that were regarded as the entirety of the inquiry."

97. Lord Reed concluded the analysis in this important section of his judgment by stating his conclusions on the "manifestly without reasonable foundation" approach at [157] to [162]. At [158], he said it was appropriate that the approach which the Supreme Court had adopted since Humphreys "should be modified in order to reflect the nuanced nature of the judgment which is required following the jurisprudence of the European court." He continued:

> "In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality."

98. At [159], Lord Reed stressed the importance of avoiding a mechanical approach in this area, "based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant."

99. It follows, as Lord Reed went on to explain at [161], endorsing in this respect two recent decisions of this Court:

> "… that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising

> sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department (National Residential Landlords Association intervening)* [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the "manifestly without reasonable foundation" formulation in circumstances where a particularly wide margin is appropriate."

100. Finally, Lord Reed gave an important warning about the "risk of undue interference by the courts in the sphere of political choices", given the proliferation of challenges to legislation in the UK on the ground of discrimination. As Lord Reed pointed out at [162], "almost any legislation is capable of challenge under Article 14". He explained that:

> "The favoured ground of challenge is usually Article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process."

101. In the light of this guidance, I have no hesitation in concluding that HMRC have discharged the burden of establishing justification in relation to the difference in treatment on the ground of Mr Banks' status as a donor to a political party with no MP elected to Westminster following the 2010 General Election. It is convenient to start by considering the impugned legislation itself. The exemption from IHT contained in section 24 of the 1984 Act is contained in primary legislation of the UK Parliament, which has remained in materially the same form (apart from the removal of an upper limit on the amount of the exemption) for over 45 years. Furthermore, as I have sought to explain, this is a case where no safe conclusions can be drawn about the aim of the exemption apart from the terms of the legislation itself. In other words, it is a case where the aim and the effect of the legislation coincide. There is nothing unusual about that, given the principles reviewed by Lord Reed in the section of his judgment in R (SC) dealing with the use of parliamentary materials. In particular, for the reasons I have given, Mr Banks cannot draw any positive support from the fact that the legislation dates from an era when no consideration was given by Parliament to the differential impact of the legislation on the Convention rights of donors, depending on whether the terms of the exemption are met. The will of Parliament, as expressed in section 24, remains the starting point, whatever the nature or quality of the debate in Parliament which led to the introduction of the original legislation in 1975.

102. The next important points concern the subject-matter of the legislation. Section 24 forms an integral part of the structure of a major piece of tax legislation. The concepts of a transfer of value and a chargeable transfer are central to the architecture of IHT. Taxation, as we have seen, is an area in which the European court has expressly recognised (in Guberina) that a wide margin is usually allowed to the state. Conversely,

the terms of the exemption do not obviously engage any of the "suspect" grounds recognised in the jurisprudence of the European court. That is clearly so in relation to the one ground of discrimination which I have found to be established, but the same would also be true if Mr Banks had established a breach of his rights under Article 10 or 11 ECHR. The nature of such a breach, had it been established, would have been very much at the outer margin of the area of protection under those Articles, given that section 24 is entirely neutral in its operation across the political spectrum, and the most that could be said is that, for some comparatively wealthy donors, it might act as a disincentive to the making of political donations.

103. A third group of points relates to the criteria for exemption chosen by the legislature. The funding of political parties is a sensitive subject on which widely differing views may be held by supporters of all parties, or none. While most people would probably agree that private funding of political parties by individual donors is in principle a desirable aim in a functioning democracy, there are no obviously right answers to the question of how (if at all) such support should be encouraged by the fiscal system. There are many possible solutions, and the comparative material before the Tribunals showed that there is no uniformity of practice in the member states of the Council of Europe. The question is essentially a political one, upon which the courts have neither the equipment nor the democratic credentials to rule. Interference by the courts in a case of the present type would in my view provide a classic example of the risk against which Lord Reed warned in R (SC) at [162], and would cross the boundaries which need to be firmly maintained between legality and the political process.

104. The position might arguably be different if there were some obvious structural flaw or irrationality in the legislation which led to the discrimination complained of, but the criteria which Parliament has chosen to use in section 24 are clearly not of such a character. As I have explained, the criteria reflect the conditions chosen by Parliament for the payment of "Short" money to opposition parties, but with the difference that the conditions apply to governing as well as opposition parties. The requirement that the party should have at least one MP at Westminster cannot possibly be stigmatised as irrational. Similarly, the exclusion of MPs elected at by-elections or who defect from other parties reflects the different, and possibly more volatile, political circumstances in which a party may acquire such MPs. The use of discriminatory factors of this nature is quintessentially a matter of political judgment, and not a question upon which the court could or should express any opinion.

105. In summary, it seems clear to me that this is one of those cases where a wide margin should be accorded by the court outside the context of social or welfare benefits. As is typically the case in those contexts, so here the context is one where the criteria chosen by Parliament will by their very nature have a differential impact on persons affected by them, but the courts should normally resist any temptation to interfere.

106. I have discussed this issue without detailed reference to the written and oral submissions which we received at the hearing, or to the full and careful analysis of the Upper Tribunal. The reason for that, as I hope goes without saying, is no lack of gratitude or respect for that material, all of which I have attempted to take into account, but simply that the judgment of the Supreme Court in R (SC) has now restated and recalibrated the governing principles of law in this area so comprehensively that Lord Reed's analysis must now be the starting point for any consideration of justification by the courts, especially in Article 14 cases. I would merely note, in conclusion, that the Upper

Tribunal wisely resisted HMRC's invitation to apply the test of "manifestly without reasonable foundation" to all stages of the analysis of the justification issue, and they did in fact adopt a more nuanced approach which to my mind sits very well with the guidance in R (SC). Moreover, the factors identified by the Upper Tribunal as ones to which very significant weight should be given, at [182] of the UT Decision, are essentially the same as those which have led me to the same conclusion.

107. For all these reasons, I would dismiss the fourth ground of appeal and uphold the conclusion of the Upper Tribunal on justification. It follows that Mr Banks has in my judgement failed to establish any breach of his human rights occasioned by the application of section 24 of the 1984 Act to the donations which he made to UKIP in the 2014/15 tax year.

Ground 6

108. In view of the conclusions which I have reached, it is unnecessary to consider Ground 6.

Overall conclusion

109. If the other members of the court agree, I would dismiss the appeal.

Nicola Davies LJ:

110. I agree.

The Chancellor of the High Court:

111. I also agree.