OUTER HOUSE, COURT OF SESSION

[2021] CSOH 81

P392/21

OPINION OF LORD SANDISON

In the Petition

AVAAZ FOUNDATION

Petitioner

against

THE SCOTTISH MINISTERS AND OTHERS

Respondents

Petitioner: Springham, QC, Welsh; Harper Macleod LLP
Respondents (Scottish ministers): Crawford, QC, Scullion; Scottish Government Legal Directorate

11 August 2021

Introduction

[1] By this petition Avaaz Foundation, a non-profit organisation incorporated in Delaware, seeks judicial review of the approach of the Scottish ministers in determining whether to apply to the court for Unexplained Wealth Orders ("UWOs") in terms of the Proceeds of Crime Act 2002. The petitioner seeks declarators both as to general questions, namely precisely where responsibility for deciding whether to make applications to the court for UWOs lies, whether that responsibility can be delegated, the standard of behaviour required by law in the discharge of the responsibility, and whether there is a mandatory

duty to make such applications where the requisite criteria appear to exist; and also as to the specific question of whether the ministers have acted unlawfully in failing to make an application for a UWO in relation to former US President Donald Trump's assets in Scotland.

[2] After a brief oral hearing in terms of RCS 58.7(1)(b) on 14 July 2021, I decided that the application had real prospects of success within the meaning of section 27B(2) of the Court of Session Act 1988; in other words, that there was a sensible legal argument to be had on the matters raised by the petition. The respondents did not dispute that the petitioner could demonstrate a sufficient interest in the subject-matter of the petition. However, in relation to the time limit for bringing applications to the supervisory jurisdiction of this court under section 27A(1)(a) of the 1988 Act, I decided that, for reasons which appear more fully below, grounds capable of giving rise to an application to the court in essentially the same terms as the petition was ultimately drafted first arose more than three months before the petition was in fact lodged with the court, and that the application had not, thus, been made timeously. The petitioner had not stated in the petition that it sought any extension to that time limit such as the court may grant in terms of section 27A(1)(b), as it ought to have done in terms of RCS 58.3(5) had it wished the court to grant such an extension.

[3] At the oral hearing on 14 July, the petitioner indicated that it did seek such an extension of the time limit in the event (as then transpired) that I considered that the petition was not timeously brought. Two issues therefore remained for determination. The first was whether I could competently entertain an application for an extension of the normal time limit given the failure of the petitioner to seek the same in the petition and, if I could extend that period, whether I should do so in the circumstances of the case. The second issue was whether, in the event that I could not or did not extend the normal time limit, I was obliged

to disapply it from application to this case in order to ensure full and effective application of EU-derived law, as claimed by the petitioner in advance of the oral hearing. Those matters could not be addressed in the time available at the hearing on 14 July and so a longer hearing was fixed for 29 July to enable them to be debated and decided.

[4] At that hearing, the petitioner moved for the exercise of the court's dispensing power under RCS 2.1 to relieve it from the consequences of having failed to comply with the provisions of RCS 58.3(5), on the ground that its failure was the result of mistake as to when the three-month period actually expired, or as an otherwise excusable matter. The respondents did not suggest that such a course of action was either incompetent or unmerited, and in the circumstances I was readily persuaded to grant the motion under RCS 2.1 and let the substantive argument proceed.

Petitioner's Submissions

[5] Senior counsel for the petitioner invited me to exercise the equitable discretion conferred by section 27A(1)(b) to extend the three-month time limit in the circumstances of this case so as to allow the petitioner to seek all the remedies set out in the petition, including both those expressed in general terms and also that specifically directed at the case of Mr Trump. Counsel reminded me that the purpose of the existence of the discretion was to allow a late petition to proceed if injustice would otherwise result (Report of the Scottish Civil Courts Review (2009), Chapter 12, para. 38, and *S* v *Scottish ministers* [2021] CSOH 23, para. 13). Counsel argued that the discretion was wide in nature and submitted that it had been recognised in authorities such as *S*, paragraph 14, *Wightman* v *Advocate General* [2018] CSIH 18 at paragraph 33 and *EnergieKontor UK Limited* v *Advocate General* [2020] CSOH 17 at paragraphs 25 and 26 to 28 that it might comprehend consideration of issues such as the

length of the delay, the reasons for the delay, the reasonableness of not having proceeded earlier, the prejudice that would be caused to each side by either exercising or refusing to exercise the discretion, the conduct of both sides, the extent to which the passage of time might have rendered any necessary evidence less cogent, the importance of the issues raised, the strength of the petitioner's case, and the extent to which the matters complained of in the petition had a continuing effect.

[6] In the present case, senior counsel submitted firstly that the petitioner had acted reasonably in trying to resolve matters without litigation before finally being driven to court. It had raised concerns about an apparent lack of clarity in connection with the Trump Foundation's funding for the purchases of its Scottish properties, and about the possibility of the Scottish ministers proceeding to seek a UWO in relation to the matter, in a briefing report published by it April 2019. It had been informed by a letter from the ministers in May 2019 that UWOs were matters for the Lord Advocate. It had been dissatisfied with that response and had commenced political lobbying activities in an attempt to put pressure on the ministers about the position being adopted by them, which had in due course resulted in a letter being written in February 2020 by Patrick Harvie MSP to the First Minister enquiring about the kind of matter ultimately raised in the petition. That letter had not been responded to until July 2020, and then in terms with which the petitioner was dissatisfied; a further question had been raised in Parliament by Mr Harvie in November 2020 and had received a different answer from that previously given. The petitioner had obtained counsel's opinion supportive of its views in January 2021 and had provided that opinion to the First Minister. A debate in Parliament on the subject had been held on a motion by Mr Harvie in February 2021 and the petitioner had received a letter dated 22 February in apparent response to its provision to the First Minister of counsel's opinion, which letter

gave rise to further concerns on its part. Its agents had written to the ministers on 7 May 2021 and had had no response by 21 May, being the eve of the expiry of the three-month period from the date of the letter of 22 February during which the petitioner had understood it might timeously raise proceedings. The petition had accordingly been lodged on that day. The petitioner had not wilfully ignored any time limit which it subjectively understood to apply, nor had it been idle at any point in the advancement of its position to the ministers. Counsel referred in this regard to *EnergieKontor* at para. 25 as an example of the exercise of the power to extend the three-month time limit in what she maintained were at least broadly similar circumstances.

[7] Counsel for the petitioner next argued that substantial prejudice would be caused to the petitioner (which is a membership organisation committed to advancing the public interest in a variety of situations worldwide) and to the public interest were the petition not to be permitted to proceed; by contrast, there would be no identifiable prejudice to the respondents were permission to be granted. If the petition were not to be allowed to proceed, there would be no obvious means whereby the Scottish ministers' approach to the UWO legislation could now or in future be challenged, at least in its application to the affairs of Mr Trump, whether by the petitioner or anyone else. The respondents had taken no irrevocable steps in reliance on the correctness in law of the position they had adopted; there was nothing that would require to be unravelled if the petition were to proceed successfully, cf *EnergieKontor* at paragraph 28.

[8] The third factor identified as significant by senior counsel was that the issues raised by the petition, both general and specific, were of considerable importance, in that they sought to have the Scottish ministers give proper effect to money laundering and anti-corruption legislation derived from international obligations. Reference was made to

EnergieKontor at paragraph 28 and to *R (Burkett)* v *Hammersmith and Fulham LBC* [2001] Env LR 684 (CA) at paragraph 29. This would, further, be one of the first judicial reviews in the Scottish courts dealing with the continuing significance of EU-derived law post-Brexit.

[9] The fourth factor relied upon by senior counsel was the strength of the challenge to the Scottish ministers' position set out in the petition. While recognising that any detailed examination of the strength or weaknesses of the application was scarcely possible at this stage, she relied at least on the fact that I had already determined that the petition had real prospects of success within the meaning of section 27B(2) of the 1988 Act.

[10] The final factor upon which senior counsel for the petitioner relied was that the Scottish ministers' position was one which had a continuing effect, both in the particular case of a potential UWO against Mr Trump and more generally. In this regard she relied on the observations of the Inner House in *Wightman* at paragraph 33, that such a feature might represent a "substantial argument" in favour of the extension of the general time limit.

[11] Counsel for the petitioner further submitted that, in the event that I felt unable to make a final decision about equitable extension of the time limit on the material available to the court at this stage, I could properly defer such a decision until the substantive hearing of the petition, at least if I considered that the petitioner's position in relation to the matter might have real prospects of success. In that connection counsel noted that that course of action had been taken by the Lord Ordinary in *INEOS Upstream Ltd* v *Scottish Ministers* [2018] CSOH 15, see especially paragraph 16. *INEOS* had been considered, albeit not directly in that connection, by the Inner House in *Wightman* without adverse comment; suggestions in *S* at paragraphs 9-11 and in *Philp* v *The Highland Council* [2021] CSIH 28 at paragraph 20 that the issue of time bar had to be decided at permission stage and no later were obiter or at least case-specific.

[12] Counsel then turned to what was presented as a separate chapter of the submissions for the petitioner, to the effect that, given the role of EU-derived law in the subject-matter of the petition, I was obliged to grant such extension of the three-month time limit as might be necessary in order to ensure a full and effective application of EU-derived law. UWOs had been introduced into the Proceeds of Crime Act 2002, by way of the Criminal Finances Act 2017, in compliance with the obligations of the United Kingdom as a then Member State of the European Union in order to implement the Fourth Money Laundering Directive (EU) 2015/849 into domestic law. The domestic legislation thus required to be given a purposive interpretation: *Litster* v *Forth Dry Dock & Engineering Co Ltd* 1989 SC (HL) 96 at 104–105.

[13] The relevant parts of the 2002 Act were EU-derived domestic legislation within the meaning of section 1B(7) of the European Union (Withdrawal) Act 2018. The principle of the supremacy of EU law continued to apply so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before 31 December 2020 by dint of section 5(2) of the 2018 Act. That comprehended the principle of sincere co-operation laid down in Article 4(3) TEU, which required the courts of Member States to ensure judicial protection of a person's rights under EU law, and the requirement of Article 19(1) TEU that Member States should provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, albeit it was for the domestic legal system of each Member State to lay down detailed procedural rules to that end and ensure compliance with the right to an effective remedy and to a fair hearing; see Case C-243/15, *Lesoochranárske zoskupenie VLK* v *Obvodný úrad Trenčín* ECLI:EU:C:2016:838 (CJEU Grand Chamber, 8 November 2016) at paragraphs 50 and 65.

[14] In cases involving EU-derived law, domestic procedural rules therefore required to be read in a manner that complied with the court's obligations to ensure full application of EU-derived law within its jurisdiction. Where (as might be the case here if the equitable power to extend the time limit was not otherwise to be exercised) it was necessary to ensure full and effective application of EU-derived law, the court was obliged to grant an extension of the time limit set out in section 27A(1)(b) of the 1988 Act. Reference was made to Case C-406/08, *Uniplex (UK) Ltd* v *NHS Business Services Authority* [2010] PTSR 1377 at paragraphs 40–43, as an example of a situation where domestic time-limit provisions had been deemed impermissible as having rendered impossible or extremely difficult the exercise of rights derived from EU law.

Respondents' Submissions

[15] Senior counsel for the Scottish ministers began by observing that, though the court's discretion to extend the three-month time limit was wide in nature, the onus rested firmly on the petitioner to persuade the court that it should be exercised in any particular case.

[16] On the substance of the matter, there had been a very lengthy delay between the grounds for the application first arising and the lodging of the petition. It was clear that the petitioner had been contending that the ministers should apply for a UWO against Mr Trump since the publication of its briefing paper in April 2019. The position of the ministers in connection with that matter and with responsibility for seeking UWOs more generally, which was what the petition sought to have addressed by the court, had been made clear in correspondence from May 2019 onwards.

[17] Although its subject-matter might be of interest to the public, that did not mean that allowing the petition to proceed would be in the public interest. The responsibilities of the

Scottish ministers in relation to UWOs were ongoing, so if appropriate circumstances arose in future, the exact nature of those responsibilities could be explored and any public interest vindicated in proceedings that might then be timeously raised. The tenor of the briefing paper put out by the petitioner in April 2019 plainly indicated that the principal object of its interest was Mr Trump; the suggestion that these proceedings were intended to uphold the public interest in clarification of the law concerning UWOs was specious; they were in furtherance of the petitioner's own political viewpoint.

[18] It would be disproportionate in such circumstances to grant an extension of time to allow the petition to proceed, with the necessary consequent call on the public resources of the ministers and the court, particularly where any true public interest could be vindicated in suitable future proceedings if the need arose. Counsel did not claim that the ministers would otherwise suffer any specific prejudice were the petition to be allowed to proceed.

[19] In relation to the suggestion that the question of whether to grant an extension of time could be deferred, counsel for the respondents adopted the observations in *S* and *Philp* already cited and submitted that they correctly stated the law as requiring all questions of time limit, including equitable extension, to be determined as part and parcel of the permission process.

[20] On the EU-derived law point, counsel maintained that no relevant EU law derived right was engaged by the petition. There was no suggestion that the Fourth Money Laundering Directive had been inadequately transposed into domestic law. The existence of a three-month time limit for bringing proceedings such as the present, at least when coupled with a discretionary power to extend that limit, did not interfere with the full and effective exercise of any relevant EU-derived right.

Decision

[21] As parties submitted, the discretion conferred on the court by section 27A(1)(b) of the 1988 Act is wide in nature and is capable of admitting consideration of all of the circumstances of the case, with the weight falling to be given to each such circumstance varying according to the court's view of its significance in an assessment of where the overarching interests of justice ultimately lie. In the present case, there was a considerable delay between the point in time at which the petitioner could competently have come to court to complain of essentially the same matters of which it now complains, and the actual date on which the petition was lodged. That the Scottish ministers were indeed determined to adopt a position in relation to the responsibility for seeking UWOs which the petition castigates as unlawful, both in general terms and in relation to Mr Trump, ought to have been (and moreover, apparently was) clear to the petitioner by mid-2019 at the latest. That the petitioner sought to have its dissatisfaction with that position addressed by political rather than legal means for some period thereafter might be considered an abstractly reasonable course of action for it to take, but does not elide the fact that grounds of action came into existence and were not insisted upon until long after the three-month period envisaged by section 27A(1)(a) of the 1988 Act had elapsed. That an inevitably uncertain political resolution to a matter in dispute is being pursued is not something that could normally be regarded as going to the preservation, even indirectly, of an available legal route to such resolution which is not timeously taken. The letter of 22 February 2021 which the petitioner sought to present as having given rise to the specific grounds of action for the petition in fact simply represented the repetition, albeit perhaps expressed in slightly different terms, of a general position adopted by the ministers as to the distribution of responsibility for seeking UWOs with which the petitioner had already taken serious issue.

It did not in law represent an opportunity to reset the three-month timebar clock. That the petitioner may erroneously have thought that it did cannot overcome the fact that by the point that letter was written the petition was already at least five months out of time. I therefore conclude that there was a considerable delay in bringing the petition to court and that little or nothing exists going to the excusal of that delay.

[22] However, a strong antidote to that state of affairs comes from the fact that the ministers were unable to point to any prejudice that would flow from the petition now being permitted to proceed, beyond the public time and expense that would be incurred in dealing with it. That time and expense would have had to be devoted to dealing with the petition in any event had it been timeously raised. This is not a case where any other person has made arrangements, or taken or not taken any action, in reliance on the view that the ministers' position was correct, and so no question of relevant prejudice to any other person arises. These considerations go a long way towards drawing the sting of the lengthy delay in raising proceedings.

[23] In these circumstances the question comes to be whether the petition raises matters of such live and substantive public importance as to render it in the interests of justice to allow it to proceed out of time. I did not understand counsel for the ministers to deny that some aspects of the petition, being in essence those addressed to the general questions concerning responsibility for seeking UWOs as opposed to those addressing the specific case of Mr Trump, might accurately be characterised as having that quality. Further, I accept the submission on behalf of the petitioner that the matters complained of have continuing effect in the administration of the responsibility for seeking UWOs in Scotland and that that is a matter which is, on the authority of *Wightman*, capable of bearing substantial weight in the exercise of assessing whether or not to grant an extension of time. I was also unconvinced

that another opportunity for anyone to challenge the general position of the ministers in relation to seeking UWOs was at all likely to arise in ordinary course in the near future. On the other hand, the tenor of the petitioner's briefing paper of April 2019 gives plain grounds for scepticism that its motivation in bringing the present proceedings is truly a desire to clarify the somewhat technical aspects of the general law which arise, as opposed to a desire to further a political agenda to oppose the interests of Mr Trump by any means available. I enquired of counsel for the petitioner in the course of the hearing on 29 July whether it would remain interested in taking the petition further were I to restrict the grounds upon which it would proceed to those addressing the general legal position, and to exclude from the application the specific issues concerning Mr Trump's case. On instruction, counsel replied that the petitioner would, albeit reluctantly, wish to proceed with the petition on that basis. I see no reason not to take that at face value and in any event would have required a good deal of persuasion that the apparent subjective motive of a petitioner in making an application of this sort ought to prevent the ventilation of what are in any event, objectively viewed, important matters of clear public interest. I considered restricting the grounds that might be permitted to proceed to those dealing with general issues rather than those specifically concerning Mr Trump, but came to the view that since the pre-litigation correspondence and dispute had all concerned Mr Trump's case it would be artificial to require the petition to proceed on what would be an unhappily semi-abstract basis, and that in the event that the petition were to succeed in its general aims it would be unnecessary and unfortunate if the question of the import of the decision for Mr Trump's case were to be left as a matter of inference only.

[24] On the whole then, having regard to the general and continuing public importance of the legal questions raised by the petition and the lack of specific prejudice to the Scottish

ministers or others were it to be permitted to proceed out of time, I consider it to be in the interests of justice to extend the time limit for lodging the petition in terms of section 27A(1)(b) of the 1988 Act to include the day on which it was in fact lodged, and to impose no restriction on the grounds of challenge to the position of the ministers which it may advance.

[25] It is thus unnecessary for me to decide whether I could have deferred a decision on the question of extension of the time limit to a point beyond the permission stage, but given that there is at least a perceived difference between the decisions in *INEOS* and *S* on that matter which is capable of giving rise to practical difficulty in future cases, it may be useful if I express my views on that point briefly.

[26] The starting point must be section 27A of the 1988 Act, which provides that an application to the supervisory jurisdiction of the court must be made before the end of the period of three months beginning with the date on which the grounds giving rise to the application first arise, or such longer period as the court considers equitable having regard to all the circumstances. In most circumstances giving rise to applications to the supervisory jurisdiction, the facts capable of informing the answer to the question of whether the petition has been brought in time will either not be in dispute or not capable of reasonable dispute. In such cases, the court can and should proceed at permission stage to take into account the clear answer to that question in making the determinations which it is required to make at permission stage, namely those set out in section 27B. In some cases, however, the facts capable of informing the answer to the question of whether the petition has been brought in time will be in genuine and reasonable dispute, or there may be unresolved nuances within a generally-agreed factual framework properly capable of influencing the decision on whether the petition has been brought in time. I do not consider that in that kind of case

either the 1988 Act or the Rules of Court made to facilitate its application require the court to make a final decision on the question of whether the petition has been brought in time at permission stage if at that stage it lacks the means reasonably necessary to do so, and I do not consider that either the statute or the Rules of Court should be read as implying or promoting any scheme to the effect that it must or should do so. Rule of Court 58.7(1) provides a mechanism whereby a decision on permission must be made and whereby a decision on extension of time may be made if it appears that such a decision may be necessary and the petitioner seeks an extension of time, but it does not require a final decision on the substantive question of whether the petition has been brought in time at that stage. Rather, if the question of whether the petition has been brought in time remains a live one in the sense already discussed, and no extension of time is sought or granted at permission stage, that question should be dealt with in accordance with section 27B, the statutory provision which states explicitly what the court should do at the permission stage. In essence, for present purposes, that means that the court must determine whether the application has a real prospect of success. In cases where the issue of whether the petition has been brought in time has not been capable of clear resolution on the basis of the material available at permission stage, and no extension of time has been sought or granted, the court can and should assess that issue at that stage along with the other issues in the case simply in order to decide whether that test of real prospect of success is met. If it is not, then the petition cannot proceed further. If it is, the petition continues to later stages of procedure at which the timebar question will remain a live one along with the other issues in the case, to be finally determined along with those other issues on the basis of material apt for the purpose. As I understand it, that is effectively what was allowed to happen in *INEOS*; to the extent that *S* suggests that that was not a properly available option, I disagree. I add

finally that it does not seem to me that this question has been considered in the Inner House in any way productive of persuasive, let alone binding, observation.

[27] In the present case, I was not asked to defer a decision on whether the petition had been brought in time; I was able to conclude on undisputed facts that it had not been. On the analysis above, I could not have done what I was invited to consider doing, namely deferring the separate question of whether to extend the time limit to be answered at some subsequent point in the procedure, even had I otherwise thought it appropriate to do so. If a petitioner wishes an extension of time to be granted, even if only *ob majorem cautelam*, it ought to ask for it in the petition (RCS 58.3(5)) and if the question of extension requires to be dealt with because of the view that the court takes about the substantive timebar question at permission stage, it should be dealt with at permission stage (RCS 58.7(1)(a)(ii)). There would be no point in taking a substantive timebar issue forward as a live one in the proceedings if the court was in any event minded to grant an extension allowing the petition to be treated as having been presented in time.

[28] I finally deal with the EU-derived law element of the petitioner's submissions. Again, I was able to decide the extension question in the petitioner's favour without close consideration of that matter (which did not appear to me to be particularly straightforward), and so merely indicate briefly that it was not obvious to me that there was any need to read the applicable domestic procedural rules in any special manner in order to comply with any obligation on the court to ensure full and effective application of EU-derived law within its jurisdiction. In a situation where domestic legislation provides for a period of certain and reasonable duration within which an application may be brought without risk of being deemed out of time, and where the opportunity exists for the presumptive time limit to be extended if the court considers that the interests of justice so require, I consider that the

engagement of any particular aspect of EU-derived law by a petition, and any consequent duty on the court to ensure its full and effective application, are matters best dealt with as part and parcel of the ordinary process of deciding whether to grant an extension, rather than as a separate and overriding stage in the determination of whether a petition should proceed despite being brought out of time.

[29] I grant permission for the petition to proceed without condition or restriction.