

Neutral Citation Number: [2011] EWCA Civ 892

Case No: C1/2009/1224

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Claim No. CO/11073/08

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2011

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE SULLIVAN
and
LORD JUSTICE TOMLINSON

IN THE MATTER OF an application for judicial review

Between :

R(MR IAN ISAAC SHINER & ANR)

Claimants

- and -

HER MAJESTY'S REVENUE & CUSTOMS

Defendants

MR DAVID GOLDBERG QC and MR CONRAD McDONNELL (instructed by PricewaterhouseCoopers Legal LLP) for the Appellants

MR RABINDER SINGH QC, MR KIERON BEAL and MR JAMES RIVETT (instructed by HMRC Solicitor's Office) for the Respondents

Hearing dates : 2nd, 3rd and 4th November 2010

Judgment

Lord Justice Mummery :

Not an appeal

1. We are sitting in the Court of Appeal, but not on an appeal. No first instance court has given a substantive judgment to appeal. The court has itself heard the substantive claim for judicial review. An earlier order made by a different constitution of three (of whom two have since ceased to be members of the court) directed that the application, for which it gave permission, should be heard in the Court of Appeal.
2. The Claim Form defines the claimants as “the Taxpayers.” I will call them the claimants. One of them has a law degree and is now a retired magistrate. They are both directors of a building company. They are both resident in the United Kingdom. Their dispute is with Her Majesty’s Revenue and Customs (HMRC) about what is described as the “extreme, unfair and unprecedented retrospective effect” of legislation overriding all double taxation treaties so as to bring into charge to tax in the UK any share of the income of an overseas firm to which a UK resident is entitled. It is claimed that the changes caused serious concern and potential hardship to the claimants.
3. The claimants’ case is that HMRC cannot lawfully deny their claim to relief from payment of UK income tax for past years of assessment on income received by them in the UK from trusts in the Isle of Man. The claim to relief is based on a Double Taxation Arrangement (DTA) made with the Isle of Man in 1955. It was subsequently amended. By virtue of their participation in the arrangements of a tax avoidance scheme located in the Isle of Man the income received by them in the UK was channelled through interest in possession trusts established by the claimants in the Isle of Man.
4. Under purely domestic legislation having retrospective, as well as prospective, effect, the claimants are plainly liable to pay UK income tax for the past years of assessment. However, as we shall see, this is not a run-of-the-mill domestic income tax tussle with HMRC. The support of European Union (EU) law and the European Convention on Human Rights (the Convention) has been enlisted.
5. The application is for judicial review of the retrospective application of s.58 of the Finance Act 2008 (the 2008 Act). That made amendments to the legislation on UK tax affecting the income of foreign partnerships, UK residents and DTAs with the UK. The claimants’ case is that the retrospective provisions of s.58 are contrary to and incompatible with the paramount provisions of Article 56 of the European Community Treaty (prohibition of restrictions on free movement of capital between Member States). That prohibition is now incorporated in the same terms in Article 63 of the Treaty on the Functioning of the European Union (TFEU). As Article 56 was the relevant provision in force at the material time, I will continue to refer to it rather than to its replacement.
6. The claim is for a declaration that the amendments in s.58 are incompatible with Article 56 and that, as such, they cannot be applied lawfully by HMRC. Orders are also sought quashing the policy decisions of HMRC to enforce the retrospective aspects of s.58, as set out in a letter of 18 August 2008 sent by HMRC to the claimants. The claim for judicial review focuses on the terms of that letter.

7. Article 56 is not the only arrow in the claimants' judicial review quiver. In common with Mr Huitson, who has brought an appeal with which this judicial review application was directed to be listed, the claimants say that the retrospective operation of s.58 on claims to relief from UK income tax on income received in the UK from trusts in the Isle of Man is incompatible with the fundamental human right to enjoyment of one's possessions. Protection from unjustified interference with that right is derived from the Human Rights Act 1998 which incorporates the provisions of Article 1 of the First Protocol to the Convention.
8. In a sentence, this court has to decide whether it would be contrary to EU law and incompatible with Convention rights for HMRC to apply to the claimants and, in the case of Convention rights, to apply to Mr Huitson, amendments to primary fiscal legislation aimed at retrospectively nullifying the benefits of the tax avoidance scheme used by them.
9. I will begin with an overview of the proceedings that present those novel challenges based on wide-ranging arguments.

Overview of proceedings

10. The basic facts are that, from 2005 onwards, the claimants participated in a marketed tax avoidance scheme set up in the Isle of Man. It is essentially the same Manx partnership and trust set up as is described in our judgments in *Huitson*. The underlying object of the scheme was to channel to the claimants in the UK the profits of Isle of Man partnerships through interest in possession trusts established by them in the Isle of Man. The aim was to take advantage of the provisions of paragraph 3(2) of the DTA of 1955 between the United Kingdom and the Isle of Man as entitling them to claim relief from UK income tax on the payments received by them in the UK from the Manx trusts.
11. The focus of the challenge is on the alleged incompatibility of the retrospective application of the provisions in s.58 with Article 56. Section 58 purported to amend the previous fiscal legislation relating to the foreign partnerships, UK residents and the operation of DTAs contained in s.858 of the Income Tax (Trading and Other Income) Act 2005. The specific aim of the amendments was to render the Manx tax avoidance schemes ineffective beyond doubt and to make the claimants and other users of the scheme liable to pay UK income tax for past years of assessment on the income received by them in the UK from the Manx trusts.
12. The text of Article 56, which the parties have supplied to the court in different language versions, provided in the English language version that:-

“1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited. ”

13. It is common ground that the Article has direct effect and that it is capable of conferring rights on individuals enforceable in the domestic legal order. The issues of interpretation and applicability of Article 56 to this case canvassed in the detailed written and oral submissions address almost every aspect of its very wide terms, save for the numbers and the full stops. What, on the facts of this case, is the relevant “capital”? If “capital” is involved, has there been any “movement” of it? If so, was that movement between a Member State (the UK) and “a third country”? (thereby raising an intriguing and possibly obscure question of the status of the Isle of Man under EU law). If so, is such movement of capital affected by any “restrictions” on it in s.58? If so, are such restrictions justified? Is this court able to give clear and confident answers to the questions of interpretation of Article 56? If not, is it necessary to refer questions to the Court of Justice for rulings in order to determine the judicial review application?
14. The application for permission to bring judicial review proceedings raising these questions, which was issued on 17 November 2008, has not been plain sailing for the claimants. On 3 June 2009 Stanley Burnton LJ refused permission to bring judicial review proceedings based on the Article 56 point. He also stayed the Convention claim pending the outcome of Mr Huitson’s proceedings. He later granted permission to bring judicial review proceedings based on Convention grounds.
15. By an order dated 26 May 2010, this court (Waller, Rix & Wilson LJJ) granted permission to the claimants to apply for judicial review seeking a declaration of incompatibility with Article 56 and for an order quashing the decision of HMRC on retrospectivity as reflected in a “decision letter” dated 18 August 2008. The court granted an extension of time for the application.
16. The order directed that the application should be listed at the same time as the appeal in the case of *R (Huitson) v. HMRC* [2011] QB 174 in which s.58 is alleged to be incompatible with Article 1 of the First Protocol to the Convention as set out in Schedule 1 Part II to the 1998 Act. Although the judicial review application and the *Huitson* appeal were heard sequentially at the same hearing and they overlap to some extent, it is more convenient to hand down separate judgments than a composite judgment. They can be read together for a fuller picture of the dispute about s.58 of the 2008 Act, Article 56 of the EU Treaty and Article 1 of the First Protocol to the Convention.
17. In a tiny nutshell the main point forcefully advanced by Mr David Goldberg QC on the claimants’ behalf is that the retrospective effect of s.58 is contrary to, and incompatible with, Article 56. The reason for incompatibility is that the amendments made by s.58 are capable of preventing, restricting or discouraging commercial investment of capital in foreign partnerships by means of unjustified discrimination between an investment of capital in a foreign partnership and an investment of capital in a UK partnership. It is argued that s.58 favours investment in a UK partnership by imposing an incremental domestic tax charge on income, which may already have borne tax in another jurisdiction. Its retrospectivity is an infringement of the EU principles of legal certainty and legitimate expectation. There is no justification for its retrospective and discriminatory effects. If this court has any doubt on this matter contrary to the claimants’ contentions, then it ought to refer the questions of interpretation raised for rulings by the Court of Justice.

18. The substance of HMRC's comprehensive response, also shrunk to nutshell size, is that, on the particular facts as they appear in this case, the claimants' main argument has no possible foundation in EU law. The claimants' case on EU law is described as so hypothetical that the court should not entertain it. In so far as the claimants may be affected by EU law on the actual facts of their case, they have failed entirely to address their effects, or the particular steps needed to establish that s.58 falls within the scope of application of Article 56 and other provisions and principles of EC law; or that s.58 amounts to a restriction on the free movement of capital; or that its provisions are discriminatory, or are incapable of justification, or are disproportionate, or offend the principle of legal certainty.

Basic background

19. The claimants may be entitled to declaratory relief on their application for judicial review, if they can establish a case of incompatibility of s.58 with Article 56 *which affects them*. The result aimed for by the claimants is that the retrospective provisions of s.58 should be disapplied in HMRC's tax treatment of the income received by the claimants in the UK from the Manx trust in past years.
20. It is vital to be clear about the facts relied on by the claimants to found real, not just hypothetical, issues of incompatibility with EU law. There is no agreed statement of facts. Very few facts are set out in the "Statement of Facts relied upon" in Section 8 of the Claim Form. The claimants' skeleton argument refers to hardly any facts. A brief draft statement has been supplied to the court. I will summarise the facts, as they at present appear from the papers, to see whether they lay a possible foundation for the claimants' legal submissions on the application of Article 56 regarding the movement of capital.
21. The claimants are resident in the UK and they receive the income in question in the UK. From April 2005 they participated in a tax avoidance scheme designed to take advantage of the provisions of the DTA between the UK and the Isle of Man. The DTA was an "arrangement" within the meaning of s.788 ICTA 1988. It made provision for relief from income tax within the meaning of s.788(3)(a) ICTA 1988.
22. The claimants contend that the effect of the Isle of Man tax avoidance scheme is that no UK income tax is payable on the profits arising from the development of property in the UK by Manx partnerships, or the income from the Manx trusts beneficially received by them in the UK.
23. At the centre of the scheme are two interest in possession trusts with Manx resident trustees. The trusts were set up in the Isle of Man. The respective claimants were settlors of, and are life interest beneficiaries under, their respective trusts.
24. On 20 April 2005 the claimant, Mr David Sheinman, made the David Sheinman 2005 Settlement. It was established under the laws of the Isle of Man. Parleybrook Limited of Douglas, Isle of Man, is the trustee. Under the terms of the trust deed the income is payable to Mr Sheinman as the "Principal Beneficiary".
25. The claimant, Mr Ian Shiner, made the Ian Isaac Shiner 2005 Settlement on 20 April 2005. Armourdale Limited of Douglas, Isle of Man, is the trustee. Under the terms of that trust the income is payable to Mr Shiner as the Principal Beneficiary.

26. Each claimant transferred the sum of £10 to the respective trust company resident in the Isle of Man. Cheques for £10 each in favour of the respective trusts were signed by the respective settlors and dated 19 April 2005. That is referred to in the Second Schedule to the Trust Deeds as “Initial Property Comprised in the Trust Fund.” It was to be invested by each trustee at its discretion. The £10 transfer is said by Mr Goldberg QC to be a “movement of capital from a Member State to a third country” within the meaning of Article 56. The Trust Deeds make no reference to an existing or proposed future trading partnership of which the trustees are or were members.
27. On 21 April 2005 the two trustee companies entered into a partnership agreement with each other. It is governed by the law of the Isle of Man. It was called the Redwood Partnership and was later changed to The Redwood Land Partnership. It conducts a trading business described in the agreement as “the business of dealers and (where so advised) developers of land and other immovable property”. The profits and losses are to be borne equally by the partners. The Agreement states the companies entered into the agreement “as trustee” of each respective settlement. That is the only mention of the trusts in the partnership agreement.
28. The partnership is established, managed and controlled in the Isle of Man. It is “a Manx enterprise” within the meaning of the 1955 DTA (paragraph 2.1(i)). It has no permanent establishment in the UK. The partnership traded in the UK and generated profits in the tax years 2005/06, 2006/07 and 2007/08. The partnership used debt finance to acquire UK development sites with planning permission from Merchant Property Developments Limited, of which the claimants were sole directors. The partnership engaged another party, Mark Oliver Homes Limited, of which the claimants were sole directors, to develop the sites and sell them on its behalf.
29. The profits accruing to the partnership are claimed not to be chargeable to UK tax by virtue of the application of the provisions for relief in paragraph 3(2) of the 1955 DTA. That claim is based on the assertion that the income was the profits of a “Manx enterprise” within the meaning of the DTA. The profits of the partnership are distributed to the trustee companies belonging to the partnership. The trusts are described as “investors and partners in the Redwood Land Partnership.”
30. Each UK individual entitled to the income of his trust claimed relief from UK tax in tax returns for the tax years for 2005/06, 2006/07 and 2007/08 in accordance with s.788(6) ICTA 1988, which gave effect to the DTA. The DTA were “arrangements” within that section and made provision for relief from income tax within the meaning of that section. In the words of the Claim Form the claimants sought exemption under Article 3(2) of the DTA “for the share of the income of the Firm [Redwood] to which the Taxpayer in question is beneficially entitled.”
31. Section 858 of the 2005 Act had the effect of preventing UK resident partners in foreign partnerships from claiming relief from income tax under arrangements within the meaning of s. 788 ICTA 1988 in respect of their share of partnership income, but did not have the same effect in relation to UK partnerships.
32. Section 58 was enacted in the Finance Act 2008, which received the Royal Assent on 21 July 2008, in order to treat the UK residents in the position of the claimants as chargeable to UK tax. By way of amendments to s.858 of the 2005 Act it provided that UK resident persons who were not partners, but who were entitled to the income

of a foreign partnership (but not a UK partnership), were prevented from claiming relief from income tax under the DTA within the meaning of s.788 ICTA 1988. By virtue of s. 58 (4) and (5) the amendments were to have, or were deemed to have, retrospective effect.

33. As indicated earlier, the claimants say that the amendments infringe Article 56 as being a “restriction” on the “movement of capital” between the UK as a Member State and the Isle of Man as a “third country”, “restriction” having a wide meaning that includes discrimination tending to dissuade investment of capital in another country.
34. On 18 August 2008 HMRC wrote a letter to each of the claimants in the same terms asserting that the retrospective effect of s.58 was enforceable and informing them of its policy decisions. Letters in identical terms were sent to many taxpayers, who had previously submitted claims for relief under the DTA. The letter stated that, in consequence of s.58, the share of income arising in the partnerships would be chargeable on them for every year in which such income arose or arises. The letter directed the claimants to revise any tax return already submitted for prior tax years so as to omit any claim for relief pursuant to s.788 ICTA 1988. It stated that, if the claimants did not do so, HMRC would make amendments to the returns to incorporate the income now considered chargeable. As the additional liabilities attracted interest on a daily basis, the recipients of the letter were informed that they should pay the full amount now.

Claimants’ case: main steps

35. The case developed by the claimants can be broken down into the following steps, which are contested by HMRC.
 - (1) The payment of the sum of £10 into the Manx trust was a transfer of capital.
 - (2) The transfer was from a Member State to a third country, because the Isle of Man is neither part of the UK nor the EU territory. EU law does not apply, save where Protocol 3 says so. Article 56 has not been so applied to the Isle of Man.
 - (3) The effect of s. 58 is retrospectively to impose a charge to income tax on a UK resident who is “entitled to” a share of the income of an overseas firm in a case where, without that section, any part of the income would have been exempt from UK taxation as a result of a tax treaty.
 - (4) Restrictions on the free movement of capital between Member States and between Member States and third countries are prohibited.
 - (5) An investment in an overseas firm giving rise to an entitlement to a share in the income of the firm is a movement of capital.
 - (6) Any tax charge on income received by a UK resident from an overseas undertaking is potentially a restriction on the free

movement of capital, where the consequence of the tax charge is to subject the UK resident making a cross border investment to a higher burden of taxation than comparable situations by, for example, denying exemption or credit for tax paid overseas.

- (7) Section 58 cannot be justified, as it is disproportionate, unfair and retrospectively removes rights, which previously existed under national taxation and tax treaties, without any transitional periods frustrating legitimate expectations of taxpayers, who have relied on the previous legislation.

Issues

36. Within the overall context of the retrospective effect of s. 58 the following issues were canvassed on the appeal. The first two depend very much on the particular facts of this case. The remaining issues are more wide-ranging.
 - (1) Was there a relevant “movement of capital” or a payment within the meaning of Article 56?
 - (2) If so, was the transfer or payment made between a Member State and a third country? That would involve deciding whether, within the meaning of Article 56, the Isle of Man is a “third country” to which there has been a movement of capital from the UK.
 - (3) If so, how wide can the inquiry then range beyond the particular facts of this case into the realm of hypothetical situations to which s. 58 and Article 56 might relate?
 - (4) Does s.58 restrict transfers of capital to a foreign partnership, but not those to a UK partnership? If so, is that precluded by Article 56 (subject to the defence of justification)?
 - (5) If s.58 is precluded by Article 56, can it be justified in whole or in part, so that the retrospective aspect of s.58 is valid, despite the breach of the Article?
 - (6) Is there a doubt whether s.58 is precluded by Article 56 or whether it can be justified?
 - (7) If so, should there be a reference of questions of interpretation of Article 56 to the Court of Justice?
 - (8) Are the claimants’ proceedings an abuse of rights under EU law?
37. The ambitious way in which these issues have been raised and argued in this court presents a more fundamental problem than just *how* the issues should be decided: to what extent is it necessary or advisable for this court, in exercising an original judicial review jurisdiction, to determine many of the issues *at all*?
38. This court is not on this occasion sitting as an appellate court hearing an appeal from a decision of the Administrative Court on a judicial review application: it is itself sitting

as a court of first instance hearing a judicial review application. Judicial review procedure is not best suited for deciding disputed questions of fact, or for deciding the tax liabilities of taxpayers in a dispute that is fact-sensitive. Nor is judicial review available for rulings of the court on hypothetical or academic questions. The proper function of judicial review proceedings is to determine whether there has been an abuse or excess of power by a public authority, or whether its acts or omissions affecting the claimants are lawful.

39. The difficulties of keeping the case within the proper limits of the court's jurisdiction are heightened when attempts are made, either directly or indirectly and in a very general kind of way, to review the compatibility of UK legislative measures with the EU law or the Convention. This difficulty is well illustrated by the terms in which it has been suggested the court might consider making a reference of questions to the Court of Justice, if it concludes that rulings on EU law are necessary to enable the court to determine this application.
40. The questions proposed by the claimants to be referred in such an eventuality are, subject to further argument and to the court's decision:-

“1. Is a national legislative measure which:

- (a) applies to a person who is not a member of a partnership but is entitled to a share of the income of a partnership (an “Income Participant”),
- (b) permits an Income Participant to obtain the benefit of relief from taxation, both under such bilateral double taxation arrangements as apply and under domestic provisions relating to the relief from double taxation, where the partnership of which he is an Income Participant
 - (i) resides in the United Kingdom; and
 - (ii) does not carry on a trade or business, the control or management of which is outside the United Kingdom;

but which

- (c) precludes an Income Participant of any other partnership (being all partnerships resident outside the United Kingdom and all partnerships which, although resident in the United Kingdom, carry on a trade or business the control of which is outside the United Kingdom) from benefitting from any such relief

compatible with Article 63 TFEU?

2. If such a measure is not compatible with Article 63, can the breach of Article 63 be justified so far as the measure is expressed to have prospective effect but not so far as it is expressed to have retrospective effect? ”

41. Once one becomes immersed in the strategies of this litigation it is not difficult to see the EU destinations the claimants want this court and the Court of Justice, if a reference is made, to travel to: but the court is a judicial review court in this case. It has to adjudicate on the lawfulness of the actions of HMRC in their treatment of the claimants' tax affairs on the particular facts of this case. A prudent court will be cautious about being led off into unnecessary detours and must be alert as to whether it should even contemplate setting off in this case for some of the distant destinations opened up by the issues raised.
42. In other words, a judicial review court has a job description: adjudication of challenges by citizens to the lawfulness of acts and omissions of public authorities *affecting them*. Its job description does not extend to chairing seminars on EU law, or income tax law, or giving general advice on those areas of law to taxpayers, tax planning bodies or fiscal authorities.
43. Another court may take a different view. It may decide to take up the task of resolving all the issues argued in this court, or more of them than this court considers it necessary or advisable to decide. It may assist that court and the parties to this litigation, if this judgment identifies all the issues argued, even if this court declines to decide them on the ground that, on the facts of this case, it is unnecessary and inadvisable to attempt to resolve them.
44. I therefore turn to the issues.

THE ISSUES

I. Scope of application issues; transfer of “capital”; transfer from one Member State to a third country

Submissions

45. Mr David Goldberg QC contends that the payment of £10 by cheque by the claimants to the respective trustee of each Isle of Man trust was a “movement of capital” which engaged Article 56. “Capital” referred to any form of money or something having monetary value. All that Article 56 required was that the capital had moved from one country to another. Here there was a movement of cash from the UK to the Isle of Man. That was all that was required for the Article to be engaged.
46. The movement of £10 was, he says, part of the arrangement for setting up the Manx trading partnership the next day. The money put in the trust was an investment in the partnership. It was an essential part of the one arrangement that the trustee would be a partner in the partnership *and* that the income of the partnership would be channelled through the medium of the trust to the claimant settlor/beneficiary. In Mr Goldberg's words the transfer of £10 “opened the gate to Article 56” and the question whether it was infringed by s.58.
47. Mr Goldberg then goes to the question whether the Isle of Man is a “third country” for the purposes of Article 56. It is, he says, neither part of the UK for UK constitutional law purposes nor is it a sovereign state which would be a Member State. It is a self-governing dependency, which qualifies as “a third country.” He also relies on the fact that the European Commission has said that the Isle of Man is “a third country.”

48. Against that, HMRC submit that s.58 does not even begin to fall within the scope of application of Article 56, which is not therefore engaged and the EU principles of free movement of capital and of legal certainty cannot be relied upon.
49. As to whether the Isle of Man is “a third country” for the purposes of EU law, HMRC point out that the Isle of Man is a European territory for whose external relations the UK is responsible and to Article 355 of TFEU. They say that the principle of the free movement of capital has not been expressly applied to it: Protocol 3 to the Act of Accession. HMRC submit that the claimants cannot derive any EU law rights based on Article 56 in relation to dealing with a partnership established in the Isle of Man. Any movement of capital between the UK and the Isle of Man concerns a wholly internal situation and falls outside the scope of application of EU law. There is no intra-EU dimension involving two Member States nor is the Isle of Man a third country. The UK and the Isle of Man are a single Member State. In this context it is submitted that the “third country” referred to in Article 56 is a non-Member State, being a country that has no connection with EU Member States whatsoever.
50. More importantly for this case, HMRC make the more basic factual point that, even if the Isle of Man is a “third country” within the meaning of Article 56, there has been no relevant “movement of capital” to engage Article 56. The sum of £10, which is the only movement of capital relied on by the claimants, was not put into or transferred to a partnership. The £10 transferred had nothing to do with the Manx partnership structure: it was put into an interest in possession trust, which, as a matter of trust law and for tax purposes, is and must be genuine and separate and distinct from the partnership, not simply a conduit for making payment of funds to the partnership and which has been inserted artificially for the purposes of tax avoidance. Further, there is no evidence in the case that the purpose of either trust was to invest in or to enter into the Manx partnership.
51. Section 58 says nothing about the movement or transfer of a capital sum into a trust. It refers to a person entitled to a share of the profits of a partnership. It is addressed to the recipient end of the transaction, to the case of a person being entitled to a share of the profits of a partnership and to being deemed to be a member of the firm.

Conclusion

52. I am in complete agreement with the submissions of HMRC on the narrow “movement of capital” point arising on the facts of this case.
53. The payment of £10 had nothing to do with the funding of the Manx partnership structure: it was put into a trust for the claimant and not into the Manx partnership, which was a distinct and separate entity from the Manx trust established by each claimant. Putting £10 each into Manx trusts, which the claimants have created and under which they are also entitled to a life interest, is not in itself a “movement of capital” within the meaning of Article 56. It does not become so, because the Manx trustee of the Manx trust is a member of a Manx partnership that uses the services of the settlor/ beneficiary, or chooses to pay the profits of the partnership into the trust for onward transmission to the principal beneficiary.
54. If there is no “movement of capital” at all within the meaning of Article 56, then it is not necessary for the decision of the claimants’ income tax case on their past

assessments, or even appropriate, for this court to embark on the general and larger constitutional question whether the Isle of Man is “a third country” within the meaning of Article 56, or any of the other issues identified below. On those issues many of the arguments deployed in fact overlap with the opposing arguments on the Convention which are discussed and resolved in the judgments in *Huitson*.

55. In those circumstances I will limit the rest of this judgment to a brief summary of the positions taken by the parties on those issues, but without expressing a view on their respective merits.

II. No restriction on free movement of capital

56. As HMRC point out, there is no challenge to the prospective operation of s. 58. They submit that, even if Article 56 is engaged, its provisions have not been infringed in this case, as there has been no restriction in s.58 on the free movement of capital. It is open to the claimants to invest in the Isle of Man partnership, but there is no proof that they have done so, or that they have been retrospectively prevented from doing so.
57. It is also denied that, if there is any restriction, it operates on the facts of this case in a discriminatory manner based on nationality or residence as alleged by Mr Goldberg. UK citizens are treated in the same manner, regardless of whether the income is derived from a domestic partnership or a foreign partnership. There is no discriminatory treatment that favours a UK partnership at the expense of a non-UK partnership. No relevant comparator has been identified.
58. HMRC submit that the arguments advanced on the claimants’ behalf do not arise on the facts of this case and stray into the hypothetical territory into which a judicial review court should not go.

III. Justification

59. On the issue of justification Mr Goldberg accepts that there is a legitimate aim in tackling tax avoidance and in balancing taxing rights. His question is: how does blanket retrospective legislation achieve those aims? It does not prevent the particular method of avoidance from having been used: it only tackles the consequences of the avoidance. The retrospectivity here does not fulfil a purpose of the legislation.
60. HMRC’s primary submission is that it is unnecessary for the court to decide this question. The issue having been raised they say that, if there is any restriction on the free movement of capital, it is justified on public policy grounds. The prevention of wide-scale avoidance by resident persons subject to the UK tax regime and maintaining a balanced allocation of taxing rights between member states are legitimate economic and social aims. The aim of the amendments in s.58 was to prevent the use of the DTA, not to eliminate double taxation, but to avoid all taxation anywhere, or to reduce the level of taxation instead of its intended and true purpose of avoiding the imposition of double taxation on the taxpayer.

IV. Proportionality

61. HMRC submit that the s.58 response to the Manx tax avoidance schemes had a legitimate aim and was proportionate. The main arguments are the same as those deployed by HMRC in *Huitson*. The tax avoidance scheme used by the claimants circumvented the general principle that a UK resident individual should pay UK tax on his income. Under s.58 the claimants are subject to the ordinary levels of taxation on their income and chargeable gains for the years prior to the introduction of the legislation.
62. If s.58 were not made retrospective, the claimants would obtain a windfall at the expense of the general body of taxpayers. It would be unfair to the general body of resident taxpayers not to have given s.58 retrospective effect. The claimants entered into schemes with the intention of deliberately avoiding UK tax. HMRC never accepted that the schemes worked and the tax liabilities were not settled before the legislation was applied to them.
63. The claimants advanced similar arguments to those advanced by the claimant in *Huitson*.

V. Retrospectivity and the legal certainty principle

64. The focus of Mr Goldberg's case is on the retrospective provisions in s.58. He says that the claimants' purpose in bringing the case is to preserve claims duly made in their tax returns, in accordance with s.788, to the benefit of double taxation relief on certain profits. The claimants consider that they were valuable claims. The claimants were entitled to make the claims and to argue them. The claims and the right to argue them had been taken away from them by retrospective legislation in s.58 which, on the face of it, distinguished between a foreign partnership and a UK partnership, thereby giving rise to an argument on the interpretation and infringement of Article 56. The claimants seek a ruling as to whether s.58 conflicts with Article 56 and say that, if it does, s. 58 cannot be applied to them by HMRC so far as it is retrospective.
65. HMRC submit that EU law has no absolute prohibition against retrospective measures. The questions are whether the purpose of the measure so requires and the legitimate expectations of those duly affected are respected. Both are satisfied in this case.

VI. Abuse of rights doctrine

66. HMRC added a powerfully worded submission that the claimants' reliance on EU law in the challenge to s.58 is caught by the EU doctrine of abuse of rights, which would prevent EU law being used in that way. The transactions in question have not been carried out in the context of normal commercial transactions. On the contrary, they are wholly artificial. Mr Rabinder Singh QC, appearing for HMRC, described the alchemy of the scheme as "this magic wand... waved apparently to transform income which is otherwise properly taxable in the UK into income which is either not taxable at all or certainly very substantially relieved of taxation anywhere."
67. The transactions in question had been constructed for the sole purpose of generating a tax advantage. In reality and in substance there is no investment in an enterprise in the Isle of Man with a view to the generation of income via that enterprise as a trading activity. Any purported movement of capital to the Isle of Man has been artificially

created solely to circumvent the proper impact of national taxation systems under cover of rights purportedly conferred by EU law. Retrospectivity was required to deal with such an abuse of rights.

68. Mr Goldberg's response was that it was hard to see why those who sought to rely on their right to claim relief under s.788 should be accused of abuse of rights under EU law. The question was whether it was legitimate in accordance with EU law for their undoubted claim to be taken away from them. There was no question of abuse: Article 56 protected their existing claim and their existing right. Whether the claimants succeeded was a different matter. There is no abuse of rights in advancing an argument that might not succeed.

Result

69. I would dismiss the claimants' application for judicial review on the grounds that (a) it does not appear from the facts before the court that there has been any "movement of capital" falling within Article 56; and (b) for the reasons given in the judgments handed down in *Huitson* the retrospective provisions of s.58 are proportionate and compatible with Article 1 of the First Protocol to the Convention.
70. The remaining issues do not need to be decided for the disposition of the claimants' application for judicial review. They can be decided by a higher court, if and when it reaches the conclusion that the facts of the case disclose a "movement of capital" within Article 56. Otherwise, it is advisable for those issues to be left for decision by another court in another case which could not be determined without deciding them.
71. Finally, I do not consider it necessary, in order to decide this judicial review application, to refer any questions to the Court of Justice for preliminary rulings on the interpretation of Article 56.

Lord Justice Sullivan:

72. I agree.

Lord Justice Tomlinson:

73. I also agree.