OUTER HOUSE, COURT OF SESSION

[2021] CSOH 119

P392/21

OPINION OF LORD SANDISON

In the petition of

AVAAZ FOUNDATION

Petitioner

for

Judicial Review of the Scottish Ministers' unlawful policy of delegating responsibility for Unexplained Wealth Orders

Pursuer: O'Neill, QC, Welsh; Harper Macleod LLP
Respondents (Scottish Ministers): Crawford, QC, Scullion; SGLD

25 November 2021

Introduction

[1] Avaaz Foundation, the petitioner in this application for judicial review, is a non-profit organisation based in New York which describes itself as a prominent and established campaigner in the public interest and a promoter of global activism on a range of issues including in particular corruption. It seeks certain declarators from the court in relation to the approach of the respondents, the Scottish Ministers, to Unexplained Wealth Orders (UWOs), both in general terms and specifically with reference to the potential for an application to this court for a UWO in respect of heritable property in Scotland said to be beneficially owned by former United States President Donald J. Trump.

Background

[2] UWOs were introduced into the law of the United Kingdom with effect from 31 January 2018 by amendments made to the Proceeds of Crime Act 2002 (POCA) by the Criminal Finances Act 2017. In relation to Scotland, and so far as material for present purposes, POCA sections 396A and 396B provide as follows:

> *"396A Unexplained wealth orders*
>
> (1) The Court of Session may, on an application made by the Scottish Ministers, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for the making of the order is fulfilled.
>
> (2) An application for an order must—
> (a) specify or describe the property in respect of which the order is sought, and
> (b) specify the person whom the Scottish Ministers think holds the property ('the respondent') (and the person specified may include a person outside the United Kingdom).
>
> (3) An unexplained wealth order is an order requiring the respondent to provide a statement—
> (a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made,
> (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),
> (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and
> (d) setting out such other information in connection with the property as may be so specified.
>
> …
>
> (5) The order may, in connection with requiring the respondent to provide the statement mentioned in subsection (3), also require the respondent to produce documents of a kind specified or described in the order.
>
> (6) The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).
>
> *396B Requirements for making of unexplained wealth order*
>
> (1) These are the requirements for the making of an unexplained wealth order in respect of any property.

(2) The Court of Session must be satisfied that there is reasonable cause to believe that—

(a) the respondent holds the property, and

(b) the value of the property is greater than £50,000.

(3) The Court of Session must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.

(4) The Court of Session must be satisfied that—

(a) the respondent is a politically exposed person, or

(b) there are reasonable grounds for suspecting that—

(i) the respondent is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere), or

(ii) a person connected with the respondent is, or has been, so involved.

(5) It does not matter for the purposes of subsection (2)(a)—

(a) whether or not there are other persons who also hold the property;

(b) whether the property was obtained by the respondent before or after the coming into force of this section.

(6) For the purposes of subsection (3)—

(a) regard is to be had to any heritable security, charge or other kind of security that it is reasonable to assume was or may have been available to the respondent for the purposes of obtaining the property;

(b) it is to be assumed that the respondent obtained the property for a price equivalent to its market value;

(c) income is 'lawfully obtained' if it is obtained lawfully under the laws of the country from where the income arises;

(d) 'known' sources of the respondent's income are the sources of income (whether arising from employment, assets or otherwise) that are reasonably ascertainable from available information at the time of the making of the application for the order;

(e) where the property is an interest in other property comprised in a settlement, the reference to the respondent obtaining the property is to be taken as if it were a reference to the respondent obtaining direct ownership of such share in the settled property as relates to, or is fairly represented by, that interest.

(7) In subsection (4)(a), '*politically exposed person*' means a person who is—

(a) an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than—

(i) the United Kingdom, or

(ii) an EEA state,

(b) a family member of a person within paragraph (a),
(c) known to be a close associate of a person within that paragraph, or
(d) otherwise connected with a person within that paragraph.

(8) Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 applies for the purposes of determining—
(a) whether a person has been entrusted with prominent public functions (see point (9) of that Article),
(b) whether a person is a family member (see point (10) of that Article), and
(c) whether a person is known to be a close associate of another (see point (11) of that Article).

(9) For the purposes of this section—
(a) a person is involved in serious crime in a part of the United Kingdom or elsewhere if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007 (see in particular sections 2, 2A and of that Act);
(b) section 1122 of the Corporation Tax Act 2010 ('connected' persons) applies in determining whether a person is connected with another.

(10) Where the property in respect of which the order is sought comprises more than one item of property, the reference in subsection (2)(b) to the value of the property is to the total value of those items."

In broad outline, then, POCA section 396A permits this court, on an application made to it by the Scottish Ministers, to pronounce a UWO in respect of particular property if satisfied of certain requirements. A UWO requires the person holding the property to explain within a specified period of time the nature and extent of his interest in it and how he obtained it, and may also require the production of documentary evidence of those matters.

[3] By dint of POCA section 396B, the court can only make a UWO if it is satisfied of the conditions therein set out. In relation to a UWO against a "politically exposed person" (PEP), the court does not need to be persuaded of the existence of reasonable grounds for suspecting his involvement directly or indirectly in serious crime in the United Kingdom or elsewhere, but does in every case require to be satisfied that there are reasonable grounds for suspecting that the known sources of a respondent's lawfully obtained income would have been insufficient for the purposes of enabling him to obtain the property. If a UWO is

not complied with, POCA section 396C provides a presumption that the property to which it relates is amenable to confiscation in terms of Part 5 of the Act.

[4] On 27 February 2020 Patrick Harvie MSP asked a question in the Scottish Parliament of the First Minister concerning the possibility of a UWO being sought in relation to golf courses said ultimately to be owned by President Trump in Scotland and mentioned a briefing paper on the subject prepared on behalf of the petitioner (Scottish Parliament Official Report 27 February 2020, columns 19-20). The First Minister subsequently wrote to Mr Harvie on 16 July 2020 acknowledging that the briefing paper had been received, but indicating that any decision as to whether to apply for a UWO was made "on behalf of the Scottish Ministers by the Civil Recovery Unit (CRU) which reports to the Lord Advocate."

[5] The briefing paper prepared for the petitioner noted, uncontroversially, that President Trump was, as the 45th President of the United States of America, a PEP. It went on to claim that he was the sole or principal beneficial owner of the Trump Organization, which in turn was the eventual owner of golf courses known as "Trump Turnberry" in Ayrshire and "Trump International Golf Links Scotland" in Aberdeenshire. It further claimed that Trump Turnberry had been purchased by the Trump Organization in 2014 for approximately $60 million US and that the businesses operating it and the Aberdeenshire course were not profitable and depended on continuing financial support from their ultimate owners. Observations were made about newspaper reports concerning the amount of taxes historically paid by President Trump and amounts said to be owed by him, and argued that there were no reasonable grounds to suppose that known sources of lawfully obtained income would have been sufficient to enable him, directly or indirectly, to acquire the properties in Scotland. The full briefing paper is available online and contains much

more detail in relation to these and other matters than it is necessary or indeed possible to refer to in the context of this opinion.

[6] Mr Harvie returned to the subject of a UWO in relation to President Trump in a question to the First Minister in Parliament on 12 November 2020 and was informed in essence that the question of applying for a UWO was one for the Crown Office, operating independently of the Scottish Ministers (Scottish Parliament Official Report 12 November 2020, columns 11-12). The petitioner was not satisfied that that response was correct in law and commissioned a joint opinion by senior and junior counsel which confirmed it in its view. It provided a copy of that opinion to the First Minister in January 2021 and in the following month Mr Harvie initiated a debate on the subject in Parliament on a motion in his name (Scottish Parliament Official Report 3 February 2021, columns 73-88). A letter dated 22 February 2021 was then sent to the petitioner by a civil servant in the Defence, Security and Cyber Resilience Division of the Scottish Government, setting out the view that a decision whether to apply for a UWO was an operational one for the CRU, which would decide whether any of the range of investigatory orders available in terms of POCA was appropriate and would then apply to the court for any such order if it saw fit to do so.

[7] The petitioner remained dissatisfied with that expression of the Scottish Ministers' view, in particular the suggestion that any person or body other than Scottish Ministers as a collectively responsible body could decide whether to apply for a UWO in any particular case. It further regarded the letter of 22 February 2021 as inconsistent with the government positions on the matter previously adopted in Parliament, which it regarded as equally wrong in law. It raised the present petition in May 2021. After preliminary hearings, I decided that the petition 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; and that, although it had been raised outwith the time limit for bringing applications to the supervisory jurisdiction of this court under section 27A(1)(a) of the 1988 Act, it was appropriate for me in the circumstances to exercise the equitable discretion conferred by section 27A(1)(b) to extend the time limit so as to allow the petitioner to seek all the remedies set out in the petition ([2021] CSOH 81).

[8] The declarators sought by the petitioner in Statement 4 of the petition are expressed as follows:

(a) Declarator that the sole responsibility for determining whether to apply for an Unexplained Wealth Order rests with the Scottish Ministers (including the Lord Advocate) who must act collectively in their determination of whether such an order should be sought from the Court of Session.

(b) Declarator that if to any extent the Lord Advocate is involved in any decision-making concerning whether to apply for an Unexplained Wealth Order, notwithstanding any prior designation as the Scottish Minister with relevant portfolio responsibility for the Civil Recovery Unit, the Lord Advocate's involvement is and only is *qua* one of the Scottish Ministers, and does not involve the Lord Advocate's exercise of any of her retained functions as defined at section 52(6) of the Scotland Act 1998.

(c) Declarator that the Scottish Ministers may not delegate responsibility for determining whether to apply for an Unexplained Wealth Order to any other person, body or department.

(d) Declarator that the Scottish Ministers are obliged to use their best endeavours to combat and prevent money laundering and corruption, particularly by individuals who hold or who have held important public functions.

(e) Declarator that the Scottish Ministers have a duty to seek an Unexplained Wealth Order in any circumstances where the relevant requirements provided at section 396B of the Proceeds of Crime Act 2002 are made out.

(f) Declarator that, by failing to seek an Unexplained Wealth Order in relation to Donald J. Trump's assets in Scotland, the Scottish Ministers have failed in their duty and have therefore acted unlawfully.

(g) Such further orders (including an order for expenses) as may seem to the court to be just and reasonable in all the circumstances of the case.

[9] In their answers to the petition, the Scottish Ministers made it clear that decisions on whether to apply for UWOs were ordinarily taken by civil servants working within the CRU and acting on behalf of and with the authority of the Ministers. Those civil servants reported to the Lord Advocate as the Scottish Minister to whom portfolio responsibility for the CRU had been allocated, rather than to her in her capacity as the head of the system of criminal prosecution in Scotland. It was accepted that any decision made in relation to UWOs by the Lord Advocate as the designated Minister with immediate responsibility for the administration of the UWO regime was a decision for which the Ministers as a whole were collectively responsible in legal and political terms. The suggestion made by the First Minister in Parliament on 12 November 2020 that the decision whether to apply for a UWO was one for Crown Office had been an error which the correspondence of 22 February 2021 had corrected.

[10] The Ministers' answers also made it clear that as a matter of policy they did not generally confirm or deny whether POCA investigatory orders, including UWOs, were being considered, had been considered, or were in the process of being applied for. The

Ministers considered that that approach was backed by sound operational reasons, including the need to avoid compromising investigations which might be underway.

[11] The court was provided with an affidavit by Nick Flynn of the petitioner swearing to various details about the Foundation and the current state of the concerns it had in relation to the matters set out in the petition and the briefing paper already referred to. An affidavit from Anne-Louise House, the present Head of the CRU, explaining the operations of the Unit as relevant to the subject-matter of the petition and the basis for the "neither confirm nor deny" policy already noted, was also provided.

Petitioner's submissions

[12] At the substantive hearing of the petition on 26 and 27 October 2021, Mr O'Neill on behalf of the petitioner invited me to pronounce the declarators prayed for or such variation thereof as might seem appropriate. Even if the declarators set out at paragraphs 4(a) and (c) of the petition were now said not to be matters of dispute between the parties, it would serve the goals of clarity and public accessibility to the law for the court to pronounce the orders sought. Reference was made to *Wightman* v *Secretary of State for Exiting the EU* [2018] CSIH 62, 2019 SC 111 at paragraphs 21-22 and 35-36. In relation to the declarator set out at paragraph 4(b), it might be possible to narrow its scope so that it only declared that the Lord Advocate could not lawfully be designated as the Minister with portfolio responsibility for determining whether to apply for a UWO. Likewise, it might be that the declarator sought by paragraph 4(e) of the petition was too broadly cast, and that an order declaring that the Scottish Ministers had a duty to apply for a UWO where the requirements in POCA section 396B had been made out and an investigative order was the appropriate POCA tool to use, would be more apposite.

[13] Mr O'Neill submitted that the Scottish Ministers had failed to understand their proper role in relation to UWOs concerning PEPs, and had misdirected themselves in law in that regard both in the correspondence cited and in the statements in Parliament. In particular, the relevant legislation was predicated upon a division between the functions of the Ministers and the Lord Advocate, so that the latter could not lawfully be allocated portfolio responsibility for seeking UWOs, either generally or at least in relation to PEPs. Further, the statutory power in the Ministers to seek UWOs was, properly construed against the relevant background, in fact a duty to do so in cases where the statutory conditions were apparently met. Finally, the Ministers could not properly adopt and maintain a "neither confirm nor deny" policy in relation to what, if any, consideration had been given or decisions taken by them concerning seeking a UWO in relation to President Trump's acquisition of the Scottish properties given the facts publicly known about his finances.

Designation of responsible minister

[14] In developing his argument that the Lord Advocate could not properly be designated as the Minister responsible for seeking UWOs, Mr O'Neill directed me to various provisions within the Scotland Act 1998 as amended. Firstly, section 44 defined the members of the Scottish Government as the First Minister, such Ministers as she might appoint under section 47, the Lord Advocate and the Solicitor General for Scotland, all to be referred to collectively as the Scottish Ministers. Section 48(5) of the 1998 Act required any decision taken by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland to continue to be taken independently of any other person.

[15] Section 52 of the Scotland Act is in the following terms:

"52.— Exercise of functions

(1) Statutory functions may be conferred on the Scottish Ministers by that name.

(2) Statutory functions of the Scottish Ministers, the First Minister or the Lord Advocate shall be exercisable on behalf of Her Majesty.

(3) Statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Government.

(4) Any act or omission of, or in relation to, any member of the Scottish Government shall be treated as an act or omission of, or in relation to, each of them; and any property acquired, or liability incurred, by any member of the Scottish Government shall be treated accordingly.

(5) Subsection (4) does not apply in relation to the exercise of—
(a) functions conferred on the First Minister alone, or
(b) retained functions of the Lord Advocate.

(6) In this Act, '*retained functions*' in relation to the Lord Advocate means—
(a) any functions exercisable by him immediately before he ceases to be a Minister of the Crown, and
(b) other statutory functions conferred on him alone after he ceases to be a Minister of the Crown.

(7) In this section, '*statutory functions*' means functions conferred by virtue of any enactment."

[16] Mr O'Neill noted that that section provided that statutory functions could be conferred on the Scottish Ministers by that name, and that those functions should be exercisable by any member of the Scottish Government. Subsection (4) of section 52, read short, provided for the collective responsibility of the Scottish Ministers in relation to *inter alia* acts and omissions of any of them, but subsection (5) stated that that did not apply to functions conferred on the First Minister alone, or "retained functions" of the Lord Advocate.

[17] "Retained functions" of the Lord Advocate were defined by subsection (6) as being those functions exercisable by him immediately before he ceased to be a Minister of the

Crown and those statutory functions conferred on him alone after he ceased to be such a Minister. It followed that (in addition to her functions as principal legal adviser to the Scottish Government) the Lord Advocate might act (a) in her capacity as head of the system of criminal prosecution, in which case (and in which case only) she would require to act independently of any other person; (b) as one of the Scottish Ministers, in a way which would attract collective responsibility for all the Ministers; or (c) in the performance of a retained function, which would not attract such responsibility for the other Ministers. There was no requirement to act independently of any other person when acting in the latter two capacities.

[18] Mr O'Neill pointed out that POCA's structure was complex and that it was easy to lose sight of the greater structure in a morass of statutory detail. Properly construed, the Act gave separate functions to the Ministers and the Lord Advocate. While the overall intent and object of the Act might properly be described as the prevention of the enjoyment of the fruits of criminal activity, the mechanisms used to seek to attain that end were not proceedings at the instance of the Lord Advocate in her capacity as head of the system of criminal prosecution in Scotland. Indeed, so far as UWOs in relation to PEPs were concerned, there was no need even for any suspicion of criminality and thus no stigma attached to the mere fact of a UWO being sought in such cases.

[19] By way of illustration that functions under POCA were carried out by the Lord Advocate other than as head of the system of criminal prosecution in Scotland, Mr O'Neill referred to Part 3 of the Act. That Part related to confiscation proceedings in Scotland and was designed to prevent the enjoyment of the profits of crime without necessarily having to show a direct link between any crime and the assets in question. The statutory function of seeking confiscation orders under Part 3 rested on "the prosecutor"

and while that had been construed as an institutional reference to the office of Lord Advocate, the public prosecutor in the public interest in Scotland – *HMA* v *Wright* [2007] HCJ 5, 2007 SCCR 258, per Lord Macfadyen at paragraph 31 – in acting under Part 3, the Lord Advocate was in point of law exercising "retained" statutory functions falling within the scope of section 52(6)(b) of the Scotland Act; applications for confiscation orders were not criminal proceedings and were not instituted or maintained by the Lord Advocate in her capacity as head of the system of criminal prosecution in Scotland.

[20] Similarly, Part 5 of POCA dealt with civil recovery proceedings in respect of the fruits of criminal conduct at the instance of the Scottish Ministers. In *Scottish Ministers* v *Doig* [2009] CSIH 34, 2009 SC 474, the Inner House had noted at paragraph 18, agreeing with the opinion of the Lord Ordinary, that any involvement of the Lord Advocate in POCA Part 5 proceedings was simply as a Scottish Minister, not as the head of the system of criminal prosecution.

[21] Mr O'Neill noted that a particular statute could confer powers on the Scottish Ministers in one respect and specifically on the Lord Advocate in another respect, and argued that in such instances it might well not be permissible for the Lord Advocate to be designated as the responsible Minister for the performance of the functions conferred by the statute on the Ministers as a whole. Under reference to *Kapri* v *Lord Advocate* [2013] UKSC 48, 2013 SC (UKSC) 311, he instanced the separate functions conferred on the Scottish Ministers and the Lord Advocate by the Extradition Act 2003, and argued that it would not be legitimate for the Lord Advocate, if she had been institutionally involved in extradition proceedings in accordance with the provisions of the 2003 Act, then also to be involved in the ultimate decision to extradite or not to extradite a person whom such proceedings had determined could lawfully be extradited.

[22] Building on that argument, Mr O'Neill turned to POCA Part 8, in terms of which UWOs may be sought by the Ministers from the court, and in particular to section 396D, the relevant terms of which are as follows:

> *"396D Effect of order: cases of compliance or purported compliance*
>
> (1) This section applies in a case where the respondent complies, or purports to comply, with the requirements imposed by an unexplained wealth order in respect of any property in relation to which the order is made before the end of the response period (as defined by section 396C(4)).
>
> (2) If an interim freezing order has effect in relation to the property (see section 396J), the Scottish Ministers must—
>
> (a) consider whether the Lord Advocate should be given an opportunity to determine what enforcement or investigatory proceedings, if any, the Lord Advocate considers ought to be taken by the Lord Advocate in relation to the property, and
>
> (b) determine whether they consider that any proceedings under Part 5 (civil recovery of the proceeds of unlawful conduct) or this Chapter ought to be taken by them in relation to the property.
>
> (3) If the Scottish Ministers consider that the Lord Advocate should be given an opportunity to make a determination as mentioned in subsection (2)(a), the Lord Advocate must determine what enforcement or investigatory proceedings, if any, the Lord Advocate considers ought to be taken by the Lord Advocate in relation to the property.
>
> (4) A determination under subsection (2)(b) or (3) must be made within the period of 60 days starting with the day of compliance.
>
> …
>
> (6) If there is no interim freezing order in effect in relation to the property—
>
> (a) the Scottish Ministers may (at any time) determine whether they consider that any proceedings under Part 5 or this Chapter ought to be taken by them in relation to the property, and
>
> (b) the Lord Advocate may (at any time) determine what, if any, enforcement or investigatory proceedings the Lord Advocate considers ought to be taken by the Lord Advocate in relation to the property.
>
> …
>
> (9) In this section '*enforcement or investigatory* proceedings' means any proceedings in relation to property taken under—
>
> (a) Part 3 (confiscation proceedings in Scotland), or
>
> (b) this Chapter."

It may thus be seen that in terms of that section, where a person in respect of whom a UWO has been made purports to comply with it, and an interim freezing order has effect over the property to which the UWO relates, then subsection (2) requires the Scottish Ministers to consider whether the Lord Advocate should be given an opportunity to determine what, if any, enforcement or investigatory proceedings under Part 3 or Chapter 3 of Part 8 ought to be taken in relation to that property, and further requires the Ministers to determine whether they consider that any proceedings under Part 5 should be taken in relation to the property. Where no interim freezing order has effect over the property, subsection (6) permits the Scottish Ministers to determine whether to take proceedings under Part 5 and separately permits the Lord Advocate to determine whether any enforcement or investigatory proceedings should be taken.

[23] In Mr O'Neill's submission, such delineation of separate functions as between the Scottish Ministers on the one hand and the Lord Advocate on the other would be rendered absurd were the Lord Advocate nominated as the Scottish Minister with portfolio responsibility to perform the functions of the Ministers in terms of POCA Part 8. In effect, such a nomination would involve "institutional schizophrenia" because it would require the Lord Advocate to have a dialogue with herself and would remove the possibility of an effective division of information availability as between the Ministers on the one hand and the Lord Advocate on the other. The only proper conclusion to be drawn from section 396D was that Parliament had impliedly excluded the Lord Advocate from being nominated to discharge the functions conferred on the Ministers by POCA Part 8, either generally or at least in relation to the decision as to whether or not to seek a UWO, particularly against a PEP.

[24] Put another way, it was to be assumed that Parliament would legislate only for the purpose of bringing about an effective result, and it was for the Executive to recognise and give effect to that intended result – *RM* v *Scottish Ministers* [2012] UKSC 58, 2013 SC (UKSC) 139 at paragraph 34, citing *Nokes* v *Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 per Viscount Simon LC at 1022. In the present case, that meant that the Ministers were obliged to recognise from the terms of section 396D that to appoint the Lord Advocate as the responsible Minister to discharge their functions under Part 8 would stultify the differentiation between their proper functions and hers indicated by the terms of the section. In practice, the Ministers' functions under Part 8 would therefore have to be performed, if they were to be allocated to a specific Minister, by way of the nomination of the Solicitor General, the Justice Minister or at any event some Minister other than the Lord Advocate, albeit the nominated Minister might properly take the advice and counsel of others, including the Lord Advocate. This was not a suggestion that section 52(3) of the Scotland Act had been impliedly repealed, notwithstanding that that provision appeared to contemplate the performance of any function of the Scottish Ministers by any member of the Scottish Government. That subsection remained in full effect, but what was struck at was the choice of the First Minister to allocate a portfolio responsibility to the Lord Advocate which would have the result of bringing about a situation which Parliament cannot be supposed to have countenanced.

[25] Another route to the same conclusion was the application by analogy of the observations by the United Kingdom Supreme Court in *R (King)* v *Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384 at paragraphs 48-52. While it might be possible to argue that the Scottish Ministers were "statutory office-holders" in the sense discussed in *King*, and that the facility afforded in relation to the discharge of the duties of Ministers of the Crown

as described in *Carltona Ltd* v *Commissioners of Works* [1943] 2 All ER 560 thus did not apply to them, it sufficed for present purposes that *King* had noted that the performance of statutory ministerial functions by particular officials might be inconsistent with the intention of Parliament as evinced by the relevant provisions, or else simply (in a broad sense) irrational. Here, it might properly be said for the reasons already given that the performance by the Lord Advocate of the statutory functions conferred by POCA Part 8 would be inconsistent with the intention of Parliament as evinced in particular by the terms of section 396D, or else irrational given the supposedly absurd consequences which would result. Reference was made to *Somerville* v *Scottish Ministers* [2007] UKHL 44, 2008 SC (HL) 45 at paragraph 140.

[26] Nothing was to be gained in this context from examining the corresponding provisions of POCA for the rest of the United Kingdom, because the different constitutional and legal arrangements in the other parts of the UK made it impossible to draw any meaningful conclusion about Parliament's intention as to who should perform the relevant functions in Scotland.

Nature of the function of seeking UWOs

[27] Returning to *RM* v *Scottish Ministers*, Mr O'Neill next submitted under reference to paragraphs 46 and 47 of the judgment of the Supreme Court in that case, and to *Julius* v *Lord Bishop of Norwich* (1880) 5 App Cas 214 and *Padfield* v *Minister of Agriculture* [1968] AC 1014 that it was necessary to consider not only the words of a statute conferring a power, but also the general scope and object of the empowering statute, in order to determine whether at least in certain circumstances an apparent mere statutory power to do something was in point of law an obligation to do that thing.

[28] Conducting that exercise in the present case, it was necessary to have regard to the fact that UWOs were part of an armoury provided for use to combat international money laundering, an exercise which required a high level of international co-operation in order to be effective. When the United Kingdom was a member of the European Union, directives (in particular the Fourth Money Laundering Directive 2015/849/EU as consolidated) had been promulgated to set out base-level standards of what was expected of Member States in relation to the fight against money laundering. Indeed, the PEP concept itself was founded in the Fourth Directive as part of a regime of enhanced diligence in relation to such persons, without any need for a suggestion of criminality.

[29] More specifically, section 29(1) of the European Union (Future Relationship) Act 2020 now provided that existing domestic law was to have effect with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement between the European Union and the United Kingdom (TCA) so far as not otherwise implemented and so far as such implementation was necessary for the purposes of complying with the international obligations of the United Kingdom under the Agreement. That provision required state entities, including the domestic courts, to consider what was necessary to comply with the international obligations of the United Kingdom under the TCA. It was not controversial in modern jurisprudence that judges could take into account rules of international law binding on the United Kingdom when interpreting statutes and in developing the common law, so far as they were free to do so: *Moohan* v *Lord Advocate* [2014] UKSC 67, 2015 SC (UKSC) 1 at paragraph 33, and cases cited therein.

[30] The provisions of the TCA of relevance to the question of what was necessary to comply with the United Kingdom's international obligations under the Agreement were Articles 186 and 653, which are in the following terms:

> "*Article 186*
>
> International standards
>
> The Parties shall make their best endeavours to ensure that internationally agreed standards in the financial services sector for regulation and supervision, for the fight against money laundering and terrorist financing and for the fight against tax evasion and avoidance, are implemented and applied in their territory. Such internationally agreed standards are, inter alia, those adopted by: the G20; the Financial Stability Board; the Basel Committee on Banking Supervision, in particular its 'Core Principle for Effective Banking Supervision'; the International Association of Insurance Supervisors, in particular its 'Insurance Core Principles'; the International Organisation of Securities Commissions, in particular its 'Objectives and Principles of Securities Regulation'; the Financial Action Task Force; and the Global Forum on Transparency and Exchange of Information for Tax Purposes of the Organisation for Economic Cooperation and Development.
>
> *Article 653*
>
> Measures to prevent and combat money laundering and terrorist financing
>
> 1. The Parties agree to support international efforts to prevent and combat money laundering and terrorist financing. The Parties recognise the need to cooperate in preventing the use of their financial systems to launder the proceeds of all criminal activity, including drug trafficking and corruption, and to combat terrorist financing.
>
> 2. The Parties shall exchange relevant information, as appropriate within their respective legal frameworks.
>
> 3. The Parties shall each maintain a comprehensive regime to combat money laundering and terrorist financing, and regularly review the need to enhance that regime, taking account of the principles and objectives of the Financial Action Task Force Recommendations."

While both Articles provided useful background to the proper construction of POCA, of particular relevance to the question of whether the POCA function of seeking UWOs fell to be construed as a mere power or alternatively as a duty to be performed whenever their use

appeared necessary and appropriate was the obligation in Article 186 of the TCA on the United Kingdom to make its best endeavours to ensure that internationally agreed standards in the financial services sector for regulation and supervision, for the fight against money laundering and terrorist financing and for the fight against tax evasion and avoidance, were implemented and applied in the United Kingdom. That obligation related to the implementation and application of standards or high-level goals, and not merely to particular matters which the United Kingdom was already under a specific legal duty to do.

[31] The concept of "best endeavours" was now recognised as a relatively common term of art setting out an enforceable standard of behaviour in various international law contexts; see for example *R (Bashir)* v *Home Secretary* [2018] UKSC 45, [2019] AC 484; *G* v *G (Secretary of State for the Home Department and others intervening)* [2021] UKSC 9, [2021] 2 WLR 705; *General Dynamics United Kingdom Ltd* v *State of Libya* [2021] UKSC 22, [2021] 3 WLR 231; *Al-Saadoon* v *United Kingdom* (2010) 51 EHRR 9, and the general discussion in *KS Energy Services Ltd* v *BR Energy (M) Sdn Bhd* [2014] SGCA 16. In essence, the concept involved leaving no stone unturned or doing everything that could reasonably be done in order to achieve the stipulated outcome.

[32] Considering that background to POCA Part 8, it was clear that the function of seeking a UWO was not merely a power enjoyed by the Scottish Ministers, but something that they were obliged to do whenever that was necessary and appropriate for the purpose of meeting internationally agreed standards for combatting international money laundering and tax evasion.

The need to apply for a UWO in the present case

[33] Considering that, on a proper construction of POCA Part 8 in context, the Scottish Ministers were obliged to apply for UWOs where necessary and appropriate in the sense already described, and that the petitioner had provided material to the Ministers setting out a prima facie case that a PEP, President Trump, held property in Scotland with a value of more than £50,000 and that there were reasonable grounds to suspect that his known sources of lawfully obtained income would have been insufficient for the purchase of that property, the Ministers were obliged to present evidence to the court that best endeavours had been used in this case to uphold the internationally agreed standards referred to in Article 186 of the TCA.

[34] Instead, the Ministers had adopted a blanket policy of "neither confirming nor denying" in relation to the matter; in other words, contrary to the principles of good governance, justice and propriety, they were declining to put before the court, and thus presumptively into the public domain, material informing both the question of whether or not they had indeed taken a decision about whether to apply for a UWO in relation to President Trump, and the claimed legal and factual basis for any such decision. Given that the Ministers accepted that the exercise of what they characterised as a discretion to apply for a UWO was subject to the normal public law duties surrounding and governing the exercise of such a discretion, their adoption of a "neither confirm nor deny" policy prevented the petitioners and the court from ascertaining whether or not those duties had been complied with in the context of their apparent inaction in relation to President Trump.

[35] The Ministers had failed to provide any adequate justification for that blanket policy, whereas in point of law they were obliged to put forward a cogent justification for it which could be evaluated by the court, similar to that required in cases where public interest

immunity was asserted, if the policy was to be respected rather than treated as a form of abuse of process. The matter could not simply be taken on trust. Reference was made to *Secretary of State for the Home Department* v *Mohamed* [2014] EWCA Civ 559, [2014] 1 WLR 4240 per Maurice Kay LJ at paragraphs 19-20 and to *Somerville* in the House of Lords at, eg paragraphs 62-64. The supposed justifications advanced for the "neither confirm nor deny" policy of the Ministers, contained in the affidavit by the Head of the CRU placed before the court, were all concerned with the aim of disrupting crime and making Scotland a hostile environment for criminals, and with avoiding potential dissipation of assets, tipping off or unnecessary harm to the reputations of individuals under investigation. While there could be particular cases where those justifications might have some force, none of them did in the context of UWOs against PEPs, which proceeded without any necessary link to, or implication of, criminal behaviour. Against the shadowy background into which the Ministers had chosen to place their processes concerning a potential UWO in relation to President Trump, the declarator sought by paragraph 4(f) of the petition ought to be granted.

Respondents' submissions

[36] Ms Crawford QC for the Scottish Ministers invited me to refuse the petition. In relation to the declarators sought by paragraphs 4(a), (b) and (c) of the petition, they were either not expressed in a way that would resolve any live dispute between the parties, or at any rate should be refused as having no practical effect. Reference was made in this connection to *Keatings* v *Advocate General for Scotland* [2021] CSIH 25, 2021 SLT 729 at paragraph 53. The declarators sought by paragraphs 4(d), (e) and (f) of the petition had no proper foundation in fact or law and should accordingly be refused.

Designation of responsible minister

[37] It was clear from the definitions section for Part 5 of POCA (s. 316) that the Scottish Ministers were the enforcement authority for that Part of the Act. It should not be lost sight of that Part 8, dealing as it did with investigatory powers and the like, was essentially corroborative of the functions which were to be carried out in terms of Part 5. Any statutory function conferred on the Ministers could, in terms of section 52(3) of the Scotland Act 1998, be exercised by any member of the Scottish Government. The Ministers were collectively responsible for the functions of the Government except where those functions had been conferred on the First Minister alone, or else were "retained functions" of the Lord Advocate – 1998 Act, section 52(4) and (5). POCA section 396A(1) conferred the power of seeking UWOs on the Ministers as a whole, not on the First Minister alone, nor on the Lord Advocate as a "retained function". It followed that that power could be exercised by any of the Ministers and that their collective responsibility would thereby be engaged. The allocation of portfolio responsibility for seeking UWOs to the Lord Advocate in no way derogated from that collective responsibility; whatever the petitioner may previously have understood, the Answers to the petition had made it clear that the Ministers as a whole were legally and politically responsible for the exercise (or non-exercise) of that power.

[38] Nothing in the submissions advanced for the petitioner was capable of affecting that simple analysis. In relation to POCA Part 3, *Wright* had decided only that the reference to "prosecutor" for the purposes of that Part was a reference to the Lord Advocate as head of the system of criminal prosecution; she alone was responsible for what was done by the prosecutor under that Part. In relation to Part 8, sections 396A and 396D clearly conferred general functions on the Scottish Ministers collectively and also conferred retained functions

on the Lord Advocate. There was nothing problematic about that; comparison with the equivalent Part 8 functions in the rest of the United Kingdom (ss. 362A and 362D) showed that Parliament had no difficulty with the same entity performing all of the various functions described in those sections and there was, accordingly, no good reason to suppose that there was any implication that the Lord Advocate could not similarly perform all of those functions in the Scottish context, albeit some of them would be performed as her own retained functions and others as functions of the Ministers as a whole for which portfolio responsibility had been passed to her. No useful analogy could be drawn from *Kapri*, an extradition case which proceeded under an entirely different legislative framework, and which in any event contained nothing calling into question the analysis of POCA advanced by the Ministers.

[39] The *Carltona* principle applied to the Scottish Ministers: *Somerville* v *Scottish Ministers* [2006] CSIH 52, 2007 SC 140 at paragraphs 96-102, which observations in the Inner House were not doubted when the case progressed to the House of Lords, and see also *Re Buick* [2018] NICA 26 at paragraphs 16-18. While it was accepted, in accordance with the principle exemplified in *RM*, that the Scottish Ministers had to exercise their power to seek UWOs in accordance with the statutory provisions conferring that power, neither *RM*, *King*, *R* v *Adams* [2020] UKSC 19, [2020] 1 WLR 2077 nor any other case was authority, directly or by analogy, for the proposition that any special or restrictive tool for construction of the conferring powers had to be used. However, standing that section 52(3) of the Scotland Act provided expressly that statutory functions of the Scottish Ministers should be exercisable by any member of the Scottish Government, the suggestion that POCA section 396D impliedly restricted the ability of the Lord Advocate, a member of the Scottish Government, to exercise any of the functions conferred on the Scottish Ministers by POCA Part 8, fell foul

of the presumption against one enactment impliedly repealing another, and of the idea that any provision of the Scotland Act, as the expression of a constitutional settlement, could only be repealed expressly. Reference was made to *H* v *Lord Advocate* [2012] UKSC 24, 2012 SC (UKSC) 308, per Lord Hope at paragraph 30. Properly construed, nothing in section 396D, or indeed elsewhere in POCA, operated to prevent the Lord Advocate, as a member of the Scottish Government, from discharging any of the functions conferred on the Scottish Ministers as a whole by Part 8 of the Act.

Nature of the function of seeking UWOs

[40] While it was accepted that *Moohan* confirmed that judges could and should take into account rules of international law binding on the United Kingdom in interpreting statute and in developing the common law, there was no EU or international obligation requiring the United Kingdom to have UWOs as part of an anti-money laundering framework. The Fourth Money Laundering Directive had required Member States to put in place certain due diligence and related measures which were to be incumbent upon "obliged entities", not upon the Member States or their emanations. Those requirements had been transposed into domestic law. While the definition of a PEP in POCA had been imported into domestic law from European Union law, and money laundering was certainly an area dealt with by that law, the UWO regime was not a product of European Union law and was not required in order to enable the United Kingdom effectively and sufficiently to discharge its international obligations.

[41] It followed that POCA section 396A did not require to be construed so as to comply with European Union law. Examining Article 186 of the TCA, the petitioner had not pointed to any internationally agreed standard requiring that UWOs form part of domestic law, far

less that they required to be applied for by ministers, or indeed granted by courts, in every case where the conditions set out in POCA section 396B were or might be regarded as met. Indeed, it was explicitly clear from that section that the court retained a discretion to refuse to grant a UWO even where those conditions were met. There was no good reason to suppose that, while courts had a discretion whether or not to grant a UWO on an application for one being made, the Scottish Ministers had no discretion as to whether or not to make an application in the first place.

[42] Even if some kind of international obligation based on "best endeavours" could be discerned to exist in this present context, that concept was not a settled term of art in international law, and any declarator based on it would be impermissibly vague in domestic law as a source of legal obligation to seek to achieve a particular result. The international law cases cited by the petitioners all arose in specific, fact-sensitive contexts in which it was clear – unlike in the present case – what was or would be required by the deployment of "best endeavours".

[43] While any decision by the Ministers to seek or not to seek a UWO would have to be taken consistently with the policy and objectives of POCA, there remained within those parameters a broad discretion in the Ministers as to whether or not to make an application in any particular case. POCA Part 8 provided a range of measures which could be used in support of its policy objectives, and prescribed no hierarchy amongst them. That was a clear indication of the existence of a discretion as to whether, when and by resort to which available measures any action under that Part might be taken. The suggestion that there was any sort of specific obligation on the Scottish Ministers to make an application when the relevant conditions appeared to be met, and an application for a UWO might be thought by some to be appropriate, was without a proper basis in law.

The need to apply for a UWO in the present case

[44] The Ministers operated a "neither confirm nor deny" policy in relation to what they might or might not have considered, or be considering, in relation to potential applications for UWOs. While that policy was capable of admitting exceptions in suitable circumstances, no reason for making an exception to it was considered appropriate in the case of President Trump.

[45] A variety of policy considerations lay behind the Ministers' decision to "neither confirm nor deny" what they might have been considering about any particular application for a UWO. A UWO was not merely an investigatory tool; failure to comply with it gave rise to a presumption that property had been obtained through unlawful conduct of some kind and was subject to civil recovery. Whatever the true legal position about the pre-conditions for applying for and obtaining a UWO, there was in practice a taint of criminality that might be perceived to attend the process and which risked damaging reputations unwarrantedly if the Ministers disclosed what they might be considering doing. The affidavit of the Head of the CRU before the court dealt with various other important practical matters which supported the "neither confirm nor deny" policy, including the fact that an application for a UWO could and in practice was likely to be made *ex parte* so as to prevent dissipation of assets or destruction of evidence.

[46] This was a case of a litigant criticising a failure to provide information about what the Ministers might be doing in relation to someone who was a stranger to the proceedings. The petitioner had come to court saying that it was able to make a proper challenge to the Ministers' apparent inaction in relation to President Trump. That challenge was based on its argument that the Ministers had an obligation of some kind to apply for UWOs in

appropriate cases, and that President Trump's case was such an appropriate case. The Ministers had engaged fully with the argument that POCA imposed any such obligation on them but declined to engage with any argument about the merits of an individual case concerning a third party. Nor should the court do so. This situation was a world away from cases like *Mohamed*, in which litigants were asking for information about processes that had been applied to them personally and where a *prima facie* case had been made out which called for an answer from government. This was not a case in which the "neither confirm nor deny" policy was contrary to good governance or the requirements of open justice.

Discussion and decision

Designation of responsible minister

[47] The petitioner's argument that the Lord Advocate cannot properly be designated as the Scottish Minister responsible for seeking UWOs depends upon the validity of two propositions; firstly, that POCA section 396D does have the effect of impliedly excluding the Lord Advocate from performing that function and secondly, if so, that the effect of section 52(3) of the Scotland Act 1998 is capable of being restricted by way of such an implication.

[48] In relation to the first proposition, section 396D concerns itself with what is to happen after a UWO has been granted, and indeed at least apparently complied with. That is not an immediately obvious source for an implied restriction on who may properly decide whether to apply for a UWO in the first place. The subsection draws no distinction between UWOs granted in respect of PEPs and those granted in respect of other persons, which again might make it an unlikely source of implied limitation of the Lord Advocate's powers in relation to the former but not the latter.

[49] Turning to its substance, section 396D provides that if an interim freezing order is in place in relation to the relevant property, certain prompt decisions require to be made. The Scottish Ministers, being the parties on whose application the UWO will in point of form at least have been obtained in the first place, are to consider whether to afford the Lord Advocate the opportunity to decide whether or not to undertake any of the functions which POCA specifically confers on her, namely to commence Part 3 confiscation proceedings in relation to the property, or to apply for one or other of various different types of order that can be sought by her under Chapter 3 of Part 8 as corroborative of confiscation or money laundering investigations. If that opportunity is afforded to the Lord Advocate, she then decides whether or not to take any of those actions. The Scottish Ministers are also required by section 396D to decide, once a UWO has been granted and apparently complied with, and an interim freezing order is in place, whether they should undertake any of the functions which POCA confers on them generally, namely to commence Part 5 civil recovery proceedings in relation to the property, or to apply for one or other of various different types of order that can be sought by them under Chapter 3 of Part 8 as corroborative of civil recovery investigations. Corresponding provision is made for less urgent action on the same lines if no interim freezing order is in place.

[50] I do not find it possible to discern from section 396D any implicit Parliamentary intention that the Lord Advocate may not hold portfolio responsibility as the Scottish Minister concerned with applying for a UWO, whether in relation to a PEP or otherwise. All that the section in essence says is that once a UWO has been granted and apparently complied with, the Scottish Ministers are to decide whether to give the Lord Advocate the opportunity to take the case forward under the POCA functions which are allocated specifically to her under that Act (and which are thus retained functions in terms of the

Scotland Act), or whether to take it forward under the POCA provisions which are allocated to them generally under that Act, or indeed to take neither course of action.

[51] The subsection does not specifically envisage any dialogue between the Lord Advocate and the other Ministers in relation to its subject matter; rather, it simply requires a decision or decisions to be made as to which further form(s) of POCA procedure, if any, should be taken in the case once the information sought by the UWO has on the face of matters been obtained. Nothing in the section expressly or implicitly prevents the decisions which the Ministers require to make being made by the Lord Advocate as the Minister allocated that responsibility, and indeed the entire process contemplated by section 396D might well run more efficiently if that were to be the case. Similarly, while it would of course be difficult, if not impossible, in a situation where the Lord Advocate performed the decision-making functions of the Ministers in terms of section 396D on their behalf, to ensure that information about the case under consideration could be divided up in a legally or indeed factually effective manner so that some of it would only be known to the Ministers and some only to the Lord Advocate, there is nothing in the Act that requires such a division and no reason obvious to me why any need for it should be thought to exist.

[52] Should the Lord Advocate take a decision which section 396D indicates is one for the Ministers, then the legal distinction between the functions of the Ministers and of the Lord Advocate is not elided. A decision taken by the Lord Advocate on behalf of and as one of the Ministers remains in law a decision of the Ministers as a whole for which they remain collectively legally and politically responsible. Equally, a decision taken by the Lord Advocate in the exercise of her retained functions is one for which she alone is so responsible. The circumstance that in point of fact the same person may be taking those decisions is not capable of undermining that fundamental distinction as to their legal nature.

[53] I therefore conclude that there is no implication properly to be drawn from the terms of POCA section 396D that the Lord Advocate cannot properly be designated as the Scottish Minister responsible for seeking UWOs, whether in relation to PEPs or otherwise. I did not find the suggested analogy with the law of extradition useful; a question as to what may be implied by the terms of any particular statute evidently depends on a consideration of the precise terms of that statute rather than any other statute. The terms of POCA under consideration bear no relationship to the terms of the Extradition Act 2003, and in any event there is no judicial decision as to the effect of the division of functions between the Scottish Ministers and the Lord Advocate under the 2003 Act which might cast any light on the question in the present case. Nor did I find comparison with the provisions of POCA dealing with UWOs elsewhere in the United Kingdom to be helpful – those provisions necessarily reflect the very different legal and constitutional arrangements pertaining elsewhere and provide no sound basis for a decision on the import of section 396D in the Scottish context.

[54] Had I been of the view that there was any such implication as was contended for, I would have required to consider whether it could receive effect, standing the terms of section 52(3) of the Scotland Act, which straightforwardly provides: "Statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Government". While Mr O'Neill was anxious to present his argument as one which would simply restrict the power of the First Minister to allocate the relevant portfolio responsibility to the Lord Advocate, and not as an argument for an implied *pro tanto* repeal of section 52(3), there can be no doubt that, if the argument were to prevail, there would be a statutory function of the Scottish Ministers (namely, the function of applying for UWOs under POCA section 396A, at least in relation to PEPs) which would not be exercisable by one member of

the Scottish Government, namely the Lord Advocate, and that that would be the case because of an implication arising from the terms of section 396D. It is difficult to see that situation as amounting in practice to anything other than an implied partial repeal of section 52(3) of the 1998 Act. There is a strong presumption against the implied repeal of legislation which is as recent and as weighty in its subject-matter as the 1998 Act; see *H* v *Lord Advocate* at paragraph 30. It may be, indeed, that implied repeal of any element of the 1998 Act, as a statute setting forth the legal terms of a political constitutional settlement, is simply not possible in point of law. Accordingly, even had there been at least some basis for discerning in POCA section 396D an implied intention to derogate from the terms or effect of section 52(3) of the 1998 Act, such an implication could not have been given the effect which the petitioner's argument requires of it.

[55] It follows that there is no proper basis for making any declaration that there exists any restriction on the ability of the Lord Advocate to perform on behalf of the Scottish Ministers the functions of the latter in terms of POCA section 396A.

[56] Turning to the declarators sought by the petitioner concerning the respective responsibilities of the Scottish Ministers and the Lord Advocate in relation to applying for UWOs, the first is:

> "that the sole responsibility for determining whether to apply for an Unexplained Wealth Order rests with the Scottish Ministers (including the Lord Advocate) who must act collectively in their determination of whether such an order should be sought from the Court of Session."

As explained, there is no live dispute between the parties that sole responsibility for determining whether to apply for a UWO rests with the Scottish Ministers, who include the Lord Advocate. There is, however, no need for the Ministers to act collectively in determining whether to seek a UWO; the effect of section 52(3) is clear that any member of

the Scottish Government may make that determination, and I have decided for the reasons already stated that that member may be the Lord Advocate. There is no dispute that if the determination is made by one member of the Scottish Government, responsibility for that determination is collective in nature. The declarator first prayed for accordingly falls to be refused, primarily because it mis-states the distinction between decision-making and responsibility for the decisions made, and secondarily because those elements which correctly state the legal position do not reflect any actual dispute between the parties.

[57] The second declarator sought by the petitioner concerning the respective responsibilities of the Scottish Ministers and the Lord Advocate in relation to applying for UWOs is that:

> "if to any extent the Lord Advocate is involved in any decision-making concerning whether to apply for an Unexplained Wealth Order, notwithstanding any prior designation as the Scottish Minister with relevant portfolio responsibility for the Civil Recovery Unit, the Lord Advocate's involvement is and only is *qua* one of the Scottish Ministers, and does not involve the Lord Advocate's exercise of any of her retained functions as defined at section 52(6) of the Scotland Act 1998."

I did not understand any aspect of that proposed declarator to be in dispute, at least by the stage the petition was answered by the Scottish Ministers. As was said by the Lord President (Carloway) in *Wightman* at paragraph 22:

> "… there are limits to the general right to a legal ruling. One is that a court should not be asked to determine hypothetical or academic questions; that is those that will have no practical effect. In a case where there are no petitory conclusions, the declarator must have a purpose. There has to be some dispute about the matter sought to be declared. The declarator must be designed to achieve some practical result."

Reference may also be made to *Keatings* at paragraph 53, to the same effect. The declarator sought in this regard is not a matter in dispute and the prayer in support of it falls to be refused for that reason. To the extent that the petitioner is able to make out that there was,

or appeared to be, a relevant dispute about the matter when it raised the petition, it may seek to have that reflected in the disposal of the expenses of the process.

[58] The third declarator sought by the petitioner concerning the respective responsibilities of the Scottish Ministers and the Lord Advocate in relation to applying for UWOs is that "the Scottish Ministers may not delegate responsibility for determining whether to apply for an Unexplained Wealth Order to any other person, body or department." While it had been understood before the substantive hearing of the petition that this related to a claimed restriction of the application of the principle in *Carltona* to the functions of the Scottish Ministers, and some discussion of that matter took place during the hearing, ultimately the suggestion for the petitioner was not pressed to that extent, and simply came to be, as set out above, that the performance of statutory ministerial functions by a particular minister might be deemed inconsistent with the intention of Parliament as evinced by implication from statutory provisions. That argument has been dealt with already.

[59] There is also an issue about what exactly the word "delegate" might be thought to mean in the declarator sought. The *Carltona* principle is not regarded in law as an example of delegation properly so called. Standing the terms of section 52(3) of the Scotland Act, whether the performance of a function conferred on the Ministers as a whole by one of their number to whom that responsibility has been allocated amounts in law to a delegation or not appears to be an issue of nothing more than semantic significance; if it is a delegation, it is a delegation which section 53(3) expressly permits. The overall position may correctly be stated as being that the power to make a decision statutorily confided in the Ministers as a whole may be exercised by one of their number, and the *Carltona* principle operates to elide any distinction between that Minister and civil servants operating under his general

direction and responsible to him. Since the terms of the declarator sought either do not accurately express that position, or at best express it in a clumsy and potentially misleading manner, the prayer in support of it will be refused.

[60] Although the court is declining for the reasons stated to grant any of the declarators sought in Statement 4 of the petition at paragraphs (a) to (c), it may be that the petitioner will be able to take some comfort from the fact that the legal position about the allocation of decision-making power and responsibility concerning UWOs as between the Ministers as a whole and the Lord Advocate is as has been described and is now explicitly clear. It was apparent that a principal practical driver for the making of the present application to the court was the belief held firmly by the petitioner that the particular role and responsibilities of the Lord Advocate in the present constitutional arrangements in Scotland were being used as a means of deflecting legal and political responsibility for decision-making about UWOs, and in particular for the decision-making concerning the case of President Trump, away from the Scottish Ministers in general. While I can and do express no view whatsoever about the validity of the petitioner's apparent concern in that regard, the clarification of the legal position achieved by way of the proceedings in this petition ought to ensure that no scope for confusion about those matters on anyone's part can reasonably continue.

Nature of the function of seeking UWOs

[61] I accept that, construed in its context and background (which may include the United Kingdom's international obligations), a statutory power such as that contained in POCA section 396A may amount in law to a duty to act, either in general or in specific situations. The foundation of the petitioner's primary argument in this connection, as shown in the

wording of the declarator sought at Statement 4(d) of the petition, is that, via section 29(1) of the European Union (Future Relationship) Act 2020, the terms of Article 186 of the TCA impose an obligation on the Scottish Ministers to use their best endeavours to combat and prevent money laundering and corruption, particularly by individuals who hold or who have held important public functions. While the Ministers do not remotely seek to deny that combatting and preventing those social ills are valuable policy goals, they demur from the suggestion that their legal obligations in those regards are as contended for by the petitioner.

[62] There are insuperable problems for the petitioner's argument that Article 186 of the TCA is capable of informing the proper construction of POCA section 396A. Firstly, Article 186 is not one of those provisions of the TCA which deal with money laundering. Those types of provision (which include Article 653) are gathered in Title X ("Anti-Money Laundering and Counter Terrorist Financing") within Part Three of the TCA ("Law Enforcement and Judicial Cooperation in Criminal Matters"). Title XI of that Part ("Freezing and Confiscation") contains a variety of provisions dealing with cooperation between the United Kingdom and the European Union Member States for the purposes of *inter alia* investigations and proceedings aimed at the freezing of property with a view to subsequent confiscation thereof in the criminal context. Article 186, on the other hand, forms part of Title II ("Services and Investment") of Part Two ("Trade, Transport, Fisheries and Other Arrangements") of the TCA, and in particular of Section 5 ("Financial Services") of Chapter 5 ("Regulatory Framework") of that Title.

[63] The first Article of that Section, Article 182, provides that the Section "applies to measures of a Party affecting the supply of financial services". Against that background, it may be seen that when Article 186 talks of "internationally agreed standards" for the fight against money laundering and terrorist financing and for the fight against tax evasion and

avoidance, it is talking about such standards in the financial services sector and not in any more general context. In particular, it is not addressing any standards in relation to investigations or proceedings concerning the possible confiscation of property which has been acquired in the United Kingdom, whether by PEPs or otherwise. Further, the internationally agreed standards which are specifically identified in Article 186 all deal with such standards in the financial services sector, such as in the banking, insurance and securities regulation fields. Insofar as there is reference to unspecified further standards, both the context of the part of the TCA in which Article 186 is located and the eiusdem generis principle of construction point towards those standards also being found in the financial services sphere.

[64] Further, the petitioner's argument did not point to any specific internationally agreed standard of relevance to the present case except by direct reference to the notions of "the fight against money laundering and terrorist financing" and "the fight against tax evasion and avoidance" mentioned in Article 186 itself. Those are aims, goals or ends, and are conceptually quite different from the standards (i.e. criteria for judging the quality) of whatever efforts may be made to achieve those ends. The petitioner's argument based on Article 186 crucially and erroneously confounds an end with means to achieve that end.

[65] Finally, while the use of "best endeavours" is a concept which is not so inherently vague that it could never form the basis of an obligation in international law (any more than in domestic law), it is likely to leave room for doubt as to its application in at least some sets of circumstances. In this case, even had I been able to conclude that the Scottish Ministers were legally obliged to use their best endeavours to combat and prevent money laundering and corruption, it would have required a most accomplished alchemist to transmute an obligation couched at that level of generality into a specific duty to seek a UWO in any

circumstances where the relevant requirements provided in POCA section 396B were made out, as envisaged by the declarator sought at Statement 4(e) of the petition.

[66] Article 653 of the TCA is no more helpful for the petitioner. While located in that part of the Agreement which does indeed deal with money laundering, corruption and related subjects, it is in extremely vague terms, requiring the parties to "support international efforts", to "cooperate" and to "exchange relevant information". Even the most specific paragraph simply requires the parties to the Agreement to "maintain a comprehensive regime to combat money laundering and terrorist financing, and regularly review the need to enhance that regime, taking account of the principles and objectives of the Financial Action Task Force Recommendations". The petitioner did not suggest that the United Kingdom did not have a comprehensive such regime, that that regime was not kept under review, or that it failed to take account of the recommendations referred to. In these circumstances nothing in Article 653 is capable of providing support for the declarators sought by the petitioner at Statement 4(d) or (e).

[67] Ultimately, then, the power conferred on the Scottish Ministers in terms of POCA section 396A to apply to this Court for a UWO cannot properly be construed as a duty so to apply in any particular set of circumstances. Rather, decisions as to whether to apply for a UWO in any particular case, or to pursue one of the other investigatory mechanisms envisaged by POCA, or to take no relevant action, are matters for the Ministers in the exercise of a wide discretion. While it was readily conceded by the Ministers that the exercise (or non-exercise) of the power to seek a UWO, in particular, would be subject to review on grounds generally available in public law in the course of judicial supervision of administrative action, the specific nature of that power is not as claimed in the declarator prayed for at Statement 4(d) and does not extend to a duty of the kind described in the

declarator prayed for at Statement 4(e), either as prayed for in the petition or in the form ultimately suggested by Mr O'Neill. Those prayers accordingly fall to be refused.

The need to apply for a UWO in the present case

[68] Given that the declarator sought by the prayer at Statement 4(f) of the petition, namely that by failing to seek a UWO in relation to President Trump's assets in Scotland, the Scottish Ministers have failed in their duty and have therefore acted unlawfully, is predicated entirely on the existence of the claimed duty on the Ministers to seek a UWO in any circumstances where the requirements provided at POCA section 396B are made out and a UWO appears to be the most appropriate course of action to take, and I have held that no such specific duty exists, it is apparent that that declarator too falls to be refused.

[69] The Ministers have properly accepted that their power to apply for UWOs is not one which is immune to judicial review on a variety of potential grounds, for example were they to use the power other than for the purposes contemplated by POCA, to take into account irrelevant circumstances or not to take into account relevant circumstances in making their decision, to adopt a policy unlawfully restricting their use of the power, or to make a decision which no reasonable person could make about a potential UWO application. As Mr O'Neill pointed out, it therefore remains possible that the apparent decision of the Ministers not to seek a UWO in relation to President Trump's Scottish assets is indeed attended by some vitiating factor which the Minister's "neither confirm nor deny" policy is serving to obscure. That is undoubtedly true, though it is equally true that nothing which the petitioner has pleaded or argued positively suggests that that may be the case.

[70] While it is naturally disquieting in the abstract that any government entity should consider itself constrained to maintain any degree of silence in litigation concerning

important matters of public administration, it is important to understand specifically in every case whether such a policy may be justified by the wider demands of good governance as well as what impact, if any, such silence may have in arriving at a just result in the litigation. In order fully to understand the role of the "neither confirm nor deny" policy in the context of this petition it is in the first instance necessary to bear in mind the respective responsibilities of parties in applications to the supervisory jurisdiction of the court.

[71] It is the responsibility of a petitioner only to come to court and seek to challenge administrative action or inaction on grounds which it may responsibly advance. The petitioner in the present case has met its obligations entirely in that regard; it has challenged the Ministers' apparent inaction solely on the basis of the substantial legal arguments with which I have already dealt. The responsibility of a respondent to an application like the present is to respond candidly to the case made against it, and again the Ministers have complied with their obligations in that regard by putting forward their own legal arguments against those marshalled by the petitioner. What the Ministers chose not to do in the present case was to put forward any positive case in relation to matters that would have arisen only if I had found that there was a duty on them to seek a UWO in any circumstances where the POCA section 396B requirements were made out and a UWO appeared to be the most appropriate course of action; namely whether those conditions were met in the case of President Trump. Had I found that such a duty did indeed exist, I would have had to evaluate the petitioner's claim that those conditions were met and I would have had to do so without the benefit of any material from the Ministers which might have suggested the contrary. Viewed in that context, the Ministers' decision not to present any material in

support of the view that the conditions were not met could, if the matter had arisen, only have assisted the petitioner's position.

[72] It is also important to understand that a person in the position of the petitioner (indeed any party to proceedings such as these) may, further, seek the aid of the court to recover material in the hands of its opponents or third parties which may be relevant to the proper determination of the case being considered. Upon such an application being made to it, the court determines after hearing all interested parties whether what is being sought is of at least potential relevance to an existing issue in the case and is not excluded from recovery by an applicable peremptory legal rule, and if satisfied that such is the case, may make an order for its production to the court. At that stage, a party ordered to produce such material may do so and then argue that some good reason exists for that material not to be disclosed, either in whole or in part, to the litigant seeking it. The court would then assess such an argument in the specific context of the material in relation to which it was stated and determine where the appropriate balance lay as between the competing interests which such arguments invariably raise. That was the exercise which the House of Lords described as being required when a claim to public interest immunity had to be decided in *Somerville* v *Scottish Ministers* [2007] UKHL 44, the precise nature of the exercise where – as here – there may be competing public interests in play being perhaps most fully described by Lord Scott of Foscote at paragraph 85.

[73] In the present case, the petitioner – no doubt for reasons commending themselves to it and its advisors – did not seek to avail itself of the court's aid to recover any material in the hands of the Ministers or others which might have cast light on the question of whether the conditions to which I have referred were made out in the case of President Trump. Had it done so, the process I have described would have been gone through carefully and the

issues of relevancy, the impact of any exclusionary rule and the basis to any claim to public interest immunity or its analogues would have been considered and determined with the appropriate degree of specificity to the particular questions raised.

[74] It is not self-evident that any inquiry into the justification for the "neither confirm nor deny" policy in the present case would have been determined against the Ministers. Mr O'Neill criticised the justifications advanced in the relative affidavit by the Head of the CRU on the grounds that they were apposite, if at all, to cases where a UWO was sought on grounds of suspicion of direct or indirect involvement in serious criminality, and that no such grounds required to be present when a UWO was sought against a PEP. However, while it is true that the court is not required to be persuaded of the existence of a reasonable suspicion of serious criminality when considering an application for a UWO against a PEP, it cannot grant a UWO against a PEP or anyone else unless persuaded that there are reasonable grounds for suspecting that the known sources of the relevant person's lawfully obtained income would have been insufficient for the purposes of enabling him to obtain the property in question. A suggestion that a PEP ought not to have been able to acquire property from his lawful income raises at least an inference that it may have been acquired by unlawful income, and the circumstance of a PEP being in receipt of unlawful income in turn raises the prospect of corruption in whatever public office that PEP holds or held.

[75] It may be extremely difficult in practice, and particularly at the stage when conduct is merely being investigated on potentially incomplete information, to draw a clear distinction between the commission of mere civil wrongs on the one hand and frank criminal offences on the other. Indeed, I note that the petitioner's own briefing paper, referred to above, in addition to arguing the point about apparently insufficient lawful income, goes on to allege the commission of a good deal of what might be described as

penumbral criminal activity by persons said to be connected in various ways with President Trump, the potential relationship of which activity to the income issue remains unclear. In these circumstances any attempt to draw a bright dividing line between serious criminal conduct and other varieties of potential wrongdoing in the context of UWOs against PEPs would be fraught with difficulty and would represent a very uncertain basis upon which to formulate a governmental policy of openness in one kind of case and taciturnity in the other. It would be equally difficult to determine on a case-by-case basis whether to respond substantively to enquiries about any consideration being given to applying for a UWO against a PEP. For example, if in response to an enquiry as to whether consideration was being given to applying for a UWO against PEP "A", the Ministers were to state that no such consideration was taking place, but in response to a similar enquiry about PEP "B" declined to make any comment, it is clear how their silence in the latter instance would, rightly or wrongly, be generally interpreted.

[76] In the event, it was not necessary for the question of the justification or otherwise of the "neither confirm nor deny" policy to be determined in relation to any specific material identified by way of an application made during the procedural stages of the petition as potentially relevant to the just determination of the petition, and when the substantive issues of law raised by the petition were determined, the question to which it might have been relevant transpired to be one which did not in point of law arise. It follows that ultimately the Minister's "neither confirm nor deny" policy could not, and did not, play any active role in the determination of the petition.

[77] Finally, I wish to make it clear that I express no view whatsoever on the question of whether the POCA section 396B requirements were or appeared to be met in the case of President Trump, or indeed on the question of the identification of the legal criteria which

would have had to have been applied had I required to answer that question in the course of these proceedings. As already noted, those questions did not arise given the view I took on the merits of the petitioner's legal arguments as to the nature of the Ministers' power under POCA section 396A. Accordingly, it is unnecessary to address them. Further, for aught yet seen the Scottish Ministers may still make a UWO application in relation to President Trump's Scottish assets on grounds bearing a greater or lesser degree of similarity to those set out in the petition and expanded upon in the petitioner's briefing paper. For me to have expressed unnecessarily any kind of view, however oblique, in relation to the sufficiency of those grounds for that purpose would clearly be unhelpful should such an application in due course be made.

Disposal

[78] I shall repel the petitioner's pleas in law, sustain the respondents' second plea in law, and refuse the substantive prayers of the petition, reserving meantime all questions of expenses.