

# “Off the Record” But Not Off the Hook: The Supreme Court Criticises HMRC for Disclosure of Confidential Information to the Press

## Introduction

The Supreme Court recently handed down judgment in the case of *R. (on the application of Ingenious Media Holdings Plc) v Revenue and Customs Commissioners*,<sup>1</sup> unanimously allowing the claimant’s appeal.

This is a case emanating from the long running litigation between Her Majesty’s Revenue and Customs (HMRC) and Ingenious Media concerning purported tax avoidance schemes operated through film financing. It concerned the disclosure by a high-ranking HMRC official, David Hartnett, of confidential information relating to Ingenious Media and its founder Patrick McKenna to two journalists from *The Times* in an “off the record” interview. The confidential information was subsequently published by the newspaper in an article which quoted Hartnett anonymously as saying that HMRC was investigating the tax activities of Mr McKenna and that it believed McKenna’s schemes had enabled investors to avoid at least £5 billion in tax. At the time of the interview, HMRC had not reached a formal decision whether to challenge the validity of the film schemes.

The issue in this case was whether HMRC’s disclosure breached the Commissioners for Revenue and Customs Act 2005 s.18(1), which prohibits disclosure by HMRC of confidential taxpayer information, or whether disclosure could be justified as having been made “for the purposes of a function of” HMRC and therefore fell within an exception to the prohibition under s.18(2).

## The judgment

The Supreme Court found unanimously against HMRC. The approach taken by the Supreme Court was a marked departure from that of the High Court at first instance and the Court of Appeal. In the leading judgment, Lord Toulson held that:

- this case should be approached from the perspective of the common law rules of confidentiality; the fact that the claim had originally been brought as a judicial review had influenced the way the lower courts had dealt with it;

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<sup>1</sup> Confidential information; Disclosure; Financial journalism; HMRC officers; Investigations; Justification; Tax avoidance

- it is a well-established principle of the law of confidentiality (the so-called *Marcel* principle developed in *Marcel v Commissioner of Police of the Metropolis*<sup>2</sup>) that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom the information was received or to whom it relates not to use it for other purposes; and
- the *Marcel* principle may be overridden by explicit statutory provisions, but in the present case the proper construction of the statute was narrow, such that the exception to the prohibition of disclosure did not apply to erode the protection afforded to the taxpayer by HMRC’s general duty of confidentiality.

## General points of legal principle

Lord Toulson reaffirmed some points of legal principle which have general application, namely:

### Principle of legality

It would be contrary to the important principle of construction known as the “principle of legality” to construe vague words in the statute—“for the purposes of a function of”—in accordance with the wide interpretation contended for by HMRC to permit disclosure of the information and thereby deny the claimant’s right to confidentiality. HMRC had argued that it was permitted to disclose the information because “for the purposes of a function of” meant “necessary or expedient or incidental or conducive to or in connection with the exercise of the functions of the collection and management of revenue”.

The judgment recited Lord Hoffmann’s oft-quoted dictum in *R. v Secretary of State for the Home Office Ex p. Simms*<sup>3</sup> that:

“fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in

the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”

Lord Toulson expanded on this view, however, when he stated: “Lord Hoffmann said that this presumption will apply even to the most general words, but I would say further that the more general the words, the harder

it is likely to be to rebut the presumption”. This clarification has potentially wide-reaching application in the interpretation of statutory provisions.

### *Judicial review and the common law*

Pursuing public law remedies and seeking the application of principles associated with judicial review are not the only actions available to challenge the conduct of a public body. Public bodies are not immune from the ordinary

application of the common law, including the law of confidentiality, and in some cases this will provide the more appropriate route.

In the present case, the lower courts were wrong to apply a public law test to the disclosures made by HMRC. Lord Toulson was firm in his criticism of the lower courts, saying:

“it was not for them to approach the disclosures made by Mr Hartnett as if they were primary decision makers. In accordance with ordinary principles, the question of breach of confidentiality is one for the court’s judgment.”

### *Test for breach of confidentiality*

It is for the court to decide whether there has been a breach of confidentiality by applying the law to its own judgment of the facts. The opinion of the individual who has disclosed the information is not irrelevant, but the court will decide what weight it should be given. This principle applies where the duty of confidentiality is contractual or where, as in the current case, the person or body owing a duty of confidentiality holds a public office, is a public body, or is performing a public function, subject to any contrary statutory provision.

In this case, Lord Toulson dismissed the specific justifications put forward by HMRC for its disclosure of the confidential information. He said that “a general desire to foster good relations with the media or to publicise HMRC’s views about elaborate tax avoidance schemes cannot possibly justify a senior or any other official of HMRC discussing the affairs of individual tax payers with journalists”.

As to HMRC’s claim that: “the conversation might have led to the journalists telling Mr Hartnett about other tax avoidance schemes” that was “no more than speculation” and “far too tenuous to justify giving confidential information to them”. By dismissing HMRC’s approach in such strong terms, Lord Toulson reaffirmed the importance of the confidentiality of information provided to the tax authorities in the exercise of their functions. He quoted Lord Wilberforce who said in *R. v Inland Revenue Commissioners Ex p. National Federation of Self-Employed and Small Businesses Ltd* at 633<sup>4</sup> that “total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the [taxation] system”.

### *“Off the record” disclosure*

Unlawful disclosure of confidential information is no less unlawful because the information is passed on in confidence, or “off the record”. The information supplied by the HMRC official to journalists in this case was confidential in nature and HMRC owed a duty of confidentiality in respect of it. The fact that the HMRC official did not anticipate his comments being reported was not a justification for making them.

## **Comment**

This case provides a cautionary reminder of the potential for uncertainty surrounding “off the record” interviews and conversations. Lord Toulson observed that “off the record” is an idiom and “like many idioms [it] can bear different shades of meaning”. Does it mean, for instance, that the information passed on is strictly confidential, not to be used without explicit permission of the interviewee; or does it mean only that it is not to be quoted directly or is quotable only on a “no names” basis? Those who intend to disclose confidential information in “off the record” interviews, or publish articles predicated on them, should ensure in advance that they clarify their legal obligations and the exact basis on which the information is being shared with or by the other party. This should avoid misunderstandings, embarrassment and the possibility of being liable for damaging disclosures.

<sup>1</sup> *R. (on the application of Ingenious Media Holdings Plc) v Revenue and Customs Commissioners* [2016] UKSC 54.

<sup>2</sup> *Marcel v Commissioner of Police of the Metropolis* [1992] Ch. 225.

<sup>3</sup> *R. v Secretary of State for the Home Office Ex p. Simms* [2000] 2 A.C. 115.