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The Effect of the Human Rights Act 1998 on Taxation Policy and Administration

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Abstract

In her paper, Natalie Lee considers the implications for UK taxation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, incorporated into UK law by the Human Rights Act 1998. The paper reviews the history of the Convention and the context in which it was framed. It examines what its effect on taxation has been thus far and it goes on to speculate as to its likely future impact, specifically in the context of the UK taxpayer. It concludes that although European Community law has applied in the UK for over thirty years it, and its implications, are only now coming to be understood. It is clear that taxpayers are perfectly prepared to mount an attack on the application of a tax law on grounds of breach of rights under the Convention and this will have implications for tax administration in future. The paper considers the likelihood of success of such challenges and notes that taxpayers mounting such challenges have, to date, had less success than citizens mounting challenges to more serious and fundamental infringements. This may continue to be the case in future, and indeed such an outcome may be justifiable in light of the need to balance "...the interests of the whole community and the protection of individual fundamental rights".

INTRODUCTION

In October 2000, the Human Rights Act 1998 incorporated into the law of the United Kingdom the European Convention on Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms (to give it its full title) is a treaty of the Council of Europe. The Council of Europe was itself established on May 5, 1949 by ten founding western European states,¹ with thirteen others joining a short while after. Since the dismantling of Communism, a number of eastern and central European states have been admitted, bringing the Council's current membership to some forty-five.² The Council has generated over 150 international agreements, treaties and conventions, replacing numerous bilateral treaties between European states. Among the most important of its agreements is the European Convention on Human Rights (the Convention) which first saw the light of day in Rome in 1950. The Council, which comprises a Committee of Ministers³ and a Parliamentary Assembly, also established the European Commission of Human Rights⁴ and the European Court of Human Rights, both in Strasbourg, to which people from countries that had signed up to the Convention could take their complaints and have them judicially determined.

The Council of Europe was really the first step along the road to a type of federated Europe, culminating in 1958 in the formation of the European Economic Community. But the Council was borne of motives other than just economic ones. The idea of

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¹ Including the UK and France.

² As of January 2004, 44 of those 45 states have ratified the Convention.

³ A separate body from the Council of Ministers of the European Union.

⁴ Abolished in November 1998.

uniting Europe, which had been promoted from the 1920s onwards, was revived at the onset of the Second World War. Indeed, in 1939, Clement Attlee, then leader of the British Labour Party, declared, “Europe must federate or perish.”⁵

That the Council of Europe and the Convention were both aimed at securing the most fundamental of values can be concluded from surrounding circumstances, the Preamble to the Convention itself and modern-day pronouncements. Thus, the Council was established, and the Convention came into being, four and five years respectively after the end of the Second World War, and one and two years respectively after the adoption and proclamation by the General Assembly of the United Nations of the Universal Declaration of Human Rights⁶. The Preamble to the Convention specifically reaffirms the “profound belief” of the members of the Council “in those fundamental freedoms which are the foundation of justice and peace in the world” The first four of the Convention rights and freedoms are the right to life, the prohibition of torture, the prohibition of slavery and forced labour and the right to liberty and security. More recently, it was said:

The Europe we foresee in our Presidency priorities is one which is anchored in the values of the Council of Europe and the European Convention on Human Rights. ... We will give a focus to issues such as fair wages, good job opportunities, civil and political rights, greater security and better co-operation between Governments in Europe and beyond.⁷

The aim of this paper is to determine the effect to date of, and any likely future impact from, the incorporation of Convention rights into UK law by the Human Rights Act 1998 (HRA) on the formation of tax policy and tax administration. This will, however, necessitate the consideration of three preliminary issues. First, since UK citizens have enjoyed the right to take a case to Strasbourg since 1953⁸ and, more recently, the protection by the common law through judicial review against interference with a fundamental right through the exercise by a public body of a very wide discretion conferred by statute,⁹ why should the HRA make any significant difference? Secondly, what are the main principles of the HRA? Finally, given the fundamental values behind both the Council of Europe and the Convention, what have the Convention and the HRA to do with taxation at all?

COMPARING RIGHTS BEFORE AND AFTER INCORPORATION

The effect of the Convention is to guarantee a number of basic human rights by allowing an individual to complain about the behaviour of his own government.¹⁰

⁵ In a speech, later circulated in pamphlet form, on November 8, 1939 that sought to define the Labour Party’s war objectives, in Cole, GDH, *A History of the Labour Party from 1914* (Routledge & Kegan Paul Ltd, London 1948) at p 379.

⁶ On 10 December 1948.

⁷ Dick Roche, Irish Minister of State for European Affairs in a presentation to the Committee of Ministers of the Council of Europe of the priorities of the Irish Presidency of the European Union, January 2004.

⁸ Although the UK was the first state to ratify the Convention in 1951, it only came into force in 1953.

⁹ See, for example, *R v Ministry of Defence, ex p. Smith* [1996] QB 517; *R v Secretary of State for the Home Department, ex p. McQuillan* [1995] 4 All ER 400.

¹⁰ Before the adoption of the Convention in 1953 by the UK, individuals enjoyed few opportunities to assert rights under international law.

Prior to October 2000,¹¹ any person within the jurisdiction of the UK could submit a petition to the European Commission of Human Rights if they felt aggrieved about the effect of an existing law or an action of the executive, provided that they had exhausted all the possible means of challenge within the UK system. If a friendly settlement between the Commission and the applicant could not be secured, then the Commission would send to the Committee of Ministers of the Council of Europe a report, including its opinion on whether or not there had been a violation of a Convention right. The Committee itself could make a decision, thereby concluding the matter, or the case could have been referred to the European Court of Human Rights for consideration. Then, as now, if the Court found that there had been a violation, it could either make a simple formal finding to that effect, or it could make an award of damages or of costs and expenses to the injured party. For its part, the country concerned would be expected to amend the relevant law or procedure so as to bring it into line with the Convention.

At the time of ratification by the UK, it was believed that the rights guaranteed by the Convention were already protected by British law, and that there was no pressing need for their actual incorporation. This appears to stem from the fact that the “easy assumption, and source of pride, that our unwritten constitution is the best in the world has long been part of our national consciousness.”¹² With a deal of conviction, the commentator added that the “time had come when an examination of that assumption is acceptable and necessary.”¹³ In practice, the Convention had very limited effect upon UK law since, apart from changes made to domestic law through public and political pressure following a Strasbourg decision, it was used only as an aid to interpretation of statute or common law. And even here the Convention could only be considered where it was necessary to resolve an ambiguity in a statute or there was some uncertainty in the common law.¹⁴ Moreover, one commentator was critical of Strasbourg’s approach to commercial issues, and went as far as to say that:

the Court at Strasbourg, quite understandably, is preoccupied with the task of broadening the geographical reach of the simpler sort of human rights, those issues of life, limb and liberty with which it began. It shows signs of being overwhelmed even by this task and it lacks the resources ... to develop the potential of its jurisdiction in the ways that would be interesting to those .. who practise commercial law. Worst of all, it lacks any real capacity for establishing matters of fact, particularly on complex or judgmental issues, and in consequence is excessively deferential to the factual assertions of signatory States.¹⁵

By 1997 it had become clear that non-incorporation had two further serious repercussions. First, Convention rights, developed with major help from the UK

¹¹ Although the HRA received the Royal Assent in 1998, most of its provisions did not come into effect until October 2000. It was believed that a period of no less than two years was required to educate those, including senior members of the judiciary, who would be required to apply the Act.

¹² Richard Wilmot-Smith, *Incorporation and the Loss of Illusion in Human Rights in the United Kingdom* Richard Gordon & Richard Wilmot-Smith, eds (Oxford University Press, 1996) at p 92.

¹³ *Ibid.*

¹⁴ *Derbyshire County Council v Times Newspapers* [1993] 1 All ER 1011.

¹⁵ Nicholas Jordan, *The Implications for Commercial Lawyers in Practice in The Impact of the Human Rights Bill on English Law* Basil S Markesinis, ed (Oxford, Clarendon Press, 1998) at p133.

Government, were no longer perceived as British rights.¹⁶ Indeed, it was pointed out with some force that the United Kingdom lagged some way behind the international human rights movement, with Britain remaining “in a slightly insular condition of satisfaction with its own legal institutions.”¹⁷ Secondly, the cost of taking a case to Strasbourg was enormous, and the time involved too great.¹⁸ Furthermore, whilst there is no doubt that the common law was developing to protect rights that were coming to be regarded as fundamental against excessive use of discretion by public bodies,¹⁹ the source of those rights was a matter of conjecture; in other words, how was a judge to decide what rights were fundamental, and from where were the judges deriving their authority?²⁰ Moreover, although there are some who would disagree,²¹ it has been argued with some force²² that the protection afforded to such rights through the doctrine of ‘Wednesbury unreasonableness’²³ is not as great as it might otherwise be, requiring a lesser degree of scrutiny of actions by public bodies than that exercised under the doctrine of proportionality.²⁴

That these problems would be overcome by “bringing home” fundamental rights and freedoms was made clear by the 1997 White Paper, in which it was said that incorporation of such rights into domestic law would mean that:

... British people will be able to argue for their rights in the British courts – without ... inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.²⁵

Accordingly, since October 2000, individuals in the UK have been able to bring human rights issues directly before the British courts, whilst remaining entitled to petition Strasbourg after all possible domestic remedies have been exhausted. Since that time, there has been a steady stream of cases before the courts in which, inter alia, questions of human rights have had to be determined, giving credence to the belief of Lord Cooke of Thorndon that human rights law would “take off in the United

¹⁶ *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997), para 1.14. As Rabinder Singh points out in *The Future of Human Rights in the United Kingdom* (Hart, 1997) at pp 5-6, the relative silence during the 20th century on the matter of the protection of liberty in the UK belied the contribution made by Britain to the development of human rights around the world.

¹⁷ Lord Cooke of Thorndon, *The British Embracement of Human Rights*, (1999) EHRLR, 3, 243-260, at p 246.

¹⁸ *Op. cit.* n 16. It was estimated that it took an average time of five years to get an action into the European Court of Human Rights, at an average cost of £30,000.

¹⁹ See, in particular, the judgment of Bingham MR in *R v Ministry of Defence, ex p. Smith* [1996] QB 517 at 554E-F.

²⁰ Rabinder Singh, *The Future of Human Rights in the United Kingdom* (Hart, 1997), pp 13, 16.

²¹ See, for example, Nicholas Blake, *Importing Proportionality: Clarification or Confusion* (2002) EHRLR, 1, 19-27 at p19.

²² Rabinder Singh, *The Future of Human Rights in the United Kingdom*, at pp 40-42.

²³ So called after the case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, in which reasonableness was first propounded as a judicial device designed to preserve the exercise of statutory discretion by a public body free from inappropriate interference from the judges.

²⁴ Discussed later.

²⁵ *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997), at para 1.14.

Kingdom” in the same way that administrative law had grown exponentially in the latter half of the twentieth century.²⁶

THE MAIN PRINCIPLES OF THE HUMAN RIGHTS ACT 1998

Three Main Principles

Convention rights have been incorporated into UK law by the HRA only insofar as this is consistent with parliamentary sovereignty. So, the Act, which itself can be repealed, does not give the courts a power to strike down primary legislation that is inconsistent with Convention rights, and Parliament may, if it chooses, maintain in force such legislation. Subject to that overriding caveat, the Act operates on three main principles. First, and of supreme importance, courts and tribunals are required to construe both primary and secondary legislation in a way that is, as far as possible, compatible with Convention rights.²⁷ In practical terms, this section introduces a new and different approach to statutory interpretation by UK courts, going beyond the common law rules. Thus, rather than searching for the true meaning of words or phrases in the traditional manner, courts will now seek to find a meaning that will prevent legislation from being incompatible with Convention rights.²⁸ The former Lord Chancellor, Lord Irvine stated:

The Act will require the courts to read and give effect to the legislation in a way compatible with the Convention rights ‘so far as it is possible to do so’. This ... goes far beyond the present rule. It will not be necessary to find an ambiguity. On the contrary the courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so. Whilst this particular approach is innovative, there are some precedents which will assist the courts. In cases involving European Community law, decisions of our courts already show that interpretative techniques may be used to make the domestic legislation comply with the community law, even where this requires straining the meaning of words or reading in words which are not there.²⁹

Whilst Lord Irvine did not repeat this view in Parliament, it was nonetheless seen at the time as an indication of the quantum leap that the courts would now be taking towards statutory interpretation in the light of the HRA and, indeed, his words now appear to have full judicial force. In *R v A (No. 2)*, Lord Steyn said:

In accordance with the will of Parliament as reflected in Section 3, it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in the statute, but also the implication of the provisions.³⁰

This pronouncement seems to give credence to the belief, formed during the passage through Parliament of the Human Rights Bill, that the new legislation would give excessive power to an unelected judiciary to strike down legislation enacted by

²⁶ *The British Embracement of Human Rights* (1999) EHRLR 3, 243-260, at pp247-248.

²⁷ Human Rights Act 1998, s 3(1).

²⁸ Lord Cooke of Thorndon, H.L. Debs., Vol. 582, cols. 1272-1273

²⁹ [1998] PL 221, at pp 228-229.

³⁰ [2001] 2 WLR 1546 at p1563.

Parliament. However, as Lord Hope has observed, section 3(1) must be read so as to preserve the sovereignty of Parliament:

... the interpretation of the statute by reading words in to give effect to the presumed intention should always be distinguished carefully from amendment. Amendment is a legislative act. It is an exercise which must be reserved to Parliament.³¹

Secondly, although it has already been stated that no court is able to strike down or disregard legislation that conflicts with Convention rights, the High Court and above³² may make a ‘declaration of incompatibility’,³³ which may be viewed as a first step towards correcting the primary or secondary legislation. However, a declaration of incompatibility has been described as a “measure of last resort” and one that “must be avoided unless it is plainly impossible to do so.”³⁴ Such legislation will continue in force until the relevant Minister chooses to exercise his power to amend it by way of remedial order, which can have retrospective effect.³⁵ Moreover, a Minister responsible for the introduction of a Bill in either the House of Commons or the House of Lords must now make a written statement prior to the Second Reading of such Bill to the effect that either it is compatible with Convention rights or, if this cannot be done, that the Government has nonetheless decided to proceed with the Bill.³⁶ This ensures that every new piece of legislation must be considered in the light of the HRA and, although the Government is still able to proceed with legislation that does not necessarily have the ‘stamp of approval’, the force of public opinion may make such an attempt very difficult.

Finally, the Act requires all public authorities (and this would include the Inland Revenue and Customs and Excise) to act in accordance with Convention rights.³⁷ This is subject to the all-important doctrine of the ‘margin of appreciation’, which refers to the ability of public authorities to make discretionary decisions with which courts should not unduly interfere, and requires the court to consider not only whether the relevant authority acted reasonably, carefully and in good faith but, in addition, whether the authority’s action was proportionate to the aim pursued. Certain of the Convention rights are specifically subject to what may loosely be called restrictions. Thus, for example, the right in Article 8 to respect for private and family life is subject to the caveat that there may be interference in accordance with the law to achieve a legitimate aim in light of a pressing social need. So also in Article 1 of the First Protocol, the peaceful enjoyment of possessions by a person, is limited by the right of a state to enforce laws that it deems to be necessary for the control of the use of property or ‘to secure the payment of taxes or other contributions or penalties’ in ‘accordance with the general interest.’ The words of the Convention itself provide for

³¹ *R v Lambert* [2001] 3 WLR 206.

³² But not tribunals.

³³ Human Rights Act 1998, s 4(2).

³⁴ *R v A (No. 2)* [2001] 2 WLR 1546 at p 1563.

³⁵ *Ibid*, s 10(2)(3).

³⁶ *Ibid*, s 19.

³⁷ *Ibid*, s 6(1). Public authorities include courts and tribunals, but not the Houses of Parliament or any individual person (such as a Minister) exercising functions in connection with proceedings in Parliament. In holding that a parochial church council was not a ‘public authority’ for these purposes, the House of Lords in *Aston Cantlow & Wilmcote with Billesley PCC v Wallbank & Wallbank* [2003] UKHL 37; [2003] 3 WLR 283 drew a distinction between persons who, in Convention terms, are governmental organisations on the one hand, and those who are non-governmental on the other.

the purposes for which these restrictions may be made and, although they also give an indication of the width of a discretionary area of judgment enjoyed by public authorities in actually deciding whether to introduce measures restrictive of fundamental rights, they do not “spell out ... a doctrine of proportionality.”³⁸ Rather, the question of whether the action of a public body, which has the effect of restricting fundamental rights, is proportionate to the needs of a democratic society has, in the past, been left to the Strasbourg Court to decide.

The European Court of Human Rights has explained fully the principles that it, in its supervisory role, should apply with respect to taxation. First, although the margin of appreciation available to the national legislature, particularly under Article 1 of Protocol No 1 is a wide one, the measure imposed must have a legitimate aim in the sense of not being ‘manifestly without reasonable foundation’; secondly, where the measure has a legitimate aim, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised; and finally, a fair balance must be struck between the demands of the general interests of the community and the protection of the individual’s fundamental rights, the balance failing to be struck if the measure results in an individual or section of the public carrying an excessive burden.³⁹ In summary, these principles require the court to consider not only whether the relevant authority acted reasonably, carefully and in good faith but, in addition, whether the authority’s action was proportionate to the aim pursued. Importantly, incorporation of Convention rights by the HRA has “brought the concept of proportionality directly into force in the law of the United Kingdom”,⁴⁰ and that concept is now “at the heart of the HRA case law.”⁴¹ What this actually means in practice is that, rather than questioning whether a public authority reasonably believed that their decision was proportionate and not therefore irrational, it has to be asked whether the decision was *in fact* proportionate.

CONVENTION RIGHTS, THE HUMAN RIGHTS ACT 1998 AND TAXATION

Given the circumstances that gave rise to the Convention in post-war Europe, not to mention the origins of human rights themselves which, it has been argued, lie in the “Enlightenment belief in inalienable rights ... incompatible with Parliamentary absolutism, which is a residue ... of many centuries of despotism,”⁴² it has to be asked whether human rights apply, or were ever meant to apply, to taxpayers, bearing in mind particularly that a number of them are corporate bodies whose property interests could not have been uppermost in the minds of those who drafted the Convention. One commentator certainly believed that the enactment of the HRA was a prelude to change. He wrote:

Until now, this was a jurisprudence mainly developed by men whose motives were ethical or political, or urgently personal, but the potential for

³⁸ *Ibid* at p 51.

³⁹ *Wasa Liv v Sweden* (1988) 58 DR 163 at pp177-178.

⁴⁰ Nicholas Blake, *Importing Proportionality: Clarification or Confusion* EHRLR 2002, 1,19-27 at p19.

⁴¹ *Ibid* at p 20.

⁴² Andrew Marr, *Rights and Rites for a New Britain in Human Rights in the United Kingdom* (ed Richard Gordon & Richard Wilmot-Smith, Oxford University Press, 1996) at p15.

applying many of the Convention rights to business life has been dawning upon lawyers in the UK for some years now.⁴³

Taxation was mentioned for the first time in the Convention only when Protocol No 1 was adopted a few years after the original Convention, and only then to permit contracting states to limit the right of an individual's enjoyment to property in order to secure the payment of taxes.⁴⁴ Nonetheless, whilst individuals cannot maintain that an ordinary assessment to tax or the imposition of very high rates of tax is a breach of Article 1 of Protocol No 1, it does mean that cases can be brought on the basis that a certain tax measure was not proportionate to society's needs. Moreover, it has to be accepted that a large number of tax cases have come before the Human Rights Commission⁴⁵ and the Strasbourg court, a few of these being cases brought by UK taxpayers against the Government even before the Act had come into force.⁴⁶ That Convention rights should apply to taxpayers has been explained on the basis that taxpayers have as much right to protection as do criminals whose right, for example, to a fair trial is guaranteed by Article 6, and that the "system of human rights is, after all, a matter of protecting the individual human being and not especially protecting governments."⁴⁷

As far as corporate taxpayers are concerned, it is the view of one leading human rights lawyer that, despite "the irritation which many people feel at the prospect of incorporation being "hijacked" by the rich and powerful to protect their interests against progressive action by the state," human rights protection should not be denied to companies.⁴⁸ Indeed, it is argued that to do so would itself be a violation of Convention rights insofar as it would be inconsistent with Article 1 of Protocol No 1 and could be said to be discriminatory against companies on the ground of their status in breach of Article 14.⁴⁹ And it is undoubtedly the case that, despite the fact that companies have been petitioning the Strasbourg court for many years, the results do not indicate that "the Convention has become a boardroom charter."⁵⁰

This point is well illustrated by the decision in *National and Provincial Building Society and Others v United Kingdom*.⁵¹ In that case, three building societies challenged retrospective legislation introduced by the Government to prevent a windfall benefit to the applicants that would otherwise have occurred due to technical defects in the regulations governing the taxation of interest paid to investors, and to frustrate any attempts to challenge the validity of the regulations. For their part, the applicants claimed that the legislation would result in double taxation, that it was

⁴³ Nicholas Jordan, *The Implications for Commercial Lawyers in Practice in The Impact of the Human Rights Bill on English Law* (ed Basil S Markesinis, Oxford, Clarendon Press, 1998) at p133.

⁴⁴ Article 1 of Protocol No 1 guarantees, subject to conditions, the right to property.

⁴⁵ When it was still in existence.

⁴⁶ For example, *National and Provincial Building Society and Others v United Kingdom* (1998) 25 EHRR 127; [1997] STC 1466; *A, B, C & D v UK* (1981) 23 DR 203; *Nap Holdings UK Ltd v UK* (1996) 22 EHRR 114. All of these cases concerned the issue of retrospective legislation.

⁴⁷ Isi Foighel, *Do human rights apply to taxpayers?* in *Protecting Human Rights: The European Perspective* (Koln: Heymanns, 2000) 535-543 at p 543.

⁴⁸ Rabinder Singh, *The Future of Human Rights in the United Kingdom* (Oxford, Hart Publishing, 1997) at p 25.

⁴⁹ *Ibid* at p 24. For Article 14, see *infra*.

⁵⁰ Michael Smyth, *The United Kingdom's Incorporation of the European Convention and its Implications for Business* (1998) EHRLR 3, 273-291 at p 273.

⁵¹ (1998) 25 EHRR 127; [1997] STC 1466.

invalid and that it sought specifically to limit their access to justice. The European Court of Human Rights rejected the argument that there had been double taxation, and concluded that, despite the fact that the legislation did constitute an interference with the applicants' rights of possession to property under Article 1 of Protocol No 1, the interference was justified in the public interest in that it secured the payment of taxes. The Court rejected the applicants' further claim that the retrospective legislation restricted their right of access to a court and that there was therefore a breach of Article 6(1),⁵² on the grounds that it was in the public interest that legislation should intervene to prevent litigation that was aimed at frustrating the intention of Parliament and, in any event, the dispute concerned matters of taxation, where recourse to retrospective legislation is not confined to the UK.

Whilst this case demonstrates the hurdles faced by all applicants, not just commercial ones, it should not be thought that the decision places doubt on whether applicants in tax matters will ever be successful. As has been pointed out, the case was lost on its merits⁵³; the court took the view that there was no double taxation in any real sense, and that all the retrospective legislation was intended to do was to cure technical defects in earlier legislation. The suggestion is that where there are issues of real double taxation, or cases where legislation is introduced with the sole aim of depriving taxpayers of the fruits of successful litigation, then such actions may well be open to a successful challenge.

The precise circumstances in which Convention rights might be invoked in tax matters still remains a matter of some speculation, although the comment has been made that "there is every reason to believe that tax and VAT cases will bulk large in post-incorporation litigation,"⁵⁴ and this prophecy seems to have been borne out over the last couple of years. That cases will be brought in ever greater numbers is recognised by the fact that public funding (formerly legal aid) is now available for cases before both the General and Special Commissioners of Income Tax where the proceedings concern penalties which the courts have declared to be criminal in the terms specified by the Convention, or where an applicant seeks to argue that issue *and* it is in the interests of justice for an applicant to be legally represented.⁵⁵

TAXATION AND CONVENTION RIGHTS POST-OCTOBER 2000

In monitoring compliance with Convention rights, a domestic court or, indeed, the Strasbourg court as a final court of appeal on matters of human rights, is concerned with two principles: first, it must ensure that a given piece of legislation is compatible with Convention rights and, secondly, it must be satisfied that the rules legislated for are being administered in such a way as to ensure that the rights of individuals are secure. As far as taxation is concerned, the first of these two principles clearly relates

⁵² Right to a fair trial.

⁵³ Michael Smyth, *The United Kingdom's Incorporation of the European Convention and its Implications for Business* (1998) EHRLR 3, 273-291 at p 285.

⁵⁴ *Ibid* at p 273.

⁵⁵ *Public Funding for Legal Advice and Representation Before the General and Special Commissioners of Income Tax*, Legal Services Commission in *Guidance to Inland Revenue Staff on Human Rights and Penalties*, guidance issued to Inland Revenue staff on 11 September 2002. Funding is available for both legal advice prior to any hearing and for legal representation at the tribunal. This is subject to the applicant being financially eligible, with applicants on income support and income-based jobseekers allowance being automatically eligible.

to tax policy, whilst the second deals with the administration of the tax system. Accordingly, it is proposed that the particular Convention rights affecting tax matters will be discussed under the two headings of 'tax policy' and 'tax administration.'

Tax Policy

The fact that the relevant Minister has to state in writing that a Bill introduced into Parliament complies with Convention rights suggests that, since the passing of the HRA, all legislation will be so compliant. However, it has already been seen that the Government may nevertheless proceed with a Bill without this positive statement. Whilst it is unlikely that this would ever be the case with fundamental issues relating to life and liberty, it is highly probable that it could be where matters of taxation are concerned. Thus, where legislation similar to that at issue in the case of *National & Provincial Building Society & Others v United Kingdom*⁵⁶ is sought to be introduced, although it may well result in an interference with a claimant's rights to property, the Government may yet continue with it and argue successfully against any challenge on the ground of securing the payment of tax in the public interest and the margin of appreciation.

It is interesting to debate whether such an argument would apply in the case of any possible future windfall tax. Soon after taking office in 1997, the new Labour Government imposed a windfall tax⁵⁷ on the excess profits of the privatised utilities⁵⁸ in order to fund its 'Welfare to Work' programme, which was aimed at encouraging people to move away from relying on state benefits and into work.⁵⁹ It should be noted that the profits that were to be taxed were profits previously made and upon which tax had already been levied. The Government's argument for raising the money in this way was based on the belief that the previously publicly-owned utilities had been sold by former Conservative Governments at far less than their market value, resulting in a windfall to the shareholders of the companies concerned. Of course, by the time the windfall tax was imposed, many of the original shareholdings had been sold, although it is highly likely that the company executives with their lucrative share-options remained the same and would, accordingly, suffer some financial loss as a result of the measure. Since the HRA had not been enacted at the relevant time, there was no question of a challenge before the domestic courts. However, legal opinions were canvassed on the likely success of a challenge before the Strasbourg Court on the basis that the tax was contrary to Article 1 of Protocol No 1, which (as already mentioned) guarantees, in substance, the right to property, and comprises three elements. The first contains the general principle of peaceful enjoyment of property; the second deals with deprivation of property and subjects that to certain conditions; the third recognises that contracting states are entitled to control the use of property, expressly reserving their right to pass laws that they deem necessary to secure the payment of taxes.

⁵⁶ *Op. cit.* n 51.

⁵⁷ Sections 1-5 and Schedule 1, Finance (No 2) Act 1997. The amount by reference to which tax was charged was the difference between a notional flotation value established by looking at average post-tax profits over four years following privatization, and an actual flotation value equal to the flotation price at which the shares were offered multiplied by the ordinary share capital of the company at flotation.

⁵⁸ For example, the water, electricity and telecommunication companies.

⁵⁹ This programme has since been bolstered by the Working Families' Tax Credit (now repealed) and, more recently, the Working Tax Credit, both measures providing tax credits for lower paid workers in an attempt to reduce or alleviate the poverty trap arising on a move from benefits to work.

The question that needed to be answered in the case of the windfall tax was not whether it interfered with the taxpayers' enjoyment of their property (for it obviously did since they would have rather less after the imposition of the tax than before) but, rather, whether it was disproportionate to the needs of the society for whose benefit it was being levied. Opinions on the matter differed and, in the event, no challenge was ever made, possibly for the reason that the directors of the companies' concerned could not justify to their shareholders the expense of a petition to Strasbourg when compared with the actual tax owed. As a matter of conjecture, it is submitted that a challenge would not have been successful. Although in *Wasa Liv v Omsesidigt v Sweden* the Strasbourg Court held that the protection afforded by Article 1 of Protocol No 1 and other relevant provisions of the Convention is not excluded by the fact that a legislative provision involved the payment of tax, so theoretically a challenge *could* be successful,⁶⁰ the facts surrounding the windfall tax are materially different from those of the *Building Societies* case.⁶¹ Whilst both involve the imposition of tax retrospectively, there was here undoubtedly a question of double taxation, and the legislation was not seeking to correct any previous errors. Moreover, the findings of the Strasbourg Court have to be applied in forty-four states, all having very different cultures and politics and, accordingly, it would not be surprising for it to act in a conservative fashion and apply a particularly wide margin of appreciation under Article 1 of Protocol No 1 in favour of the Government.

Of course, the question of whether a domestic court would come to the same conclusion is a totally separate one and, given that it would not be subject to the same political constraints as the Strasbourg Court, the answer cannot be assumed to be in the affirmative. Moreover, as for the *Wasa Liv* case, whilst domestic courts and tribunals will take into consideration the jurisprudence of the Strasbourg Court, indeed they are obliged to do so under the HRA,⁶² just like the European Court of Human Rights itself, they are not bound by any of its previous decisions. This was spelt out by Potter LJ in the following terms:

Since s. 2(1) of the HRA requires the court or tribunal to take into account the Strasbourg case law of the European Court of Human Rights (the Strasbourg Court) when determining a question which has arisen in connection with a Convention right, that case law provides a starting point for the domestic court or tribunal's deliberations and the court or tribunal has a duty to consider such case law for the purpose of making its adjudication. It is not bound to follow such case law (which itself has no doctrine of precedent) but, if study reveals some clear principle, test or autonomous meaning consistently applied by the Strasbourg Court and applicable to a convention question arising before the English courts, then the court should not depart from it without strong reason.⁶³

On balance, it is submitted that, like the Strasbourg Court, domestic courts will be reluctant for political reasons to reach a finding that a particular piece of tax legislation, even retrospective legislation such as a windfall tax, is in breach of

⁶⁰ (1988) 58 DR 163. In this case, which involved a challenge to a windfall tax on Swedish insurance companies, the Strasbourg Court dismissed the complaint as inadmissible.

⁶¹ Discussed earlier.

⁶² Section 2(1).

⁶³ *Han (t/a Murdishaw Supper Bar) v Customs and Excise Commissioners* [2001] EWCA Civ 1040, [2001] 1 WLR 2253 at p 2260.

Convention rights. It is likely that their unexpressed view would be that it should not be left to the courts to arbitrate on matters of tax policy, and an expressed conclusion could easily be reached on the grounds of the margin of appreciation and proportionality.⁶⁴

Indeed, this was exactly the position in *R (on the application of Professional Contractors Group Ltd v IRC)*,⁶⁵ a high-profile judicial review case arising in respect of the imposition of the notorious IR35 legislation relating to personal service companies. Companies subject to the IR35 regime are primarily one-man companies, which charge out the services of the owner ('the service contractor') to a client for fees paid by the client to the service company in circumstances under which the service contractor would be an employee of the client if he had provided the services directly to it. Out of this remuneration, the service contractor is paid a small salary, from which income tax and employers' national insurance contributions (NICs) are deducted, and the service company pays employers' NICs. From the balance will be deducted allowable expenses, and a substantial dividend out of the profit may eventually be paid to the service contractor which will not attract NICs, and in respect of which income tax will only be payable as and when the dividend is declared. Any retained profit will be assessable to corporation tax, but usually at the special low rate applicable to small companies. The aim of IR35 is to treat the fees as income from employment, with income tax and NICs being deductible.

The claimants' case was that a right to enjoy the benefit of a shareholding in a service company is a right of property and, by virtue of the IR35 legislation, there was an interference with the enjoyment of that right contrary to Article 1 of Protocol No 1 for two reasons. First, the imposition of income tax and NICs on the notional remuneration together with the way in which expenses are treated, meant that the 'right' was rendered more expensive. Secondly, the uncertainty as to whether a particular service contractor would be classified as an employee if he had rendered his services directly to the client, would result either in a loss of enjoyment of the shareholding or it put the very existence of service companies in jeopardy.

In holding the impact of IR35 was insufficient to amount to a breach of Article 1 of Protocol No 1, Burton J considered the Strasbourg jurisprudence in relation to the claimant's first argument, and, cited the conclusion of the Commission in *Svenska Managementgruppen AB v Sweden*⁶⁶ that:

A financial liability arising out of the raising of taxes or contributions may adversely affect the guarantee of ownership if it places an excessive burden on the person concerned or fundamentally interferes with his financial position. However, it is in the first place for the national authorities to decide what kind of taxes or contributions are to be collected. Furthermore the decisions in this area will commonly involve the appreciation of political, economic and social questions which the Convention leaves within the

⁶⁴ It is submitted that any challenge to the rumoured withdrawal of the capital gains tax exemption on principal private residences would fail on this ground.

⁶⁵ [2001] EWHC Admin 236; [2001] STC 629. A later appeal by the taxpayers did not concern the issue of human rights.

⁶⁶ (1985) 45 DR 211 at pp 222-223..

competence of the Contracting States. The power of appreciation of the Contracting States is therefore a wide one.⁶⁷

Accordingly, he concluded that even if the full amount of a service company's earnings (without any allowance for expenses) in a given year were treated as the remuneration of the service contractor, this would not amount to a confiscation of property, nor to a fundamental interference with the claimants' financial position, and nor would it amount to an abuse of the UK's rights to levy taxes.

As to the second argument relating to uncertainty, Burton J concluded that the effect of IR35 was to submit service companies to the same common law test of employment with respect to each engagement to which they would have been subject but for the interposition of the service company, and thus it could not offend against the concept of certainty for the common law of employment to apply to a service contractor. Bearing in mind the amount of publicity given to the IR35 legislation, and the furore with which it was met, the decision of Burton J, coupled with the fact that the claimants' chose not to appeal on the human right issue, demonstrates quite clearly how difficult it is likely to be to challenge successfully any particular aspect of tax policy, with the exception, perhaps, of legislation that could be said to be discriminatory.

Perhaps more so than any of the others, Article 14 has the greatest potential to cause a change in Government policy. Whilst there is no general prohibition on discrimination in the Convention, Article 14 requires that the enjoyment of Convention rights is to be secured without discrimination. In practice, this means that a claimant must plead a substantive right alongside discrimination. In the area of taxation, the substantive right that will most often be alleged to have been violated is Article 1 of Protocol No 1,⁶⁸ and although the connection between some substantive rights and Article 14 may be somewhat tenuous, the European Court of Human Rights has confirmed that the second paragraph of Article 1 of Protocol No 1 establishes that the duty to pay tax falls within its field of application.⁶⁹

In the spirit of legislation such as the Sex Discrimination Act 1975 and the Equal Pay Act 1970, it is difficult to understand how discrimination on the grounds of gender could possibly be justified in any circumstances. Since the beginning of the 1990s, successful attempts have been made to weed out such discrimination from the UK tax system. So, gone is the system whereby a married woman's income was treated as that of her husband's (and along with it has disappeared the wife's earned income allowance and the married man's allowance – so too the married couple's allowance that replaced it), and in its stead there is a single person's allowance. Nonetheless, a provision⁷⁰ (now also abolished with respect to deaths occurring after 5 April 2000⁷¹) that allowed for a widow, but not a widower, to claim a bereavement allowance, has

⁶⁷ [2001] STC 629 at p 648.

⁶⁸ See, for example, *R (on the application of Wilkinson) v IRC* [2002] EWCA Civ 814; [2003] 1 WLR 2683.

⁶⁹ *Derby v Sweden* 13 EHRR 774. This has since been followed in the domestic courts by *R (on the application of Wilkinson) v IRC* [2002] EWCH 182 (Admin); [2002] STC 347. The point was conceded before the Court of Appeal: [2003] EWCA 814.

⁷⁰ Section 262(1) ICTA 1988.

⁷¹ Section 34 FA 1999. The Welfare Reform and Pensions Act 1999 now provides for social security benefits which are available to both widows and widowers alike.

been the subject of two challenges under the Convention. In the first case, in order to avoid setting a precedent, the UK Government conceded the point and reached a 'friendly settlement' whereby the same amount was paid to Mr Crossland, the claimant widower, as would have been given to a widow.⁷² The second challenge arose in the wake of the Revenue's refusal to provide the same treatment for other widowers in the same position as Mr Crossland. In the High Court, Moses J held that it was clear that the difference between widows and widowers in relation to the widow's bereavement allowance constituted discrimination under Article 14 read with Article 1 of Protocol No 1 *in the absence of any objective justification advanced for such discrimination*.⁷³

The important issue of the margin of discretion (or appreciation) was discussed fully in another case concerning challenges in respect of certain types of widow's benefit and raising similar issues in relation to discrimination.⁷⁴ In that case, Moses J. sought to strike a balance between, on the one hand, the principle of equality between the sexes from which there should be departure only when there exist compelling reasons and the adoption of alternative measures that cause minimum interference to the right to non-discrimination and, on the other, the need to defer to Parliament in matters of social and economic policy. The weight of authority seems clearly to favour deference to Parliament, and was explained by Lord Woolf when, in relation to housing policy, he stated:

The economic and other implications of any policy in this area are extremely complex and far-reaching. This is an area where, in our judgment, the courts must treat the decisions of Parliament as to what is in the public interest with particular deference The correctness of this decision is more appropriate for Parliament than the courts and the Human Rights Act 1998 does not require the courts to disregard the decisions of Parliament in relation to situations of this sort when deciding whether there has been a breach of the Convention.⁷⁵

Moreover, the Strasbourg Court has also accepted the need to afford a wide margin of appreciation to contracting states in cases concerning social policy. Again in relation to housing policy, the Court has said:

In order to implement such policies, the legislature must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures. The court will respect the

⁷² *Crossland v United Kingdom*, 9 November 1999 (unreported). A similar set of events occurred in *Fielding v United Kingdom*, 29 January 2002 (unreported). Historically, this provision was introduced to compensate for the fact that if a husband died early in the tax year, his widow would only be entitled to a single person's allowance, whereas a husband would continue to receive the higher married man's allowance in the year of his wife's death. Moreover, it was extended in 1983 to the year of assessment following the year of death because, if a husband died towards the end of a tax year, a wife would often not have sufficient income in the remainder of the year to use the allowance in full.

⁷³ *R (on the application of Wilkinson) v IRC* [2002] EWHC 182 (Admin); [2002] STC 347.

⁷⁴ *R (on the application of Hooper & Ors) v Secretary of State for Work & Pensions* [2002] EWHC 191 (Admin); [2003] EWCA Civ 813; [2003] 1 WLR 2623.

⁷⁵ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 3 WLR 183 at p 202.

legislator's judgment as to what is in the general interest unless that judgment be manifestly without reasonable foundation.⁷⁶

Moses J also drew attention to the decision in *Petrovich v Austria*,⁷⁷ a case concerning parental leave payments to a man, where it was explained that a factor relevant to the scope of the margin of appreciation is the existence of common ground between the laws of the contracting states. Thus, the greater the disparity that exists between such states, the broader is the margin of appreciation.⁷⁸ In the end, however, Moses J concluded that:

it is neither possible nor productive to determine with any precision the degree of deference to be paid to the legislature when the issues concern social and economic policy and the constitutionally important right not to be discriminated against on the ground of gender⁷⁹

and felt that his task was simply the ordinary judicial one of subjecting to scrutiny the reasons advanced by the Government for the discrimination. He continued:

If the reasons advanced by the Defendant are insubstantial or, even if they are substantial, they do not persuade me, I shall decline to find any objective justification.⁸⁰

Using that reasoning, Moses J found that there was no objective justification for the discrimination resulting from the widow's bereavement allowance, and made a declaration of incompatibility, seemingly ignoring the fact that the legislation concerned could be justified on an historical basis⁸¹ and, moreover, had already been repealed. The point was not at issue in the Court of Appeal, where it was common ground that the offending provision was discriminatory, and the Revenue conceded that this discrimination fell within the ambit of Article 1 of Protocol No.1.⁸² Whilst this sounds hopeful for future claimants, the point should be made that, despite the finding by the judge, the taxpayer failed in his claim to be paid a sum of money equivalent to the allowance, on the basis that the Revenue had no power to make such a payment. This will be discussed below when considering tax administration. In the meantime, however, all that can really be said is that, whilst challenges to discriminatory tax legislation may be successful in terms of the willingness of the courts to accept that there has been a breach of a convention right, the real benefits may only be felt *in the future* by those similarly placed if the judgment weighs heavily on the conscience of the Government and Parliament agrees to amend the offending legislation.

⁷⁶ *Mellacher v Austria* [1989] 12 EHRR 391 at para 45.

⁷⁷ [1998] 4 BHRC 232.

⁷⁸ [2002] EWHC 182 (Admin) at para 105.

⁷⁹ *Ibid* at para 106.

⁸⁰ *Ibid*.

⁸¹ This provision was introduced to compensate for the fact that if a husband died early in the tax year, his widow would only be entitled to a single person's allowance, whereas a husband would continue to receive the higher married man's allowance in the year of his wife's death. Moreover, it was extended in 1983 to the year of assessment following the year of death because, if a husband died towards the end of a tax year, a wife would often not have sufficient income in the remainder of the year to use the allowance in full.

⁸² *R (on the application of Wilkinson) v IRC* [2003] EWCA Civ 814; [2003] 1 WLR 2683.

As to the scope of Article 14 as it might affect tax policy, it is possible that challenges could also be made on the grounds of the favourable tax treatment afforded to married couples, discrimination between similarly situated taxpayers and discrimination between employees and self-employed persons. As far as marriage is concerned, whilst UK legislation that provided for allowances discriminating between single and married people has been held not to be an infringement of the Convention on the grounds that it was within the discretion allowed to contracting states and that the distinction was objectively justifiable,⁸³ it remains to be seen whether the distinction will remain justifiable with the changing attitudes of society to marriage.

The issue has been recently tested in the context of Inheritance Tax (IHT), which allows for an exemption between spouses.⁸⁴ In *Holland v IRC*,⁸⁵ the Revenue accepted that marriage was a question of status within Article 14, and that the facts of the appeal fell within both Article 1 of Protocol No. 1 and Article 8 (right to respect for family and private life, discussed below), but the Special Commissioner dismissed the claimant's argument that, although she and the deceased were not legally married, they had lived together as husband and wife for thirty-one years before his death and so she should be treated as his spouse for IHT purposes. He held (*obiter*, since the HRA was not in force at the time of death) that it was permissible for Parliament to legislate for different tax provisions to apply to married persons, since this reflected the fact that marriage is accompanied by mutual rights and obligations between the spouses relating to maintenance both during their lives and after their deaths. That the claimant and her partner chose not to marry was entirely their decision; having made that decision, they had to accept the consequences.

It is, of course, quite possible that a single sex couple, living as though married, may seek to challenge the same legislation and may be successful since, in the UK in such a case, they would have no choice in the matter of marrying. Other legislation that could be the subject of a similar challenge is the Tax Credits Act 2002 which, whilst drawing no distinction between those who are married and those who are not, does not recognise single sex partnerships. It was to be hoped that this particular form of discrimination might soon be removed if the proposals which aim to permit the civil registration of single sex partnerships are carried into fruition.⁸⁶ Under these proposals, once a couple has registered its partnership, then certain rights that are currently afforded only to married couples, will also be available to single sex couples. Unfortunately, despite the fact that exemption from IHT is a key issue for many same-sex couples, the consultation document failed to address it (or, indeed, the further issue of tax credits). In its response, the Government merely paid lip-service to the problem, saying that the Budget process would take full account of the comments that had been received as part of the consultation process and their implications for the tax system.

It is possible that discrimination between similarly placed taxpayers could be the basis of a further challenge in respect of a windfall tax (already considered above in the

⁸³ *Lindsay v United Kingdom* (1997) 23 EHRR 199

⁸⁴ Inheritance Tax Act (IHTA) 1984, s 18.

⁸⁵ (2003) Sp C 350; (2003) Simons Tax Intelligence 62.

⁸⁶ The proposals were published in a consultation document, *Civil Partnership: a framework for the legal recognition of same-sex couples* DTI, June 2003. The Government's response to the proposals was published in November 2003.

context of Article 1 of Protocol No 1). If such a tax fell on one, or only some, of a number of companies in the same sector, it could be argued that it draws an arbitrary distinction between a similar group of taxpayers. It would, of course, be necessary for the claimant to prove such a similarity.

It is unlikely that the different tax provisions that apply to the employed⁸⁷ and to the self-employed⁸⁸ will ever be successfully challenged. One such provision permits employers to obtain a deduction for childcare expenses for employees as the provision of a benefit to its employees. Subject to certain conditions, an employee is not taxed on that benefit.⁸⁹ In contrast, self-employed persons can make no deduction for expenses incurred in respect of childcare. The taxpayer, a self-employed person, argued in *Carney v Nathan*⁹⁰ that the disallowance of such expenditure constituted discrimination within Article 14 in relation to Article 1 of Protocol No 1. Her argument was dismissed by the Special Commissioner, whose brief view was that the taxpayer, as a self-employed person paying childcare expenses for herself, was not in a similar situation to an employer paying for the employee. Given that the rules allowing for deduction of expenditure are generally more generous to the self-employed than to the employed, this must be seen as a pragmatic decision.

Although, in the context of taxation, Article 8 is inextricably linked with issues of compliance, and much of the case law concerns challenges against revenue authorities in respect of oppressive demands for information, it could well be that the future may also see challenges in respect of the legislation itself. The primary protection in Article 8 is that everyone is entitled to respect for his private and family life, his home and his correspondence. This does not provide a comprehensive privacy provision, and the right that is granted is subject to the strict limitations that any interference must be in accordance with the law, and necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the prevention of crime, the protection of health and morals and the protection of the rights and freedoms of others. Accordingly, legislation that gives authority to the Revenue, within limits, to secure information necessary for investigations into taxpayers' affairs, will generally be held inviolable on the ground of being in the interests of the economic well-being of the country.

Nevertheless, in one recent case concerning legal professional privilege,⁹¹ comments made by Lord Hoffman give an indication that that view may be changing. The issue in that case was whether the taxpayer was protected against a notice under section 20(1) of the Taxes Management Act 1970 requiring production of documents covered by legal professional privilege. The appeal to the House of Lords was concerned solely with the construction of the Act. However, in the event that the court should reach a finding unfavourable to the appellants, they put forward an alternative submission that the provision should be declared incompatible with Article 8. In the

⁸⁷ Income Tax (Earnings & Pensions) Act (ITEPA) 2003.

⁸⁸ Income and Corporation Taxes Act 1988, s 18.

⁸⁹ Income Tax (Earnings and Pensions) Act 2003, s 318.

⁹⁰ (2003) Sp C 347; (2003) *Simons Tax Intelligence* 33. In *X v Austria* (Application No 6163/73), the Austrian tax system allowed certain deductions only to employed persons and not to the self-employed. The European Commission rejected the admissibility of the complaint on the grounds that the difference in treatment was justified.

⁹¹ *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21; [2002] STC 786.

event, this proved unnecessary, but Lord Hoffman took the opportunity to pronounce on the human rights issue. Citing the European Court of Human Rights case of *Foxley v UK*,⁹² he confirmed that legal professional privilege is a fundamental human right, which can be derogated from only in exceptional circumstances, and he doubted that these exceptional circumstances would include the public interest in the collection of financial information by the Revenue. He concluded by saying that if new information-gathering legislation were to be passed, then any interference with privilege would have to be shown to have a legitimate aim which is necessary in a democratic society.⁹³ It should be noted that Lord Hoffman's words of caution are limited to an 'interference with privilege' and, as vitally important as that may be, would not have a more general effect of curtailing Revenue powers in the future.

Tax Administration

Even though a piece of tax legislation may be Convention-compliant, it does not necessarily follow that the rules administered thereunder are similarly compliant. It is submitted that it is in this area where the HRA will have its biggest impact but, as the decision in *R (on the application of Wilkinson) v IRC*⁹⁴ demonstrates, this is more likely to be the case where the issue concerns proceedings in tax fraud cases and penalties, rather than with discretionary decisions by either the Inland Revenue or Customs and Excise. In that case, having ascertained that the legislation in question was indeed incompatible with Article 14, the taxpayer argued that, first, the Revenue had the power to make an extra-statutory concession in his favour by way of an income tax deduction equivalent to the allowance in question⁹⁵ and, secondly, they were *obliged* to grant such a concession to the taxpayer pursuant to section 6(1) of the Human Rights Act 1998. This section provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. In respect of the first argument, the Court of Appeal reviewed the authorities dealing with both the extent of the Revenue's powers to care for, manage and collect, the various taxes,⁹⁶ and their ability to make extra-statutory concessions. Despite the fact that the Revenue proceed on the basis that they are vested with a wide managerial discretion to refrain from recovering taxes which are payable under a strict application of the relevant legislation,⁹⁷ there has for many years been some considerable debate about the basis upon which extra-statutory concessions are made,⁹⁸ the nature of that debate being summarised in the words of Scott LJ when he said:

⁹² [2001] 31 EHRR 637 at p 647.

⁹³ *Op. cit.* n 91 at p 796.

⁹⁴ [2003] EWCA 814; [2003] 1 WLR 2683 (discussed above in relation to legislation concerning the widow's bereavement allowance).

⁹⁵ The list of extra-statutory concessions published by the Revenue is introduced by an explanation of the term as "a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. Most concessions are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter." It should also be noted that, in addition to published concessions, *ad hoc* concessions are also given to individual taxpayers. .

⁹⁶ Section 1(1) Taxes Management Act 1970.

⁹⁷ *Op. cit.* n 94 at pp 2692-2697.

⁹⁸ See, in particular, the judgment of Walton J in *Vestey v Inland Revenue Commissioners (No 2)* [1979] Ch 198; David Williams, *Extra Statutory Concessions* [1979] BTR 137; John Booth, *The Inland Revenue: saint or sinner* (Lymington: Coracle, 2002) pp17-19.

No judicial countenance can or ought to be given in matters of taxation to any system of extra-legal concessions.⁹⁹

Although there has been a move to incorporate some of the published concessions into the legislation,¹⁰⁰ a huge number remain and form an important part of the tax system. One writer commented that “[O]ne day the court may have to decide whether it is theoretically possible to order the department to give the taxpayer the benefit of a concession, i.e. to make an assessment which is not in accordance with the law.”¹⁰¹ That was exactly the issue before the Court of Appeal in the *Wilkinson* case, and it reached the conclusion that it was not; the Revenue were not authorised to grant the taxpayer an extra-statutory allowance in the form of a tax reduction. Lord Phillips MR, on behalf of the whole court, said:

we do not see how section 1 of the TMA can authorise the Commissioners to announce that they will deliberately refrain from collecting taxes that Parliament has unequivocally decreed shall be paid ... because the Commissioners take the view that it is objectionable that the taxpayer should have to pay the taxes in question.¹⁰²

Although the conclusion reached in respect of the taxpayer’s first argument made the second argument untenable, the court nevertheless decided to deal with it briefly, and took the view that, had the Revenue the power to grant extra-statutory allowances to widowers to match the Widow’s Bereavement Allowance, then, since the HRA, they would have been *obliged* to exercise that power in order to avoid a breach of Convention rights.¹⁰³ In the event, they had no such power and, although the result was a breach of the HRA, the Revenue had a defence to that breach.¹⁰⁴

Moreover, the Court of Appeal was unable to accept the taxpayer’s final argument that, in the light of the friendly settlement of the *Crossland* case,¹⁰⁵ the Revenue’s refusal to make a settlement in similar terms had caused Mr Wilkinson to suffer a pecuniary loss that should be compensated by payment of damages. An award of damages is permissible under the HRA, but only if it is necessary to afford the claimant “just satisfaction.”¹⁰⁶ Lord Phillips MR opined that the widow’s bereavement allowance was “an anachronistic relic”¹⁰⁷ of a previous tax regime, which was no longer sustainable with the advent of independent taxation because it gave widows an unjustified advantage over widowers and, indeed, over all other taxpayers. Since the allowance had been abolished prospectively by the time the HRA had come into force, there was no reason to increase further the numbers of those to whom anomalous payments were being made. He therefore concluded that the principle of “just satisfaction” did not entitle Mr Wilkinson to compensation.

⁹⁹ *Absalom v Talbot* [1943] 1 All ER 589 at p 598.

¹⁰⁰ For example, a number were incorporated into the Income Tax (Earnings & Pensions) Act 2003.

¹⁰¹ John Tiley, *Revenue Law* (Oxford, Hart Publishing, 4th ed., 2000) at p 59.

¹⁰² [2003] 1 WLR 2683 at p 2697.

¹⁰³ This, in fact was the decision reached in *R (on the application of Hooper & Ors) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, where, despite the statutory provision of certain widow’s benefits, there also existed a common law power that enabled the Secretary of State to make benefits payments to widowers.

¹⁰⁴ Human Rights Act 1998, s 6(2)(b).

¹⁰⁵ *Op. cit.* n 72.

¹⁰⁶ Human Rights Act 1998, s 8(3).

¹⁰⁷ *Op. cit.* n 102 at p 2700.

It is quite clear that despite the elation from commentators following the decision of the Strasbourg Court in *Willis v The United Kingdom*,¹⁰⁸ decided after the *Wilkinson* case, in which it was held that the difference in treatment between men and women regarding entitlement to the Widow's Payment and Widowed Mother's Allowance (both social security payments) was not based on any objective and reasonable justification, and was therefore in violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No 1, this case will have little bearing on the issue under discussion. Whilst it is necessary to take the decision into account,¹⁰⁹ it carries little weight because it did not concern a tax allowance and, further, the UK did not deny its obligation to pay pecuniary compensation in that case, so that the principle of just satisfaction was not in issue.¹¹⁰ These differences will surely also be taken into account by the House of Lords when it eventually hears the *Wilkinson* appeal. It is submitted that the reasoning of the Court of Appeal was sound, and that the HRA cannot be a panacea for ill-founded claims against actions that can be historically justified.

This decision, albeit made in a particular context, must cause the whole question of the general operation of extra-statutory concessions to be re-opened, as the following example attempts to demonstrate. Taxpayer A, aggrieved that the Revenue have refused to grant him a concession previously granted to taxpayer B in similar circumstances, will either have no opportunity to challenge this discriminatory action, or will be unsuccessful in such a challenge. It now appears quite clear that no court will sanction the granting of an extra-statutory concession *in favour* of a taxpayer. Moreover, to maintain a successful challenge under Article 14, it has first to be decided if the claimant has been treated less favourably than others in relation to the enjoyment of a Convention right and, if he has, the grounds upon which he suffered discrimination have then to be determined. What has to be demonstrated is:

that the claimant is one of a class or group who share a distinguishing characteristic and that this characteristic is the ground upon which the State distinguishes against the members of the class or group.¹¹¹

This means that, unless an individual taxpayer can identify himself with a group being singled out for separate treatment, he will be unable to maintain a challenge under Article 14. Accordingly, any challenge by A will have to be made on the basis of requiring the Revenue to withdraw the concession granted to B, but this would be unsuccessful for two reasons. First, A cannot bring an action for judicial review because he has no sufficient interest or *locus standi* in the affairs of another taxpayer.¹¹² Secondly, section 7(1) of the HRA provides that a person who claims that

¹⁰⁸ 2002. The TaxZone Digest incorrectly reported that "the Inland Revenue was put to shame for its dreadful behaviour over not giving men and women equal treatment under the tax system," and commented that "there is expected to be a number of cases appearing in the European Court soon on the widow's allowance issue. Their chances of success were already great, but will have been bolstered by the *Willis* case." See TaxZone Digest, Issue 124 (17 June 2002) www.taxzone.co.uk and www.accountingweb.co.uk.

¹⁰⁹ Under the Human Rights Act, s 2.

¹¹⁰ See *R (on the application of Hooper & Ors) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813; [2003] 1 WLR 2623 at p 2678.

¹¹¹ *R (on the application of Hooper & Ors) v Secretary of State for Work and Pensions* [2003] 1 WLR 2623 at p 2658..

¹¹² One taxpayer has no sufficient interest to ask a court to investigate the tax affairs of another: *IRC v National Federation of Small Businesses Ltd* [1981] 2 All ER 93.

a public authority has acted in a way which is incompatible with a Convention right must be a *victim* of that unlawful act. It is suggested that this requirement is even stricter than that of *locus standi*, and that it would be difficult for A to argue that he was a ‘victim’ because the Revenue had exercised an extra-statutory concession in favour of B. In effect, this leaves the Revenue with a considerable amount of unchecked discretionary power.

In the future, taxpayers may have more success with challenges under Article 6, one of the cornerstones of the Convention, which entitles everyone in civil cases to a ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’ and, in criminal cases, to more generous rights such as a presumption of innocence, a right to be informed of the nature and cause of the charges (and to have the assistance of an interpreter if necessary), adequate time to prepare a defence and the right to secure the attendance of witnesses.

One of the main issues to arise is the extent to which tax-related obligations are within Article 6(1), which requires either that the ‘civil rights and obligations’ of the claimant must have been affected, or that he is the subject of a criminal charge. As far as ‘civil’ rights are concerned, Strasbourg jurisprudence indicates that a taxpayer’s obligations are outside the scope of Article 6(1) because they are public in nature. Thus it would appear that public law rights and obligations are not civil rights and obligations, whereas private law rights and obligations are. So, the obligations to make social security payments and to pay taxes are ‘public’ obligations since they derive from the citizen’s normal civic duties in a democratic society¹¹³ and any procedural dispute, for example, concerning the restriction of a right of appeal¹¹⁴ in respect of the payment of such taxes, will not fall within the scope of Article 6(1).

It should be noted that, in contrast, restitution proceedings for tax paid under regulations later declared invalid do involve the determination of the applicant’s civil rights because the action concerns a private law claim against the Revenue based on unjust enrichment.¹¹⁵ In such a case, where a taxpayer is given no right of appeal against a particular decision, or the right of appeal is so restricted that it is impossible to exercise, then Article 6(1) may be invoked. In *Ferrazzini v Italy*,¹¹⁶ a case in which the claimant alleged a violation of Article 6 on account of the length of tax proceedings to which he was a party, the majority of the European Court of Human Rights (sitting as the Grand Chamber of 17 judges, thus giving an indication of the importance of the issue) rejected the notion that the pecuniary nature of the claim was in itself sufficient to attract the applicability of Article 6(1) under the ‘civil’ head. Their view was that:

tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant.¹¹⁷

¹¹³ *Schouten and Meldrum v Netherlands* (1994) 19 EHRR 432.

¹¹⁴ *Eagerpath v Edwards* [2001] STC 26.

¹¹⁵ *National Provincial Building Society & Ors v United Kingdom* (1998) 25 EHRR 127; [1997] STC 1466 at p 1490.

¹¹⁶ [2001] STC 1314.

¹¹⁷ *Ibid* at p1320.

Nonetheless, there was a strong dissenting opinion from six members of the Grand Chamber, and an indication that the majority view might not hold sway in the future. The view was put that:

as long as a dividing line between “civil” and “non-civil” rights and obligations is maintained in respect of proceedings between individuals and governments, it is important to ensure that the relevant criteria for determining what is “civil” are applied in a logical and reasonable manner – and that may make it necessary from time to time to adjust the case law in order to make it consistent in the light of recent developments.¹¹⁸

Whilst the majority considered that there had been no major developments in the field of taxation concerning the nature of the obligations of individuals and companies since the time of the drafting of the Convention, in the opinion of Judge Lorenzen, whose dissenting judgment represented the views of all the dissenters, this was far from reality. Whilst it was clear from the travaux préparatoires relating to Article 6 that disputes between governments and individuals generally were intended to be excluded from its scope, the lack of any specific reference to tax matters resting on the perception at the time that they were based on strict legal rules rather than on the exercise of discretion, it was also evident that administrative disputes were not intended to be excluded forever from the scope of Article 6(1). The major development to have occurred since 1953 is the recognition in the majority of contracting states that fiscal matters can be decided in ordinary proceedings by a court or tribunal. The fact of development, together with the caveat in Article 1 of Protocol No 1 that permits states to take measures for the purpose of collecting taxes, it would be wholly unfounded to deny to applicants procedural protection in disputes on tax matters. For these reasons, the minority was of the opinion that there were no convincing arguments in favour of the proposition that proceedings concerning tax do not determine ‘civil rights and obligations.’ The fact that UK taxpayers are now referred to as ‘customers,’ perhaps signifying a change in the nature of the relationship between the taxpayer and the Revenue from a public to a private one, may add further fuel to the flame.

Whether the Strasbourg court would accept such an argument is doubtful, bearing in mind the breadth of jurisdictions it must serve. The real question is whether it would find favour with the domestic courts, and whether the HRA has, in any event, caused them to adopt a different approach to the Strasbourg jurisprudence. The signs have not been promising. Prior to the *Ferrazini* case, the Court of Appeal had indicated in an *obiter dictum* that a challenge to a restriction with respect to an appeal seeking recovery of overpaid tax¹¹⁹ did not concern civil proceedings for the purposes of Article 6(1).¹²⁰ More recently, a Special Commissioner applied the *Ferrazinni* decision in two cases before him. In one, he dismissed a claim by a personal representative that an appeal against a notice of determination to inheritance tax was not within a reasonable time of the death of the testator in 1993¹²¹ and, in the other, he held that the imposition of a non-criminal tax penalty relating to the late payment of tax was so closely related to tax itself that it was not within the taxpayer’s ‘civil rights

¹¹⁸ *Ibid* at p 1324.

¹¹⁹ Pursuant to the Taxes Management Act 1970, s 33.

¹²⁰ *Eagerpath v Edwards* [2001] STC 26..

¹²¹ *Taylor (personal representative of Sosnowski, deceased) v IRC* (2003) Sp C 363; (2003) Simons Tax Intelligence 948.

and obligations.¹²² Furthermore, one commentator has expressed the view that *Ferrazzini* “makes it very unlikely that article 6 will be held to apply to most proceedings before the Special or General Commissioners or the VAT and Duties Tribunal.”¹²³

However, it is submitted that in these instances, no consideration at all was given to the dissenting minority opinion in *Ferrazzini*; that it was so strong and so well reasoned is surely an indication of a possible shift in direction, and it is argued that it should form the basis of an argument in the domestic courts, particularly in the higher courts, in future cases. Indeed, *Ferrazzini* has been rejected in one case by the VAT and Duties Tribunal. In *N Ali & S Begum & Ors v Customs & Excise Commissioners*,¹²⁴ the tribunal had to consider the preliminary issue of the extent the human rights of a taxable or potentially taxable person under Article 6, prior to deciding whether the tribunal and its procedures afforded that person a fair and independent hearing by an independent tribunal. Recognising that it was required to take into account decisions of the Strasbourg Court, but that it was not bound by them, the tribunal held that the majority decision in *Ferrazzini* was not applicable since:

there is no place in the laws of any part of the United Kingdom for a “public law” relationship, distinct from civil law rights and obligations, between taxpayer (sic) and the tax authorities.¹²⁵

Preferring the view of the minority in that case, the tribunal therefore held that the obligations imposed by the VAT assessments, default surcharge assessments, misdeclaration, late registration and civil penalty notices and notices of requirement for security were within the scope of Article 6(1) although, in the event, it was decided that the tribunal was sufficiently independent and impartial to satisfy the requirement set out therein. Although this decision should be hailed as representing a sea change in approach since the HRA, whether it will be followed in cases before the Special Commissioners remains questionable, bearing in mind that the decision was emphatically limited to VAT. As the tribunal pointed out:

The rights and obligations under the VAT code, a product of EC law, were not within the contemplation of those who drafted the Convention.¹²⁶

Different considerations apply to penalty proceedings which, if they can be classified as ‘criminal proceedings,’ are subject to the more generous protection mentioned before. Thus, Article 6(2) confirms the principle of innocence until proven guilty, whilst Article 6(3) guarantees certain minimum rights to everyone charged with a criminal offence. A spate of relatively recent decisions has been concerned with the question of whether certain tax, and ostensibly civil, penalties give rise to criminal charges within the meaning of Article 6(1).

¹²² *Bancroft & v Crutchfield* (2002) Sp C 322; (2002) Simons Tax Intelligence 1153. Interestingly, the Special Commissioner was of the further view that, if he was wrong on the point, and that Article 6(1) was engaged, judicial review alone of the Revenue’s decision was a sufficient remedy to satisfy the HRA.

¹²³ Jeremy Woolf, *Human Rights One Year On* (2001) The Tax Journal, Issue 617, 7 at p 8.

¹²⁴ (2002) VAT Trib 176851; (2002) Simons Tax Intelligence 1675.

¹²⁵ (2002) STC 1675 at p 1676.

¹²⁶ *Ibid.*

That such a penalty could be criminal in nature was confirmed by the Strasbourg Court in *Georgiou v United Kingdom*,¹²⁷ and was applied in the High Court in *King v Walden*¹²⁸ where it was held that the system for imposing penalties for fraudulent or negligent delivery of incorrect tax returns was criminal for the purpose of Article 6(1) because the system was punitive. In *Han v Customs and Excise Commissioners*,¹²⁹ the Court of Appeal, in deciding that appeals against civil evasion penalties¹³⁰ were criminal proceedings for the purpose of the Convention, agreed that the concept of a 'criminal charge' within the meaning of Article 6 is an autonomous one, and applied three criteria previously enunciated by the Strasbourg Court for determining whether a criminal charge has been imposed.¹³¹ These are, first, the classification of the proceedings in domestic law, secondly, the nature of the offence and, thirdly, the nature and degree of severity of the penalty that the person concerned risked incurring. In applying these criteria, Potter LJ said that they should not be considered separately, but as factors weighed together to decide whether, taken cumulatively, the relevant measures should be treated as criminal, and he concluded that, when coming to such a decision the second and third factors should weigh heavier than the first.¹³²

In slight distinction, two more recent decisions of the Strasbourg Court have treated the three criteria as alternatives and not cumulative, unless an analysis of each did not make it possible to reach a conclusion as to the existence of a 'criminal charge'.¹³³ In any event, our own courts are of the view that categorisation of the proceedings in domestic law is not decisive of their nature, and provides only a starting point for the classification. Applying the criteria to the facts before them, the Court of Appeal was of the opinion that the national classification of the penalties as 'civil',¹³⁴ did not represent a decision on the part of the legislature to de-criminalise dishonest evasion of VAT. The relevant provisions applied in principle to all taxpayers and sought to punish, rather than compensate, Customs and Excise. Finally, it was sufficient that the penalty was substantial and its purpose was punitive and deterrent, and there was no requirement that it should involve imprisonment. Accordingly, looking at the substance rather than merely the form of the penalty, it was evident that it amounted to a criminal charge to which Article 6 applied. For its part, the Strasbourg Court has also taken the view that so-called 'civil' surcharges amounting to 20% and 40% of the increased tax liability were criminal for the purposes of Article 6.¹³⁵

It has already been noted that the importance of the question at issue in cases such as *Han* lies in the protection afforded to taxpayers by the various minimum rights provided for by Article 6(2) and (3). It is critical, then, to have some certainty on the matter, and yet there is none. In *N Ali and S Begum & Ors v Customs and Excise*¹³⁶

¹²⁷ [2001] STC 80. The penalty in question was for dishonest evasion in respect of undeclared output VAT, but it was decided that there had been no infringement of Article 6 rights.

¹²⁸ [2001] STC 822.

¹²⁹ [2001] STC 1188.

¹³⁰ Imposed pursuant to the Value Added Tax Act 1994, s 60(1).

¹³¹ In *Engel v The Netherlands*(1976) 1 EHRR 647.

¹³² *Op. cit.* n 129 at pp 1208-1209.

¹³³ See *Vastberga Taxi Aktiefbolag and Vulic v Sweden* (application no 36985/97) (final decision, 21.5.2003) and *Janosevic v Sweden* (application no 34619/97) (final decision, 23.5.2003).

¹³⁴ The classification came about through the implementation of the report of the Keith Committee, *Enforcement of Powers of Revenue Departments*, Cmnd 8822 (1983) and Cmnd 9120 (1984).

¹³⁵ *Op. cit.* n 139.

¹³⁶ *Op. cit.* n 130.

the VAT Tribunal concluded that serious misdeclaration penalties, default surcharges and late registration penalties were not criminal for the purposes of Article 6, a decision seemingly at odds with both the Strasbourg jurisprudence and the Court of Appeal. The Tribunal said that the penalties and surcharges in question had none of the characteristics of a criminal penalty, despite the fact that the 15% default surcharge appeared severe where the delay on payment was small,¹³⁷ and that the operation of the penalty regime under UK law adequately protected the rights of alleged defaulters, with no need for further safeguards.¹³⁸ What is not clear is whether the decision rests on the fact that the penalty was lower than in other cases, or on the fact that the Tribunal considered that the VAT system had inbuilt safeguards. If it is the former, then there needs to be spelt out with some precision how severe a penalty has to be before it metamorphosises into a ‘criminal charge;’ if it is the latter, then it is submitted that such a view may not withstand a review by the Court of Appeal.

The question that has to be asked is how are any future cases concerning penalties for misdeclaration, belated VAT registration, default surcharges, demand for security and refusal to restore seized excise, together with any future cases involving direct tax civil penalties, likely to be decided? This is surely one area where the HRA should have the greatest impact and yet, as both Potter LJ and Mance LJ said in *Han v Customs And Excise Commissioners*, there is unlikely to be any great change in existing procedures, provided all the necessary steps are taken to explain to the taxpayer his rights under the Convention and he is afforded his minimum rights under Article 6(3) (considered previously).¹³⁹ Certainly as far as Customs and Excise are concerned, this has proved to be the case, having amended their explanation to taxpayers involved in ‘civil’ investigations simply to confirm and explain the nature of a civil penalty.¹⁴⁰ In contrast, the Inland Revenue seems more aware of the possible impact of the HRA, and have issued guidance to their staff so as to avoid the possibility of infringing the taxpayer’s right of non-incrimination and right to silence.¹⁴¹ These particular issues will be discussed below, but it should be noted that the Revenue did not concede that their civil penalties were criminal in nature, but said that “it is not clear.”

The question of whether evidence obtained during interview or by way of disclosure breached the taxpayer’s right to silence and the right of self-incrimination were not resolved in the *Han* case, which the Court of Appeal recognised could only be dealt with by individual rulings by the VAT and Duties Tribunal in the light of the decision in *Han*. The issues concerning the invitation to cooperate with Customs and Excise, and subsequent disclosure of information, are at the heart of the civil evasion penalty regime, and similar considerations apply to the Revenue’s Hansard interview procedure. This procedure is adopted by the Revenue in cases of serious tax fraud, and permits the Board to accept a money settlement in lieu of instituting criminal proceedings in respect of the alleged fraud. Prior to recent changes made to the

¹³⁷ See also *Bancroft & Another v Crutchfield* (2002) Sp C 322; (2002) Simons Tax Intelligence 1153, where the late payment surcharge of 5% of unpaid tax under the Taxes Management Act 1970, s 59C was thought not to be sufficiently severe to constitute a criminal charge.

¹³⁸ *Ibid* at p 1677.

¹³⁹ *Op. cit.* n 129 at pp 1214, 1214-1215.

¹⁴⁰ HM Customs and Excise, *Civil Penalties: Fixed, geared and daily*, Notice 209 (December 2002).

¹⁴¹ Inland Revenue, *Guidance to Inland Revenue Staff on Human Rights and Penalties*, issued to Inland Revenue staff on 11 September 2002.

procedure, no undertaking was given that such a settlement would be accepted even if the taxpayer had made a full confession, and the Revenue's decision to exercise its discretion in favour of the taxpayer would have been influenced by the amount of co-operation given by him. In these circumstances, the taxpayer may well argue that his right to a fair trial has been breached because, by providing sensitive information under threat of a penalty, he has been forced to incriminate himself.

In *R v Allen*,¹⁴² a taxpayer charged with cheating the Revenue sought to have certain evidence, provided during a Hansard interview, excluded by relying on the privilege against self-incrimination. Although the House of Lords held that it was not necessary to consider the alleged breach of Article 6 because the HRA was not in force at the relevant time and it did not have retrospective effect, it nonetheless considered the issue. Confirming that the right to silence and the right to not incriminate oneself are "generally recognised international standards which lie at the heart of a notion of a fair procedure under Article 6," in Lord Hutton's opinion, to the extent that there was inducement to provide information contained in the Hansard procedure, it was to give true and accurate information to the Revenue. In *Allen*, the defendant failed to respond to the inducement and gave false information. Accordingly, his argument that he was induced to provide certain information to the Revenue by hope of non-institution of criminal proceedings by them, and that its provision was therefore involuntary and a breach of Article 6(1) was rejected. However, Lord Hutton concluded that, if true and accurate information is disclosed during the Hansard procedure, a taxpayer would have a strong argument that the criminal proceedings were unfair.¹⁴³

In the light of Lord Hutton's concluding words, changes have now been made to the Hansard procedure. As a consequence, a taxpayer making a full confession under this procedure is now assured that the Revenue will not pursue a criminal prosecution; the discretion previously enjoyed by the Revenue as to the course of action it would take following such a confession has effectively been removed. However, in addition to giving both a full and complete confession, the taxpayer must also offer full co-operation during the investigation, including the giving of full facilities for investigation into his affairs, and for the examination of such books, papers, documents or information as the board may consider necessary. Without such co-operation, the taxpayer remains at risk of prosecution. In addition, to avoid any further possibilities of infringing the taxpayer's rights under Article 6, as previously mentioned, the Revenue have also issued guidance to their staff,¹⁴⁴ a clear indication that the Revenue is taking the HRA seriously.

Just as the changes to the Hansard procedure were a direct result of the HRA, so also is the fact that taxpayers suspected of fraud must now be interviewed under caution. The Revenue had always maintained that the Hansard interview was part of a civil

¹⁴² [2002] 1 AC 509.

¹⁴³ *Ibid* at p 546.

¹⁴⁴ *Op. cit.* n 55. Under these guidelines, Revenue staff must make the taxpayer fully aware of (i) the need to provide information; (ii) the penalties that may attach if this is not done; (iii) the formal powers that can be used to obtain the necessary information should the taxpayer be unwilling to answer questions directed to him; (iv) the fact that the extent to which the taxpayer has freely and fully offered information may be taken into account in calculating the penalty; and (v) the fact that, in the event that the Revenue are unable to agree with the taxpayer, information or documents provided during the enquiry may be used in any appeal proceedings.

process, designed to gather in money, and was not a criminal investigation. However, in *R v Gill and Gill*,¹⁴⁵ taxpayers charged with cheating the Revenue challenged the use made of answers given by them during the Hansard opening interview. The Court of Appeal held that tax fraud involves the commission of a criminal offence or offences, with the result that the investigating of tax fraud must involve the investigation of a criminal offence. Accordingly, the provisions of the Police and Criminal Evidence Act 1984 applied to the Hansard interview, which involves the need to caution the taxpayer and to make a tape-recording of the interview.¹⁴⁶ Despite this, the court held further that, on the facts of the case, the admission of the evidence provided during the Hansard investigation would not have had such an adverse effect on the fairness of the proceedings that the court ought not to have admitted it. Although it was thus possible that the Revenue could have continued as normal using the new Hansard procedure introduced as a result of *R v Allen*¹⁴⁷ with the hope of surviving any subsequent challenge on the lines of *Gill and Gill*, the Revenue have now started to interview under caution, and to tape those interviews. Whilst this must be seen as a positive step towards the ‘fairness’ that is implicit in Article 6, the result must mean that taxpayers will need to be legally represented at all stages of a Hansard investigation, thereby increasing the taxpayer’s costs even further.

CONCLUSION

European Community law has applied in the UK for three decades, but it is only relatively recently that its implications for income tax and corporation tax have begun to be understood.¹⁴⁸ The Human Rights Act 1998 has been in force for only three and a half years, and it is still too early to predict what future courts, particularly the House of Lords, will make of challenges by taxpayers. Since October 2000, there have been a sufficient number of tax cases before the domestic courts in which a breach of Convention rights has been alleged, for there to be no doubt that taxpayers are just as able to mount challenges under the HRA as, say, a person claiming wrongful imprisonment. The difference is, however, that taxpayers have enjoyed far fewer successes than other types of claimants, particularly when the challenge is in respect of a statutory provision. In this context, then, the future looks bleak for taxpayers. Thus, there has been much media speculation that the UK Labour Government is to abolish the CGT relief afforded to gains arising from the disposal of “the principal private residence.”¹⁴⁹ This measure could theoretically be challenged as a breach of Article 1 of Protocol No 1, on the basis that the property was bought in the belief that, when it was sold, no CGT would be chargeable; any CGT eventually charged would, in effect, amount to retrospective taxation. The important question is whether, on the principles discussed in this paper, such a challenge would be successful. The discussion surrounding the proposed windfall tax suggests that, just like the Strasbourg Court, any domestic court will be reluctant to arbitrate on matters of tax policy and, in finding no breach, will formulate their decision on the basis of the wide

¹⁴⁵ [2003] EWCA Crim 2256;

¹⁴⁶ This is in contrast to the views of Potter LJ and Mance LJ in *Han v Customs and Excise* [2001] STC 1188 at pp1213,1214.

¹⁴⁷ *Op. cit.* n 142.

¹⁴⁸ See, for example, *ICI v Colmer* [1999] 1 WLR 2035.

¹⁴⁹ First reported in May 2003, Jennifer Adams, www.taxationweb.co.uk. Further reports followed, for example, see Robert Watts and Francis Elliott, *Chancellor looks at 40 per cent tax on all home sales*, *The Sunday Telegraph*, October 20 October, 2003, and Robert Watts, *Brown ponders plans to tax all house sales*, *The Daily Telegraph*, 20 October, 2003.

margin of appreciation afforded to the Government, and argue that the measure is in proportion to the needs of a democratic society. Only in very exceptional cases will the courts be willing to hold that a measure is not proportionate.¹⁵⁰

Challenging discretionary actions taken by the Revenue may also prove to be either difficult or impossible as an analysis of *R (on the application of Wilkinson) v IRC*¹⁵¹ has revealed. And perhaps that is all justifiable for, in the end, what is trying to be secured is a balance between the interests of the whole community and the protection of individual fundamental rights. It is all too easy to support the ‘little’ taxpayer against the might of the Revenue and Customs and Excise, departments universally loathed and vilified, sometimes without justification. The courts and tribunals, on the other hand, can look at the matter with dispassion, and can identify with relative ease those cases in which the taxpayer is simply jumping upon the ‘human rights bandwagon.’ However, when it comes to matters that are more in line with the original aims of the European Convention on Human Rights, for example, the presumption of innocence and the right to a fair trial, it has been shown that the domestic courts are more willing to consider holding both the Revenue and Customs and Excise to account, even to the extent of departing from the Strasbourg jurisprudence in holding that tax matters are not purely ‘public’ but are ‘civil’ for the purposes of Article 6(1). It is to be hoped that the courts will be rigorous in continuing to ensure that a taxpayer is treated as fairly as an ordinary criminal when being investigated in relation to serious fraud, and that any further attempt to infringe professional privilege will be held to be totally incompatible with Convention rights.

¹⁵⁰ As did the Strasbourg Court in *Darby v Sweden* (1991) 13 EHRR 774.

¹⁵¹ [2003] EWCA Civ 814; [2003] 1 WLR 2683.