UNITED KINGDOM

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I. INTRODUCTION

Discussion of the application of the European Convention on Human Rights (ECHR or "the Convention") to tax matters in the United Kingdom can be divided into two periods of time: prior to 2 October 2000, and subsequent to that date. 2 October 2000 is the date on which the Human Rights Act 1998 went into force and incorporated certain of the Articles of the ECHR into UK domestic law. This has meant that articles of the Convention can now be raised directly by taxpayers in tax appeals and has resulted in a flourishing of case law on the application of the Convention to tax matters.

The United Kingdom was the first country to ratify the ECHR on 8 March 1951.[1] However, at that time the decision was taken not to incorporate the Convention into UK domestic law. As a country which follows the dualist approach to international law, treaties do not create rights for persons or become justiciable in the UK courts unless the treaty is incorporated into domestic law by legislation. In 1951 the view seems to have been that the existing legal systems of the United Kingdom provided adequate protection for persons, and there was no need to incorporate the Convention into domestic law.

This policy was challenged subsequently, and in 1997 the Labour Party included as a manifesto commitment for the election of that year that they would incorporate the Convention into domestic law. Following their election, they did so by the Human Rights Act, which was enacted on 9 November 1998 and went into force on 2 October 2000.[2]

II. THE PERIOD BEFORE 2 OCTOBER 2000

Though the decision not to incorporate the Convention into domestic law meant that individuals could not rely on it directly before the UK courts, there were occasions when taxpayers (appearing in person) tried to rely upon the Convention. For example, in *Oxhey (Collector of Taxes) v. Raynham*[3] the taxpayer said that he had withheld payment of tax as a matter of conscience, and relied on Article 9 of the ECHR. The judgment of the County Court judge merits quotation in full:

> His Honour Judge Sir Ian Lewis: "Mr. Raynham submits that he is not bound to pay taxes because of Article 9 of the European Convention on Human Rights to which this country is a signatory. He says that his conscience does not allow him to give any support or assistance to the Crown. When I asked him he was bold enough to submit that if his conscience told him so, he would be entitled to rely on Article 9 to disobey any of the laws of this country. Mr. Raynham made those submissions but cited no authority and adduced no evidence in support of them.
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> Mr. Mehta appearing for the Collector of Taxes agreed that this country was a signatory to and had ratified the Convention which came into force on the 3rd September 1953. He relied, however, on *R v. Chief Immigration Officer, ex parte Salamat Bibi* [1976] 1 WLR 979 and in particular on the dicta of Lord Denning MR, Roskill and Geoffrey Lane LJJ. to submit that the Convention was not part of the law of this country. From those judgments, it is clear to me that the Convention is not part of the law of this country but it may be referred to when there is any ambiguity or uncertainty in domestic law. To my mind there is no ambiguity in the tax legislation. Section 4 of the Income and Corporation Taxes Act 1970 is quite explicit as to the circumstances in which tax is due and payable. Further, Mr. Raynham agrees that he has not appealed against the assessments. In my judgment, Mr. Raynham's case falls there. However, in deference to Mr. Mehta's researches, I would go on to say that in my view the Convention has to be read as one with the First Protocol thereto which this country ratified on the 3rd November 1952. Articles 1 and 5 of that Protocol make it clear that even under the Convention this country is entitled to levy taxes.
>
> Finally, I would add, though having regard to my decision what I say is obiter, that even if Article 9 applied as law, it is clear to me that it is wholly inapplicable in its wording to the present case. Put simply, the position is as has been said 'Render unto Caesar the things which are Caesar's, and unto God the things that are God's'. Mr. Raynham's application fails."

In *Sweeney v. Maidstone General Commissioners*[4] the taxpayer appealed against an award of penalties against him on the grounds that the refusal to grant him an adjournment or to grant him legal aid had infringed his rights under the ECHR. Peter Gibson J dismissed the appeal:

> This is an appeal by Mr. Kevin Sweeney (the taxpayer) […] He gives as his grounds for requesting an adjournment:
> (1) that he has not had adequate facilities for the preparation of his case – and he refers to Article 6(1)(b) of the European Convention on Human Rights (but I think he means Article 6(3)(b)) as ratified by the British Government in 1966 [sic] – and

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1. The United Kingdom has also ratified the following Protocols on the following dates:

1st Protocol	3 November 1952
2nd Protocol	6 May 1963
3rd Protocol	6 May 1963
4th Protocol	Signed but not ratified
5th Protocol	24 October 1967
6th Protocol	20 May 1999
7th Protocol	Neither signed nor ratified
8th Protocol	21 April 1986
9th Protocol	Neither signed nor ratified
10th Protocol	9 March 1993
11th Protocol	9 December 1994
12th Protocol	Neither signed nor ratified

2. The delay in implementation was due largely to the need to train the judiciary and others in the application of the ECHR.
3. (1983) 54 TC 779 (Weston Super-mare County Court, 27 July 1983).
4. [1984] STC 334.

(2) that he has not been granted legal and financial assistance for the purpose of this case, pursuant to Article 6(1)(c) of the European Convention on Human Rights (and again I think he means Article 6(3)(c)).

[…]

So far as he seeks to rely on provisions of the European Convention, it is trite law that the effect of that Convention is not justiciable in the Courts. Further, the provisions that he relies on relate to criminal proceedings, and although these are proceedings in respect of penalties they are not criminal proceedings.[5]

Leaving aside these attempts by litigants in person to rely upon the ECHR, there were two valid legal bases (prior to the incorporation of the Convention into domestic law by the Human Rights Act) on which reference could be made to the Convention.

The first basis – referred to in *Oxhey v. Raynham* – derived from the rule of statutory interpretation that, in enacting legislation, Parliament is presumed to intend to act consistently with the United Kingdom's obligations under international law. Ratification of the ECHR imposed an international law obligation on the UK government, and so legislation should be read consistently with the Convention. However, this principle would only apply if the legislation was unclear or ambiguous: if the legislation was clear – even if it was clearly contrary to the Convention – then it had to be applied. Thus, only if it was possible to show an ambiguity in tax legislation would it be possible to refer to the Convention on the basis that an interpretation consistent with the Convention should be adopted.

One sees this strict approach being applied even at the beginning of 1999 (after the Human Rights Act had been enacted, but before it came into force). In the case of *Commissioners of Customs & Excise v. Harris*[6] the Commissioners appealed against an award of costs to the respondent. He sought to rely upon the ECHR. The Divisional Court rejected the application of the Convention:

On behalf of Mr. Harris, Mr. Clompus has repeated those submissions in this Court together with further argument relating to the applicability of the European Convention on Human Rights […]

Having drawn attention to those provisions in the European Convention on Human Rights upon which his submissions were based, Mr. Clompus very properly accepted that these would only come into play in his favour in the event that this Court came to the conclusion that there was an ambiguity or uncertainty in the relevant statutory provisions which made it appropriate to have regard to the Convention as a guide to interpreting the statutory provisions in question. He accepted that the Convention does not form part of the domestic law of this country at present and will not do so until the Human Rights Act 1998 is brought into force, presumably in the year 2000.

In my judgment, there is no ambiguity or uncertainty in the statutory provisions in question. Accordingly, this is not a matter in which this Court can have regard to the provisions of the Convention as an aid to construction. In those circumstances, it is not necessary to go into the merits of Mr. Clompus' submission that the legislation in question should be construed by reference to the rights enshrined in Article 6 of the Convention.

There does not appear to have been any reported case in which a UK court found a provision of tax legislation to be uncertain or ambiguous and relied upon the ECHR as an aid to interpretation.

The second legal basis upon which reference might be made to the Convention was via the route of European Community law. On a number of occasions UK courts or tribunals dealing with VAT or excise duties referred to the ECHR as part of Community law.

In the case of *Hodgson v. Commissioners of Customs & Excise*[7] the appellant challenged a penalty of GBP 250. The penalty was imposed on him on grounds that an amount of hand-rolling tobacco, which he had imported into the United Kingdom, was imported for a commercial purpose. The appellant argued that he was entitled to the fair trial rights in Article 6(1) of the ECHR. The VAT & Duties Tribunal approached the applicability of the Convention as follows:

[18] So far as United Kingdom law is concerned it is well-established that the Convention is not part of our law and the courts have no power to enforce Convention rights directly; though the Convention may be deployed for the purpose of resolving an ambiguity in UK law. See *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 per Lord Bridge at page 747g and Lord Ackner at page 760g. The Convention is nonetheless relevant to the present issue. If the Community law rights conferred on Mr. Hodgson by the Excise Directive[8] include the right to a 'fair trial' conferred by Article 6.1 of the Convention, then on that ground also the *Customs & Excise Commissioners v. Carrier*[9] construction of Article 5.3 will be incompatible with Mr. Hodgson's Community law rights. In this connection we record that the ECJ has held that fundamental rights form part of the general principles of law the observance of which the ECJ ensures. The Convention has special significance in determining such rights, though it is not the only source from which such rights have derived. The Court has further held that 'the Community cannot accept measures which are incompatible with the observance of human rights thus recognised and guaranteed': see *Elliniki Radiophonia Tileorassi Anonimi Etatria v. Dimotiki Etairia Pliroforissis* [1991] ECR I 1-2925 at paragraph 41.

The VAT & Duties Tribunal similarly applied the Convention as part of European Community law in *Formix (London) Ltd. v. Commissioners of Customs & Excise*,[10] in *Edwards v. Commissioners of Customs & Excise*[11] and in *Yates v. Commissioners of Customs & Excise*.[12] In the litigation involving *Marks & Spencer plc v. Commissioners of Customs & Excise*[13] issues of the Convention were run

5. The penalties were fixed penalties for failing to comply with notices requiring the taxpayer to make returns. It is probably correct that they are not criminal for Convention purposes.
6. Queen's Bench Divisional Court, 29 January 1999 (CO/3875/98).
7. [1996] V&DR 200.
8. EC Council Directive 92/12/EEC.
9. [1995] 4 All ER 38.
10. Case No. 15241 (LON/97/882), decision of 13 November 1997.
11. Case No. 16245 (LON/93/2423), decision of 24 August 1999.
12. Case No. 16760 (LON/00/455), decision of 27 July 2000.
13. See [1999] STC 205 and [2000] STC 16.

alongside arguments based upon general principles of Community law.

In a number of cases arguments based upon the ECHR were addressed to the VAT & Duties Tribunal, but the Tribunal found it unnecessary to apply the Convention since the matter could be resolved by application of Community law: see *Widnell Group v. Commissioners of Customs & Excise*[14] and, especially, *Coleman & Others v. Commissioners of Customs & Excise*.[15]

The application of the Convention as part of Community law only arose in connection with VAT, customs duties and excise duties. In a few cases, the Convention was referred to in direct tax cases as well.

In *Hillsdown Holdings plc v. Inland Revenue Commissioners*[16] the taxpayer sought to rely upon Article 1 of the First Protocol to the ECHR. In *R. v. Inland Revenue Commissioners ex parte Banque Internationale à Luxembourg SA*[17] the question arose whether notices addressed to a third party bank to disclose information concerning the affairs of a number of its customers infringed their right to privacy under Article 8 of the Convention. Lightman J held that the notices impinged on confidentiality and the right of privacy but that there was ample justification for the notices under Article 8(2). He said:

> … the notices were issued according to law, in pursuit of a legitimate aim and necessary in a democratic society for protecting the taxation system and revenue. The size and sophistication of the tax avoidance schemes in question and what appears to the inspector to have been the dubious (if not dishonest) character of the devices employed required him to take the immediate remedial action, which the legislature in section 20 provided for in this situation. The decisions of the European Court of Human Rights in *Funke v. France* (1993) 16 EHRR 297 and in *Chappell v. United Kingdom* (1989) 12 EHRR 1 amply support the existence of the required justification in this case.

Prior to 2 October 2000 it was strictly the case that the Convention could only be referred to either under the principle of statutory interpretation or as part of Community law. However, as the implementation of the Human Rights Act approached, some courts and tribunals began to apply the Convention as if it was already part of UK law. The courts appreciated that it was only a matter of time before the Convention became part of domestic law and that if any appeal was made against their decision it would in all probability be heard after the Convention was part of domestic law. In *Ellinas, Ellinas & Ellinas (trading as Hunts Cross Supper Bar) v. Commissioners of Customs & Excise*[18] the Commissioners applied to exclude evidence which might identify an informant on grounds of public interest immunity. The Tribunal concluded that the exclusion of the evidence would not infringe the right to a fair trial under Article 6 of the ECHR. In *Anchor Foods Limited v. Commissioners of Customs & Excise*[19] the VAT & Duties Tribunal considered Article 6(1) of the ECHR in deciding whether it had jurisdiction to review a requirement to provide security as a substantial restriction on the right of access to the courts. The Tribunal added[20] that the same result could have been reached by reference to the Community law principles of effectiveness and proportionality.

Finally, one might note that in a number of cases, of which an example is *Power v. Commissioners of Customs & Excise*,[21] the VAT & Duties Tribunal decided that it should hold a hearing in public so as to comply with the provisions of Article 6 of the ECHR.

Before turning to the period after the Human Rights Act came into force, one might mention that during this earlier period (before the Act came into force) at least twenty-eight cases involving UK taxation were decided by the European Commission of Human Rights (ECnHR) or the European Court of Human Rights (ECtHR).[22]

III. THE PERIOD SUBSEQUENT TO 2 OCTOBER 2000

The entry into force of the Human Rights Act on 2 October 2000 marked a new era for human rights protection in the United Kingdom. The Act meant that it was possible to introduce arguments based upon the ECHR directly in UK courts and tribunals in a way that had not previously been possible. Human rights arguments have subsequently been raised on a number of occasions in tax tribunals or courts dealing with tax matters. There have been at least twenty-six reported cases dealing with taxation and human rights since the Act went into force.

Because it had not been possible, by and large, to raise human rights points in UK courts before 2 October 2000, a number of these recent cases had to deal with quite basic issues which might have been resolved earlier had the Convention been applicable in domestic law. Examples are the applicability of Article 6 to tax proceedings and, in particular, which (if any) of the tax penalties constitute criminal charges for the purposes of that article.

The following sections examine the case law of the last year under the different articles of the ECHR and the First Protocol.

14. Case No.15170 (LON/97/1914), decision of 7 October 1997.
15. [1999] V & DR 133. This was also the case with the litigation involving the Building Societies Ombudsman Company: see *R. v. Customs & Excise Commissioners, ex parte Building Societies Ombudsman Company Limited* [1999] STC 974.
16. [1999] STC 561.
17. [2000] STC 708 at 723b to e.
18. Case No.15346 (MAN/90/692), decision of 11 February 1998.
19. Case C00100 (LON/94/7043), decision of 16 July 1999 – there is further litigation in this matter reported in [1999] 3 All ER 268.
20. At paragraph 142.
21. Case No.16748 (LON/98/1155), decision of 20 July 2000.
22. These cases are all identified in Table 1 to the article on "Taxation and the European Convention on Human Rights" [2000] *BTR 211* and 40 *European Taxation* 8 (2000), p. 298.

IV. JURISPRUDENCE (AND DOCTRINAL WRITINGS) ON THE PRINCIPAL ARTICLES OF THE CONVENTION RELEVANT TO TAXATION

A. Article 1 of the First Protocol (protection of property)

The protection of property has been raised in a number of tax cases since 2 October 2000. This includes a recent decision of the House of Lords.

Article 1 of the First Protocol was raised (together with extensive arguments based upon European Community law) in the case of *R (on the application of Professional Contractors Group Limited & Others) v. Inland Revenue Commissioners.*[23] The issue in that case concerned new legislation introduced in the Finance Act 2000 which placed a number of self-employed individuals on a similar basis for tax purposes as employed individuals. (This legislation was preceded by a Press Release numbered "IR35" and the litigation is often referred to as "the IR35 case".)

The argument based on the First Protocol was that the new legislation made it more expensive for the individuals to exercise their activities through a service company because its effect was to impose a higher charge to tax. It also made the tax position more uncertain since the question would need to be addressed whether or not the individual would have been an employee if he had provided services directly to his client. This in turn raised quite difficult issues of law as to whether an individual would be self-employed or an employee.

The arguments based on Article 1 of the First Protocol were rejected by Burton J.[24] The additional tax costs were not so severe as to amount to a de facto confiscation of property or to a fundamental interference with the financial position of the taxpayers, or an abuse of the United Kingdom's right to levy taxes. On the issue of uncertainty, the UK law on the question whether an individual is employed or self-employed is the common law based upon precedents: Burton J did not consider that this created unacceptable uncertainty in the application of the tax law.

The argument based upon uncertainty in the law is particularly interesting. There is authority from the ECtHR that the rule of law requires that an individual should be able to know with certainty what his legal position is.[25] This may be an area where there will be developments in future years: no one would realistically deny that there are major areas of UK tax law where the legal position is far from certain and the taxpayer – even with the help of professional advice – may have difficulties in determining his liability.

The House of Lords case which considered Article 1 of the First Protocol was *R v. Dimsey*.[26] This was an appeal to the House of Lords arising out of a conviction in a criminal court for defrauding the Inland Revenue. One of the charges was that the defendant had failed to submit tax returns for certain companies which were resident in the United Kingdom (though incorporated abroad). An argument was raised on appeal against the convictions that anti-avoidance legislation in Sec. 739 of the Income and Corporation Taxes Act 1988 deemed the income of such companies to be the income of the UK residents who had established the companies. On the basis that the income was deemed to be the income of the individuals, the argument ran that the income could not also be that of the companies, so the companies had no corporation tax liability to be declared. This rather sophisticated argument did not appeal to the House of Lords.

The argument based upon Article 1 of the First Protocol was that, if the income was both deemed to be that of the individuals and also the income of the companies, there was double taxation. The House of Lords considered that an interpretation of Sec. 739(2) to the effect that the income was both deemed to be the income of the individuals and remained the income of the companies was well within the margin of appreciation allowed to states in respect of tax legislation under Article 1 of the First Protocol. There was no reason to disturb the conviction on this ground.

One area where Article 1 of the First Protocol has been raised in a number of cases has concerned the seizure of goods for non-payment of excise duties and the forfeiture of vehicles in which such goods had been imported.

An example is the decision of the VAT & Duties Tribunal in Edinburgh in *Speyside Bonding Company Ltd v. Commissioners of Customs & Excise.*[27] In that case, the appellant supplied a quantity of goods subject to excise duty to a customer with whom there was an existing arrangement – approved by the Commissioners of Customs & Excise – to defer payment of excise duty until the goods were sold by the customer. However, the customer's approval was subsequently revoked by the Commissioners, the goods were seized from the customer, and the appellant was assessed to payment of the excise duty which should not have been deferred. The appellant argued that the seizure of the goods was a breach of their right to property. The Tribunal rejected this argument on the grounds that the goods were not in the possession of the appellant when they were seized so there could not be any infringement of their right to property. The Tribunal referred specifically to the second paragraph of Article 1 which permitted legitimate measures to secure the collection of tax.

The United Kingdom has a major problem of bootlegging: that is, individuals purchasing goods in other European countries – mainly France and Belgium – and then bringing these goods back to the United Kingdom and selling them. The levels of excise duties in Continental Europe are significantly lower than they are in the United Kingdom; goods imported and sold in this way damage the UK Government's revenue from excise duties. Travellers to Continental Europe are entitled to bring back goods bought abroad provided they are not imported for commercial use: that is, in particular, they are not imported for

23. [2001] EWHC Admin 236; [2001] STC 629: Queen's Bench Division, Administrative Court.
24. See paragraphs [38] to [51] of the judgment.
25. See, especially, *Sunday Times v. United Kingdom* (1979 – 1980) 2 EHRR 245, p. 271.
26. [2001] UK HL 46; [2001] STC 1520. See also the related decision in *R v. Allen* discussed under Article 6 below.
27. Case No. E00164 (EDN/00/8003), decision of 17 July 2001.

sale. The Customs & Excise have indicative limits of the amount of alcohol and tobacco which a traveller might be expected to bring in for personal use. Where an individual imports more than that amount, the goods are liable to forfeiture and – particularly relevant to this point – any vehicle in which the goods were transported is liable to confiscation and will only be returned to the owner in exercise of the discretion of the Commissioners of Customs & Excise. The Commissioners have a policy of only returning vehicles in very exceptional circumstances.

This policy has been subject to challenge in a number of cases. In *Whiting v. Commissioners of Customs & Excise*[28] the appellant challenged a substantial charge made to her for the return of a vehicle seized by the Commissioners. The question was raised whether Article 6(1) of the ECHR applied and the VAT & Duties Tribunal, referring to the decision of the ECtHR in *Air Canada v. United Kingdom*,[29] noted that the proceedings concerning seizure of the vehicle were not criminal proceedings and that the opportunity of obtaining judicial review satisfied the requirements of Article 6(1).

In a number of cases, owners of seized vehicles have argued that the refusal to return the vehicle infringed their right to property. The decisions of the VAT & Duties Tribunal are split on this point at the present moment. In *Dereczenik v. Commissioners of Customs & Excise*[30] and in *Hopping v. Commissioners of Customs & Excise*[31] the Tribunal held that the refusal to return the vehicle was not a disproportionate response so as to constitute an infringement of the right to property. However, in the two recent cases of *Williams v. Commissioners of Customs & Excise*[32] and in *Lindsay v. Commissioners of Customs & Excise*[33] the Tribunal held that it was disproportionate to refuse to return a car where its value was significantly in excess of the amount of excise duty avoided on the importation of the products. In *Williams* the vehicle was worth GBP 6,000 and the excise duty was GBP 2,932; in *Lindsay* the vehicle was worth GBP 10,500 and the excise duty was approximately GBP 3,500: in both cases the Tribunal held that the seizure and refusal to restore the vehicle did not achieve the fair balance required for the measure to be proportionate.

It is likely that this conflict between different tribunals will be resolved within the next few months by an appeal to the High Court or Court of Appeal.

Before leaving Article 1 of the First Protocol one might note that, with the exception of these last two cases concerning the refusal to restore confiscated vehicles, in none of the cases was the taxpayer successful.

B. Article 6

1. Right to a fair trial

Because the ECHR had not been directly applicable in UK domestic law prior to 2 October 2000, a number of basic questions concerning the applicability of Article 6 have not previously been resolved. In a number of cases, the Court simply presumed either that Article 6 was or was not inapplicable.

Thus, in *Cartz v. Commissioners of Customs & Excise*[34] the VAT & Duties Tribunal heard an appeal against a disputed assessment for value added tax on 2 October 2000 (the date the Human Rights Act went into force). The taxpayer did not appear at the appeal and the Tribunal asked itself whether there might be any breach of his human rights by continuing with the appeal in his absence. The Tribunal noted that the appeal did not involve criminal proceedings (but merely a best estimate of the amount of VAT underassessed) and so Article 6 was not applicable.

Similarly, in *Sher Ali (Trading as the Bengal Brasserie) v. Commissioners of Customs & Excise*,[35] where the hearing commenced before the Act came into force but continued after 2 October 2000, the Tribunal took the view that, based on current jurisprudence, Article 6 did not apply to an appeal against an assessment of a person's tax liability. It would have applied to cases involving dishonesty, though that was not involved in this case.

In one High Court case – *Bennett v. Commissioners of Customs & Excise (No.2)*[36] it was assumed that Article 6 applied to an appeal against failure to register for VAT, though the judge was doubtful whether this was correct. In any event, he concluded that there had been no breach of Article 6.

In a Court of Appeal case – *Eagerpath Limited v. Edwards (Inspector of Taxes)*[37] – it was conceded that an appeal against a corporation tax assessment did not involve the determination of civil rights and obligations so Article 6 was not applicable.

All of those cases preceded the decision of the ECtHR in *Ferrazzini v. Italy*[38] which confirms the existing jurisprudence of the ECnHR and ECtHR to the effect that the determination of tax liability in ordinary proceedings does not constitute the determination of civil rights and obligations. It remains open whether a court in the United Kingdom might take a different view to the ECtHR in *Ferrazzini* on the grounds that "civil rights and obligations" would clearly include tax liabilities under the common law, and the decision in *Ferrazzini* is either wrong or should not otherwise be applied in this country.

One of the major issues of applicability of Article 6 – which needed to be faced by the UK courts – was the question whether any of the penalties imposed for offences relating to taxation constituted criminal charges for Convention purposes. Both the direct tax system administered by the Inland Revenue and the indirect tax system administered by the Commissioners of Customs & Excise employ a range of penalties, the most serious of which allow a penalty up to a maximum of 100% of the tax or

28. Case No. E00143 (LON/00/8002), decision of 1 August 2000.
29. (1995) 20 EHRR 150.
30. Case No. C00138 (LON/01/7067), decision of 7 June 2001.
31. Case No. E00170 (LON/01/8003), decision of 9 October 2001.
32. Case No. E00171 (LON/01/8018), decision of 10 October 2001.
33. Case No. E00174 (LON/00/8053), decision of 1 November 2001.
34. Case No. 16905 (MAN/99/509), decision of 24 October 2000.
35. Case No. 16952 (MAN/96/699), decision of 20 November 2000.
36. [2001] STC 137.
37. [2001] STC 26.
38. (Application No. 44759/98) [2001] STC 1314, decision of 12 July 2001.

duty avoided. The starting point was to determine whether these offences constituted criminal charges.

In the case of *Murrell v. Commissioners of Customs & Excise*[39] the VAT & Duties Tribunal was sitting the day after the Human Rights Act came into force to hear an appeal against a substantial penalty for civil evasion of VAT. Off its own bat, the Tribunal raised the question of the ECHR, concluded that Article 6 applied to the civil evasion penalty on the grounds that it was a criminal charge for Convention purposes, and then went on to hold that evidence given by the taxpayer in an interview without a caution was to be excluded in deciding the appeal. The representative of the Commissioners of Customs & Excise declined to argue the human rights point, and was penalized as to costs for not being prepared to argue the issue.

In the VAT and duties field the test case of *Han & Yao (and others) v. Commissioners of Customs & Excise*[40] was referred to the Court of Appeal to determine the applicability of Article 6. The case concerned the maximum 100% penalties for dishonest evasion of value added tax under Sec. 60 of the Value Added Tax Act 1994 and for dishonest evasion of excise duty under Sec. 8 of the Finance Act 1994. Having considered the Strasbourg case law on the subject, the Court of Appeal concluded (not particularly surprisingly) that these penalties involved the determination of criminal charges within the scope of Article 6.

On the direct tax side, the question of the maximum 100% penalty under Sec. 95 of the Taxes Management Act 1970 for fraudulently or negligently making incorrect tax returns was raised on appeal in the case of *King v. Walden (Inspector of Taxes)*.[41] Jacob J confirmed that the penalty involved a criminal charge, but then went on to conclude that there had been no breach of any of the rights guaranteed by Article 6.

In a sense, these two cases resolve the easy question whether a maximum 100% penalty involves the determination of a criminal charge. In the VAT field, in particular, there is a range of penalties with their maximum below 100%. Presumably, in the next couple of years, tribunals and courts will have to determine which if any of these constitute criminal charges for Convention purposes.

2. Rights guaranteed

Having decided that Article 6 applies to proceedings involving certain of the tax-geared penalties, the question that had then to be faced was whether the taxpayer's right to a fair trial had been infringed by the proceedings.

In *Wing Lee Carry Out v. Commissioners of Customs & Excise*[42] the VAT & Duties Tribunal assumed that Article 6 applied to an appeal against assessment of unpaid VAT and the imposition of a civil penalty based upon dishonesty. The Tribunal noted that the provision of an interpreter was now required by the Convention, and that legal aid would also need to be provided. One might contrast this case with *Ala Miah (Trading as Royal Balti) v. Commissioners of Customs & Excise*[43] where, on an appeal against an assessment to VAT, the Tribunal concluded that Article 6 did not apply and that it was for the appellant to make provision for an interpreter.

In *Nene Packaging Limited & Others v. Commissioners of Customs & Excise*[44] a challenge was mounted to the rules of the VAT & Duties Tribunal relating to disclosure of arguments and evidence by the appellants and by the Commissioners. The Tribunal concluded that the existing rules provided adequate protection for the taxpayer.

Undoubtedly the most difficult issue in cases where Article 6 applies to tax proceedings (on the grounds that they involve the determination of a criminal charge) has been the right of silence. Linked with this is the question whether existing investigation procedures used by the Inland Revenue and by Customs & Excise induce taxpayers to make disclosure of incriminating information which may subsequently be used against them.

The Inland Revenue has a long-standing practice in cases of alleged serious tax avoidance of interviewing the taxpayer (and sometimes his advisers) under the "Hansard" procedure. Under this procedure (which was originally announced in Parliament and recorded in the debates – hence the reference to Hansard) the taxpayer is told that the Revenue suspect that he has been engaged in serious tax avoidance which might lead to a criminal prosecution. However, it is the Revenue's practice that, if the taxpayer cooperates, they will not prosecute but will instead seek to resolve the tax matter with administrative penalties. The question arises whether this constitutes an inducement to the taxpayer to make incriminating disclosures which may subsequently be used against him. Customs & Excise have a similar procedure under Notice 730.

In *Murrell v. Commissioners of Customs & Excise*[45] the VAT & Duties Tribunal excluded evidence given by the taxpayers at interview where they were not reminded of their right to silence. In *Wing Lee Carry Out v. Commissioners of Customs & Excise*,[46] however, the Tribunal considered that an interview under the Notice 730 procedure did not constitute such an inducement as to vitiate any responses by the taxpayers. In *Ajay Patel v. Commissioners of Customs & Excise*[47] the Tribunal followed the decision in *Murrell* and decided to disregard any answers given by the taxpayers in interviews under the Notice 730 procedure. The same approach was adopted in *Khan & Khan (trading as Bombay Tandoori Restaurant) v. Commissioners of Customs & Excise*.[48] By contrast, the Tribunal in *W & B Sharland (trading as Sharlands Fir Tree Café) v. Commissioners of Customs & Excise*[49] held that there was no hard and fast rule that evidence given in interviews under the procedure set out in Notice 730 had to be excluded: to exclude all interviews would be disproportionate. The Tribunal decided to admit evidence given at

39. Case No. 16878 (LON/99/121), decision of 13 October 2000.
40. [2001] EWCA Civ 1040; [2001] STC 1188, decision of 3 July 2001.
41. [2001] STC 822.
42. Case No. 17047 (EDN/99/219), decision of 24 January 2001.
43. Case No. 17216 (MAN/00/687), decision of 4 May 2001.
44. Case No. 17365 (LON/00/355), decision of 17 August 2001.
45. See note 39.
46. See note 42
47. Case No. 17248 (LON/99/1144), decision of 16 May 2001.
48. Case No. 17379 (LON/00/0216), decision of 28 August 2001.
49. Case No. 17387 (LON/99/1361), decision of 13 September 2001.

tape-recorded interviews on the grounds that the interviews were properly conducted in accordance with Notice 730, and that the appellants made no admissions at the interviews which damaged their case.

All these decisions from the VAT & Duties Tribunals need to be seen now in the light of the judgment of the House of Lords in the case of *R. v. Allen*.[50] In that case the defendant – who appealed against a criminal conviction for defrauding the Inland Revenue – had been interviewed under the "Hansard" procedure. The taxpayer had also been required by a notice issued under Sec. 20(1) of the Taxes Management Act 1970 to supply certain information. The taxpayer answered certain questions put to him and, in compliance with the notice, delivered a schedule of assets which was subsequently used in connection with one of the criminal charges against him.

The taxpayer argued that in requiring him to supply a schedule of assets (upon which he was subsequently charged) his right to a fair trial had been infringed because he was compelled under threat of penalty to incriminate himself by providing the schedule. It was also argued that the taxpayer had been subjected to an inducement to provide the schedule.

The House of Lords noted that it was self-evident that to ensure the due payment of taxes a state must have the power to require citizens to inform it of the amount of their income and to have sanctions available to enforce the provision of information. More contentiously, the House concluded that the issue of a Sec. 20(1) notice requiring the disclosure of information cannot constitute a violation of the right against self-incrimination.

With regard to the argument that the Hansard procedure had constituted an inducement, Lord Hutton noted that the inducement was to give true and accurate information but the taxpayer gave false information. Lord Hutton distinguished between giving true information and false information:

> [35] … To the extent that there was an inducement contained in the Hansard statement, the inducement was to give true and accurate information to the revenue, but the accused in both cases did not respond to that inducement and instead of giving true and accurate information gave false information. Therefore, in my opinion, the appellant's argument in this case that he was induced by hope of non-institution of criminal proceedings held out by the revenue to provide the schedule and that its provision was therefore involuntary is invalid. *If, in response to the Hansard statement, the appellant had given true and accurate information which disclosed that he had earlier cheated the revenue and had then been prosecuted for that earlier dishonesty, he would have had a strong argument that the criminal proceedings were unfair and an even stronger argument that the Crown should not rely on evidence of his admission, but that is the reverse of what actually occurred.* (emphasis added)

Lord Hutton appears to be saying that, if in response to the Hansard statement a taxpayer is induced to give accurate information, that information cannot subsequently be relied upon in a criminal prosecution. More interestingly, if a claim for substantial penalties involves a criminal charge for Convention purposes, it would seem to follow that truthful admissions made under the Hansard procedure equally cannot be used against the taxpayer.

Since in the Hansard procedure – and in the Notice 730 procedure for indirect taxes – there will almost always be a question of seeking substantial penalties, this decision leaves in doubt the future of these procedures as part of the investigation in tax matters.

C. Article 14 (prohibition of discrimination)

There have been no reported cases since the Human Rights Act went into force where discrimination has been raised in a tax context. There is, however, a pending case, *R (on the application of Adrian John Wilkinson) v. Commissioners of Inland Revenue*, which will be heard in December.[51]

D. Article 8 (right to respect for private and family life)

There have been two tax cases where protection of privacy has been raised.

The first case was *R (on the application of Morgan Grenfell & Co Limited) v. Special Commissioner of Income Tax*,[52] which concerned the Inland Revenue's proposed issue of a notice under Sec. 20(1) of the Taxes Management Act 1970 to require disclosure of documents. The issue of such a notice requires the consent of a Special Commissioner of Income Tax (that is, an independent member of the first-instance tax tribunal), but the proceedings before the Special Commissioners to obtain consent are only attended by representatives of the Revenue. Morgan Grenfell sought to challenge the procedure on the grounds that they should be entitled to attend the hearing before the Special Commissioner, and also on the grounds that the information sought to be obtained was covered by legal professional privilege. The Court of Appeal concluded, however, that the issue of the information notice fell within the exception to the right of privacy in Article 8(2) of the ECHR, that the UK legislation provided that legal professional privilege did not apply and the principle of legality required the courts to accept this. The Court also held that the Convention did not require that the taxpayer should be heard on an application to issue a Sec. 20 notice.

In *Guyer v. Walton (Inspector of Taxes)*[53] a taxpayer appealed against a notice issued by the Inland Revenue under Sec. 19A of the Taxes Management Act 1970 to require production of various documents. The taxpayer was a solicitor and he argued that the disclosure of the documents would infringe the right to privacy of his clients. The Special Commissioner concluded that there was ample justification in Article 8(2) for the issue of the notice since it was issued according to law, in pursuit of a

50. [2001] UKHL 45; [2001] STC 1537 – see also the related case of *R. v. Dimsey* discussed above.
51. Since the author of this article is involved in that case, it would be inappropriate to comment further on it.
52. [2001] EWCA Civ 329; [2001] STC 497, decision of 2 March 2001.
53. [2001] STC (SCD) 75, decision of 19 March 2001.

legitimate aim, and was necessary in a democratic society for protecting the taxation system and the Revenue.

The positive side of this decision is the recognition that the seeking of information by revenue authorities might infringe the right to privacy in Article 8. On that basis, the interference with the right to privacy needs to be justified within the terms of Article 8(2) for it to be legitimate. It must not be disproportionate.

V. CONCLUSION

It is fair to say that the UK tribunals and courts are still at the early stage of becoming accustomed to the application of the ECHR in tax matters. The fact that there was no basis in domestic law for a direct application of the Convention prior to 2 October 2000 has meant that many issues were not resolved in the past. As a consequence, some basic issues are now being resolved, including, in particular, the applicability of Article 6 and the rights guaranteed by Article 6 where substantial penalties are involved.

In that respect, the United Kingdom is rather fortunate in having an existing body of case law from Strasbourg to which reference can be made. What this article shows is that the United Kingdom has begun making its own contribution to the case law on the application of the Convention in tax matters.

TABLE OF CASES

Name, Court and Date	Case Number, Case Reference or Law Report	Articles Considered	Summary of Complaint	Result
Oxley (Collector of Taxes) v. Raynham Weston Super-mare County Court, 27 July 1983	(1983) 54 TC 779	9, 1/1	Imposition of tax was contrary to the taxpayer's conscience.	Dismissed.
Sweeny v. Maidstone General Commissioners Chancery Division, 30 March 1984	[1984] STC 334	6		Inapplicable.
Hodgson v. Commissioners of Customs & Excise VAT & Duties Tribunal, 16 October 1996	E17; [1996] V&DR 200	6(1)	Challenge to penalty for importing tobacco for a commercial purpose.	Article 6(1) applied (but not Article 6(2) or (3)) the Tribunal had jurisdiction to consider the appeal on its merits.
Widnell Group v. Commissioners of Customs & Excise VAT & Duties Tribunal, 7 October 1997	Case No.15170 (LON/97/1914)	6(1)	Whether rule requiring submission of all returns and payment of all taxes restricted access to the tribunal.	Unnecessary to consider the ECHR.
Formix (London) Limited v. Commissioners of Customs & Excise VAT & Duties Tribunal, 13 November 1997	Case No. 15241 (LON/97/882)	6(1)	Requirement to make all returns and pay tax before appealing against requirement to give security for payment of VAT.	European Community law recognized the principles enshrined in the ECHR. Case adjourned to consider application to strike out appeal.
Ellinas, Ellinas & Ellinas (trading as Hunts Cross Supper Bar) v. Commissioners of Customs & Excise VAT & Duties Tribunal, 11 February 1998	Case No. 15346 (MAN/96/692)	6	Application by Customs & Excise not to identify an informant on grounds of public interest immunity.	Application accepted. No. infringement of Article 6.
Commissioners of Customs & Excise v. Harris Queen's Bench Divisional Court, 29 January 1999	CO/3875/98, The Times 24 February 1999	6(1), (3)	Application for release of detained cash to meet legal expenses.	ECHR inapplicable since the UK legislation was clear and unambiguous.
Hillsdown Holdings plc & Another v. Inland Revenue Commissioners Chancery Division, 11 March 1999	[1999] STC 561	1/1	Convention raised as part of the context for the interpretation of the legislation.	Taxpayer's claim for repayment allowed.

Name, Court and Date	Case Number, Case Reference or Law Report	Articles Considered	Summary of Complaint	Result
Coleman & Others v. Commissioners of Customs & Excise VAT & Duties Tribunal, 15 July 1999	Case No.16178 [1999] V&DR 133	6	That the requirement to submit returns before appealing against VAT (inter alia) undermined the right to a fair trial.	Not necessary to refer to the Convention as the matter could be dealt with as a matter of Community law.
Anchor Foods Limited v. Commissioners of Customs & Excise VAT & Duties Tribunal, 16 July 1999	C00100 (LON/94/7043)	6(1)	Appeal against requirement of security to be given to Customs & Excise.	Appeal allowed.
R v. Customs & Excise Commissioners ex parte Building Societies Ombudsman Company Limited Queen's Bench Divisional Court, 16 July 1999	[1999] STC 974	1/1	Limit on claiming refund of overpaid VAT.	Decided without need to refer to the Convention.
Edwards v. Commissioners of Customs & Excise VAT & Duties Tribunal, 24 August 1999	Case No.16245 (LON/93/2423)	6(3)(a)	Appeal against civil evasion penalty in respect of VAT.	Assuming Art. 6 applied, there was no breach of the Convention.
Marks & Spencer plc v. Commissioners of Customs & Excise Court of Appeal, 14 December 1999	[2000] STC 16	1/1	Limit on acclaiming refund of overpaid VAT.	Convention issues raised before Tribunal and High Court but not relied upon in decision of the Court of Appeal.
R v. Inland Revenue Commissioners ex parte Banque Internationale à Luxembourg SA Queen's Bench, 23 June 2000	[2000] STC 708	8	Notices to supply information infringed right of privacy.	There was ample justification in Article 8(2) for the Notices.
Power v. Commissioners of Customs & Excise VAT & Duties Tribunal, 20 July 2000	Case No.16748 (LON/1998/1155)	6	Tribunal decided to hold the hearing in public so as to comply with Article 6.	Case heard in public.
Yates v. Commissioners of Customs & Excise VAT & Duties Tribunal, 27 July 2000	Case No.16760 (LON/00/455)	1/1	Whether default surcharge was proportionate.	Convention applied as part of Community law and the surcharge was proportionate.
Murrell v. Commissioners of Customs & Excise VAT & Duties Tribunal, 13th October 2000	Case No. 16878 (LON/99/121)	6	Whether civil evasion penalty was criminal and whether information supplied under interview without caution should be admitted.	Article 6 applied as the penalty involved a criminal charge, and the evidence should be excluded.
Cartz v. Commissioners of Customs & Excise VAT & Duties Tribunal, 24 October 2000	Case No.16905 (MAN/99/509)	6	Whether Article 6 applied to an appeal against a best judgment VAT assessment after the Human Rights Act came into force.	Article 6 did not apply since the matter did not involve criminal proceedings.
Sher Ali (Trading as the Bengal Brasserie) v. Commissioners of Customs & Excise VAT & Duties Tribunal, 20 November 2000	Case No.16952 (MAN/98/699)	6	Whether Article 6 applied to an appeal against an assessment to VAT.	Article 6 did not apply as this did not involve the determination of civil rights and obligations.
Eagerpath Limited v. Edwards (Inspector of Taxes) Court of Appeal, 14 December 2000	[2001] STC 26	6	Whether Article 6 applied to a tax appeal.	Conceded that the tax appeal did not involve the determination of civil rights and obligations.

Name, Court and Date	Case Number, Case Reference or Law Report	Articles Considered	Summary of Complaint	Result
Wing Lee Carry Out v. Commissioners of Customs & Excise VAT & Duties Tribunal, 24 January 2001	Case No.17047 (EDN/99/219)	6	Whether an appeal against a civil evasion penalty fell within Article 6 and whether an interpreter should be supplied and legal aid provided.	The civil evasion penalty did involve a criminal charge and an interpreter should be supplied and legal aid should be provided.
Bennett v. Commissioners of Customs & Excise (No.2) Chancery Division, 24 January 2001	[2001] STC 137	6	Whether taxpayer had a right to a fair trial.	Assumed that Article 6 applied, but no breach of the right to a fair trial.
R (on the application of Morgan Grenfell & Co Ltd) v. Special Commissioners of Income Tax Court of Appeal, 2 March 2001	[2001] EWCA Civ 329; [2001] STC 497	8	Whether taxpayer had a right to be present at a hearing to determine whether an information notice should be issued and whether the notice should be issued with regard to material subject to legal professional privilege.	The legislation overrode legal professional privilege and the principle of legality required that the legislation be followed. There was no right to be heard on the application.
Guyer v. Walton (Inspector of Taxes) Special Commissioner, 19 March 2001	[2001] STC (SCD) 75	8	Whether a notice to supply information infringed the right to privacy of the taxpayer's clients.	The infringement of the right to privacy was justified under Article 8(2).
R (on the application of Professional Contractors Group Ltd & Others) v. Inland Revenue Commissioners Queen's Bench Division, Administrative Court, 2 April 2001	[2001] EWHC Admin 236; [2001] STC 629	1/1	Whether IR35 legislation interfered with right to property and was unclear.	Rejected, the rights were not infringed.
Ala Miah (Trading as Royal Balti) v. Commissioners of Customs & Excise VAT & Duties Tribunal, 4 May 2001	Case No.17216 (MAN/00/687)	6	Whether Article 6 applied to appeal against a VAT assessment.	Article 6 inapplicable to an ordinary appeal against a VAT assessment.
Patel v. Commissioners of Customs & Excise VAT & Duties Tribunal, 16 May 2001	Case No.17248 (LON/99/1144)	6	Appeal against civil evasion penalty: whether admissions made in an interview without caution should be admitted.	Evidence of admissions excluded by the Tribunal.
King v. Walden (Inspector of Taxes) Chancery Division, 18 May 2001	[2001] STC 822	6	Whether the penalty under Sec. 95 Taxes Management Act 1970 for fraudulent or negligent submission of incorrect returns was a criminal charge.	The penalty involved the determination of a criminal charge.
Dereczenik v. Commissioners of Customs & Excise VAT & Duties Tribunal, 7 June 2001	Case No.C00138 (LON/00/7067)	1/1	Whether refusal to restore vehicle used for bootlegging was disproportionate.	Refusal was not disproportionate.
Han & Yau v. Commissioners of Customs & Excise & Others Court of Appeal, 3 July 2001	[2001] EWCA Civ 1040; [2001] STC 1188	6	Whether the civil evasion penalties under s.60(1) of the Value Added Tax Act 1994 and Sec. 8(1) of the Finance Act 1994 were criminal for Convention purposes.	Both penalties were criminal for Convention purposes.
Whiting v. Commissioners of Customs & Excise VAT & Duties Tribunal, 4 July 2001	Case No.E00162 (LON/00/8002)	1/1, 6	Payment of restoration charges for vehicle seized by Commissioners.	Proceedings for seizure of goods were not criminal proceedings; the Commissioners had not acted unreasonably.

Name, Court and Date	Case Number, Case Reference or Law Report	Articles Considered	Summary of Complaint	Result
Speyside Bonding Company Ltd v. Commissioners of Customs & Excise VAT & Duties Tribunal, 17 July 2001	Case No.E00164 (EDN/00/8003)	1/1	Whether forfeiture of goods and order to pay duty infringed Article 1/1.	The Article did not apply since the goods were no longer in the possession of the Applicant. The measures to secure collection of tax were also consistent with the second paragraph of Article 1/1.
Nene Packaging Limited & Others v. Commissioners of Customs & Excise VAT & Duties Tribunal, 17 August 2001	Case No.17365 (LON/00/355)	6	Whether the Tribunal disclosure rules complied with Article 6.	The disclosure rules complied with Article 6.
Khan & Khan (trading as Bombay Tandoori Restaurant) v. Commissioners of Customs & Excise VAT & Duties Tribunal, 28 August 2001	Case No.17379 (LON/00/0216)	6	Whether evidence given at an interview without caution should be excluded.	Evidence excluded on the grounds that the taxpayer had not been made aware of his right of silence.
W & B Sharland (trading as Sharlands Fir Tree Café) v. Commissioners of Customs & Excise VAT & Duties Tribunal, 13 September 2001	Case No.17387 (LON/99/1361)	6	Whether evidence of tape-recorded interviews without a caution should be excluded.	Evidence not excluded since the interviews were properly conducted and no admissions were made.
Hopping v. Commissioners of Customs & Excise VAT & Duties Tribunal, 9 October 2001	Case No.E00170 (LON/01/8003)	1/1	Whether refusal to return seized car was disproportionate.	Refusal was not disproportionate.
Williams v. Commissioners of Customs & Excise VAT & Duties Tribunal, 10 October 2001	Case No. E00171 (LON/01/8018)	1/1	Whether refusal to return seized car was disproportionate.	Refusal was disproportionate since the value of the car was significantly more than the amount of excise duty unpaid.
R v. Dimsey House of Lords, 11 October 2001	[2001] UKHL 46; [2001] STC 1520	1/1	Whether legislation under which two persons might be charged to tax on the same income infringed Article 1/1.	Legislation which had the effect that two persons might be charged to tax on the same income did not infringe the Article.
R v. Allen House of Lords, 11 October 2001	[2001] UKHL 45; [2001] STC 1537	1/1	Whether information supplied in response to an information notice and under the Hansard procedure should be excluded.	The information given was untrue and could be utilized in prosecution; truthful information might be excluded.
Lindsay v. Commissioners of Customs & Excise VAT & Duties Tribunal, 1 November 2001	Case No.E00174 (LON/00/8053)	1/1	Whether refusal to return seized car was disproportionate.	Refusal to return car was disproportionate since the value of the car was significantly more than the amount of excise duty unpaid.