

Taxation and the European Convention on Human Rights in the Domestic Law of the Council of Europe Countries

Introduction

Philip Baker*

The European Convention on Human Rights (ECHR or “the Convention”) has been in force for almost fifty years. During that time, the domestic tax courts in countries of the Council of Europe have had to grapple with a number of issues relating to the application of the Convention to tax matters, and a substantial number of tax cases have gone on from national courts to the European Commission of Human Rights (ECnHR) or the European Court of Human Rights (ECtHR) in Strasbourg. Accessing the Strasbourg jurisprudence is relatively easy because of the availability of an electronic database of decisions.¹ The national jurisprudence in the domestic tax courts of the member countries is far harder to access. Not only is there the barrier of language, but it is difficult to find a law library which contains all the relevant reports and to understand the cases in the context of the national tax system when one finds them.

This is the background idea behind the articles in this special edition of *European Taxation*: to identify and to explain the jurisprudence on the application of the ECHR to tax matters before the domestic tax courts of the parties to the Convention. In total, twenty-six of the parties have been surveyed here. This is more than half of the current membership of the Council of Europe.

The authors of each article were asked to focus on the local jurisprudence plus any doctrinal writing from their country. They were asked to begin by explaining in outline the application of the Convention in their country: when did the country ratify the Convention; what Protocols were ratified; how is the Convention applied in domestic law. The authors were then asked to analyse the jurisprudence and doctrine under the headings of the major articles of the Convention of relevance to taxation: Article 1 of the First Protocol (protection of property), Article 6 (right to a fair trial), Article 14 (prohibition of discrimination) and Article 8 (respect for private and family life). If there was any jurisprudence under any other Articles of the Convention or its Protocols, they were asked to analyse this as well. For ease of reference, the authors were also asked to prepare tables listing the decisions of the national courts on the Convention.

For those states for which no article was written, there is a short summary of the application of the Convention and its Protocols.

The articles show that the extent to which the Convention has been relied upon in decisions of national courts varies immensely from one country to another. This variation makes it very difficult to draw any general conclusions. The following are merely some general comments about the national jurisprudence based upon the articles.

One of the striking features which appears from the articles is the different extent to which the Convention is relied upon in different countries. There seem to be a number of factors which influence the extent to which the Convention is relied upon, including how long it has been since the country ratified the ECHR, and how familiar local tax lawyers are with the Convention's principles.

One major determinant of the extent to which reliance is placed on the Convention is the constitutional position in the country concerned. In a number of countries the Constitution contains guarantees equivalent to (or more extensive than) the guarantees found in the Convention: in some of those countries the tendency has been to rely upon the constitutional protections and not to have recourse to the Convention. This is particularly true in Germany; it is also true for Spain where reliance is primarily placed on the constitution but with some further references to the Convention; and it is equally so in Turkey where the Convention is hardly referred to. In Italy there has been a change from reliance on the Constitution to a greater tendency to rely upon the Convention. There has been a similar change in Greece. At the opposite end of the spectrum is the Netherlands where a constitutional prohibition on reviewing the legality of legislation, except on the basis of incompatibility with an international treaty, has meant that a much greater reliance has been placed in that country on the ECHR (and also on the International Covenant on Civil and Political Rights; ICCPR) than on the constitutional protections. Finally, in some countries recourse to the ECHR has been limited because it has only recently been incorporated into domestic law: this is true of the United Kingdom where the Convention was incorporated by the Human Rights Act of 1998 and Norway where it was incorporated by the Human Rights Act of 1999. In an

* Barrister, Gray's Inn Tax Chambers; Visiting Professorial Fellow, Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London.

1. The Strasbourg jurisprudence on tax matters was analysed in the article on “Taxation and the European Convention on Human Rights”, 40 *European Taxation* 8 (2000), pp. 298 to 374.

ideal world, one would expand these articles to include national jurisprudence on the application of the constitutional guarantees equivalent to the guarantees found in the Convention. That would, however, be quite a significant further undertaking.

Turning to the individual articles of the Convention and its Protocols under which the jurisprudence was analysed, some of the features are hardly surprising.

Relatively few cases have referred to Article 1 of the First Protocol (protection of property), and very few of those were successes for the taxpayer. In a number of cases the national court has referred to the wide margin of appreciation enjoyed by states in tax matters. There are some pointers from the case law to future developments in this area: for example, a few cases have raised the issue of unclear tax legislation (so unclear that it conflicts with the principle of the rule of law).

Not surprisingly, the largest number of cases in national courts have considered Article 6 (right to a fair trial): in the Strasbourg jurisprudence Article 6 has also yielded the largest number of cases.

On the question of the applicability of Article 6 to tax disputes, most countries have followed the established Strasbourg line that ordinary litigation for the determination of a tax liability does not fall within Article 6 (it does not constitute the determination of civil rights and obligations), but litigation concerning substantial tax penalties may involve the determination of a criminal charge. There is an interesting exception on the first point in France where the civil law courts, and particularly the *Cour de Cassation*, have held that Article 6 does apply to tax litigation, while the administrative courts, and particularly the *Conseil d'Etat*, have taken the line that it did not apply.

On the question of whether administrative tax penalties may involve the determination of a criminal charge, some of the countries were in advance of the Strasbourg organs in considering that penalties involved criminal charges. In Belgium, for example, the courts have changed their view on this point and now accept that penalty litigation falls within the criminal protections of Article 6. For many countries, the issue they have faced is to determine which administrative penalties are sufficiently serious to engage the protections for criminal proceedings.

Where Article 6 does apply to tax proceedings (primarily to penalty proceedings), then the national courts have had to come to grips with the application of the protections guaranteed by the Article.

Unreasonable delay in the determination of tax disputes has been an issue in several countries. The non-heritability of tax penalties has arisen in Switzerland (which gave rise to the two leading cases that went on to the ECtHR in Strasbourg) and in Belgium. In Luxembourg changes were made to the system of tax courts to ensure compliance with the Convention.

An issue which has arisen in a number of countries is whether Article 6 requires that the court hearing an appeal against a tax penalty should have power not only to determine whether the penalty is due but also to adjust the amount of penalty to reflect the particular circumstances.

This has been an issue particularly in France, but also in Greece and in Belgium.

An issue which is giving rise to difficult questions in several countries is the right to silence. Where the criminal protections of Article 6 apply to tax penalty proceedings, then the taxpayer should enjoy a right to silence (which has been implied into the Convention by the ECtHR). How should this right be applied in practice in tax matters where the whole administration of the tax system depends upon the taxpayer supplying information to the revenue authorities? Clearly, the taxpayer cannot refuse to submit his annual tax return on the grounds that it might infringe his right to silence: on the other hand, can information supplied by the taxpayer – possibly under compulsory powers, possibly at an interview where the taxpayer was not warned of the right to silence – subsequently be used in a criminal prosecution or in penalty proceedings against that taxpayer? The issue has been faced by the courts in Belgium, the Netherlands and the United Kingdom and there is some guidance on the point from the Strasbourg jurisprudence. This is an area, however, where there will almost certainly have to be further developments to clarify exactly when the right to silence arises and what are the implications for tax investigations.

There is a huge disparity in the extent to which Article 14 (prohibition of discrimination) has been relied upon in national courts. At one extreme is the Netherlands where it has been raised in a large number of cases (generally in conjunction with Article 26 of the ICCPR, which is a free-standing non-discrimination provision), while in many countries the article has not been raised in any tax cases.

One issue which has arisen in several countries is the discrimination between the tax treatment of married couples and of unmarried couples in a settled relationship. This issue has arisen in Austria and in Denmark and is likely to arise in the United Kingdom in the near future. If there is a justification for applying tax reliefs to married couples on the grounds that there is some element of shared interest in family property, it is very hard to see why similar reliefs should not be extended to unmarried couples who form a family unit and have the same shared interest. The issue has also arisen in the Netherlands (in the wonderfully titled “Dentist’s Wife” case).

It is a little surprising that the right to privacy in Article 8 has not been raised more frequently in connection with information-seeking by revenue authorities. Perhaps it has much to do with the fact that the qualification in Article 8(2) is likely to be seen in most circumstances as justifying any interference with privacy. Interestingly, in Belgium the courts have had to examine the question of furtive surveillance by tax authorities. Article 8 has also yielded perhaps the most joyous case from the Netherlands where a taxpayer argued that a municipal dog tax interfered with the right to privacy and family life because it penalized the ownership of dogs. The Netherlands Supreme Court held that the tax did not infringe the right to privacy, and that it was appropriate to discriminate against dog owners (as opposed to owners of cats and other animals) on the grounds of the cost needed to clean up after dogs.

Let us turn to the Articles of the Convention which are less generally recognized as of relevance to tax. Article 9 (freedom of thought, conscience and religion) has been raised in several countries. In Greece the courts have given a positive response to the argument that tax exemptions extended to the Orthodox Church should be granted to other religious denominations. The Swiss courts have had to face the difficult question of whether a company enjoys the freedom of religion (to allow it to opt out of payment of church tax).

Article 4 (which prohibits forced labour) has been raised in a rather interesting context in Malta where notaries challenged (unsuccessfully) a rule which required them to collect capital gains tax on behalf of the government.

The requirement of an effective remedy for breach of human rights in Article 13 has featured occasionally in some countries, including Estonia.

Some of the countries surveyed have also ratified the Seventh Protocol. Article 4 of that Protocol prohibits double or multiple punishment for the same conduct. In Norway and in Switzerland this has been considered in a tax context. If a taxpayer is prosecuted before the criminal courts for tax evasion, and is also liable to pay the tax plus interest plus administrative penalties, does this constitute double punishment? Since substantial administrative penalties constitute criminal charges for the purposes of Article 6, there is at least a tenable argument that the imposition of a criminal penalty and also an administrative fine does involve double penalization.

Looking at the country articles overall, one is not surprised to find that taxpayers have been successful in a relatively small number of cases. Obviously, where they have been successful, it has sometimes been of substantial significance in terms of the tax system of the country concerned.

In proposing this series of articles, one of the hopes was that the superior courts in one or more of the countries would have considered in detail an issue on the application of the Convention which was likely to arise in other countries: the decision of that court might act as helpful guidance to other courts in other countries subsequently faced with the same problem. In fact, it has proved harder to identify any such guidance. More of the cases have been concerned with the application of the existing jurisprudence from the Strasbourg organs. What one does notice from the country reports is that courts in several countries have often found themselves grappling with the same issue. It seems that greater guidance will be needed from Strasbourg (rather from the superior courts of any national jurisdiction) to resolve these issues. Issues which the courts are grappling with include: the review of administrative fines, the application of tax reliefs to unmarried couples and the application of the right to silence in tax matters. Perhaps some of the cases identified here will be those that proceed to Strasbourg and clarify the application of the Convention on these issues.

AUSTRIA

Tatjana Polivanova-Rosenauer*

I. INTRODUCTION

A. Domestic human rights provisions

Human rights became a significant legal issue in Austria in the 19th century when the Constitution of Pillersdorff (*Pillersdorff'sche Verfassung*) entered into force.¹ After several legislative attempts, the Law on Protection of Personal Freedom (*Gesetz zum Schutze der persönlichen Freiheit*) and the Law on Protection of the Right to Undisturbed Possession of Premises (*Gesetz zum Schutze des Hausrechts*) were approved by the Emperor and published in 1862.² Both legal acts were later integrated into the State Fundamental Law on General Rights of Citizens (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*), which became effective in 1867 and still applies today. The catalogue of human rights has been expanded through additional domestic provisions and the implementation of the ECHR and its Protocols into the Austrian legal system.³

The following human rights provisions are currently in force:⁴

- State Fundamental Law on General Rights of Citizens of 21 December 1867;⁵
- Resolution of the Provisional National Assembly of 30 October 1918;⁶

* Research Associate, International Bureau of Fiscal Documentation. This report is a summary of an earlier essay written by the author. The author would like to express gratitude to Mag. Gerald Gahleitner and Dr Roman Leitner, both of Leitner & Leitner, Linz, who encouraged her in the preparation of the original essay.

1. *Politische Gesetzessammlung* (hereinafter: PGS) 1848/49. Only certain parts of the Law became effective.

2. *Reichsgesetzblatt* (hereinafter: RGBI) 1862/87 and RGBI 1862/88.

3. See Walter/Mayer, *Bundesverfassungsrecht* (2000) (Vienna: Manz, 2000), p. 544.

4. See Walter/Mayer, note 3, p. 552 et seq.

5. *Staatsgrundgesetz vom 21.12.1867 über die allgemeinen Rechte der Staatsbürger für die im Reichsrat vertretenen Königreiche und Länder*, RGBI 1867/142 and RGBI 1862/88 (hereinafter: StGG).

6. *Beschluß der Provisorischen Nationalversammlung vom 30.10.1918*, Staatsgesetzblatt 1918/3 (hereinafter: StGBI).