BURDEN AND BURDEN v. UNITED KINGDOM

IHT MEETS THE ECHR

by

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Background

Burden and Burden v. United Kingdom (2006) 21 BHRC 640, [2007] STC 252, 9 ITLR 535, [2007] WTLR 607 is about whether siblings who live together all their lives should have inheritance tax relief as with married couples and civil partnerships.

The sisters have spent their lives in a stable, committed, supportive and loving relationship with each other. Neither Applicant has ever married. One was born in 1918 the other in 1925.

The case poses a sharp and major challenge to the traditional "hands off" approach to discrimination claims in the tax field. As the case is about IHT it is of particular importance to trust and executry practitioners as well as tax lawyers.

Because they are sisters, they cannot enter into a "Civil Partnership" under the Civil Partnership Act 2004. Parrt III of that Act extends the concept of civil partnership to Scotland.

Their complaint, heard by a Grand Chamber of the European Court of Human Rights on 12th September 2007, relates to the fact that they will have to pay a significant amount of inheritance tax when the first sister dies and leaves her estate to the other sister.

Under the Inheritance Tax Act 1984 , IHT that was charged at 40 per cent on the value of a person's property insofar as in excess of £285,000 for relevant transfers during the tax year 2006-2007 and £300,000 for 2007-2008.

Section 18(1) of the 1984 Act provided that property passing from the deceased to his or her spouse was exempt. With effect from December 5, 2005, that exemption was extended to a deceased civil partner, a category introduced under the 2004 Civil Partnership Act for same-sex couples, which did not cover family members living together.

Their complaint is that it is unfair that they have to pay this tax, when married couples or partners under the Civil Partnership Act are granted an exemption.

An attempt by the House of Lords to insert an amendment into the legislation including family members over the age of thirty who have lived together for more than 12 years within the exemption was rejected by the House of Commons.

They claimed that this was a violation of their right to peaceful enjoyment of their possessions, under Article 14 of the EHCR, taken in conjunction with Article 1 of the First Protocol.

Article 1 of the First Protocol to the ECHR provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 14 of the ECHR provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

It is well recognised that in human rights cases in Strasbourg that the national authorities have a wide margin of appreciation. Provided that a measure does not lack a manifestly reasonable foundation and has a reasonable relationship of proportionality between the legitimate aim pursued and the means used and overall strikes a fair balance between the interests of the community and the individual and there is no individual or excessive burden then there will be no breach of Article 1 of the First Protocol. In human rights tax cases most tax measures will pass muster.

Article 1 of the First Protocol protects the right to property but expressly preserves the right of states to levy tax and to secure the payment of those taxes. Again, the Convention organs have been reluctant to interfere in the tax sphere. In *A, B, C, D v. UK* (Application No.8531/79) the ECtHR found retrospective legislation contained in Finance Act 1978, (FA 1978), s. 31 to prevent tax avoidance to be compatible with the ECHR. Wide measures for the enforcement of taxes including the seizure of property and the levying of fines for procedural non-compliance have also been upheld.

Windfall taxes or profit sharing taxes have been treated as within the margin- *Svenska Managementgruppen AB v. Sweden* (Application No. 11036/84) ; *Wasa Liv v. Sweden* (Application No. 13013/87). Such is the width of the margin that there is no general principle against retrospective taxation-see for a famous example of that *National & Provincial Building Society and others v. United Kingdom* (1997) EHRR 127 and of course in *A, B, C, D v. UK* (Application No.8531/79).

Few cases succeed under Article 1 in the tax field. Where they do there is an element of clear arbitrariness and they have arisen in the enforcement field. Enforcement measures against trusts will engage Article 1.

For example in *Hentrich v. France* (1994) 18 EHRR 440, the Revenue had a right of pre-emption over property if they considered the sale price in a transaction to be too low. They could exercise this right in way which was purely discretionary, difficult to forsee and was not hedged with basic procedural safeguards for thos affected. Similarly in *Lemoine v. France* (Application No. 26242/95) the imposition of a charge on nine properties valued at over Fr 1 million to secure payment of taxes worth Fr 80,000 was held to be grossly disproportionate.

Turning to Article 14 , it has rarely succeeded in tax cases. Article 14 provides that the rights protected by the ECHR must be enjoyed without discrimination. Taxes must therefore be levied to apply the same treatment to those in objectively similar situations. Discrimination in the administration of tax is already protected by the doctrines of unfairness and legitimate expectation in domestic law and Article 14 will clearly inform these doctrines.

In a leading case on IHT, it was argued that there was unlawful discrimination where IHT fell more heavily on larger estates than smaller ones : *Galeotti Ottieri della Cuija v. Italy* (23 November, 1999). The claim was rejected. The Court set out what has become to date, including in the majority judgements in Burden, the standard approach to claims of discrimination in tax matters. As can be seen the width of discretion or the margin afforded to national systems is a wide one:

"The Court notes that Article 1 of Protocol. 1, second paragraph, establishes that the duty to pay tax falls within its field of application. Accordingly, Article 14 is also applicable.

For the purpose of Article 14 a difference in treatment is discriminatory if it has " no objective and reasonable foundation," that as if it does not pursue a "legitimate aim" or of there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised." Moreover, in the field of taxation the Contracting States enjoy a wide margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.....In particular, it is not sufficient for the applicants to complain merely that they have been taxed more than others, but they must show that the tax in question operates to distinguish between similar taxpayers on discriminatory grounds."

So discrimination was not established in *X v. Ireland* (Application No. 5913/72), the applicant had been adopted in England but his family moved to Ireland. He was left a legacy in the will of his adoptive mother, blood relations paid duty at 1 %, "strangers in blood" 10%. On a person adopted in Ireland under Irish law was treated as a child for this purpose. The applicant complained that as he was adopted abroad the imposition of the 10% rate on him was discriminatory. The former European Commission of Human Rights rejected that complaint. Differences in the conditions for adoption in one country to another and the differing procedures for adoption meant that it was reasonable of Ireland to adopt this measure.

The aggregation of the income of spouses was well within the margin of appreciation in *Lindsay v. United Kingdom* (Application No. 11089/84) and did not breach Article 14. A cohabitee brought the complaint. That was because married couples and co-habitees were not in a comparable position. *Lindsay* was discussed in *Burden and Burden.*

For there to be a violation of Article 14 there will usually have to be a fairly arbitrary or clearly unfair difference in treatment. So for example in *Darby v. Sweden* (1990) EHRR 774, an Englishman resident in Finland but who worked in Sweden was still liable to Swedish Church tax. As a non-resident he could not contract out of it. A resident could. The Court held that Article 1 of the First Protocol was engaged along with Article 14. There was a breach because there was no justification for the difference in treatment. It is noteworthy that the Swedish Government could not provide any justification. The case is unusual because non-residents would not normally be considered as being in an objectively comparable situation as compared with residents.

As a general observation, Darby apart, discrimination outside of sex or other strong suspect category are unlikely to succeed.

Where the underlying entitlement engages a “suspect category” such as gender or legitimacy, the scrutiny of the Court is far more rigourous. If a tax case can engage a complaint not just about a difference in treatment as between similar classes of taxpayers but could go beyond into a claim based on a characteristic which the Court treats as prima facie indicative of discrimination, the margin afforded to the state is far more narrow.

So for example discrimination in the law of succession on grounds of illegitimacy was found to violate Article 14 in *Inze v. Austria* (1987) 10 EHRR 394. *Marckx v. Belguim* (1979) EHRR 330 is an earlier example. It would be interesting to see how this approach could apply to the Scots law of succession as it relates to succession to titles and honours. It would also be interesting to see how the remaining differences in our law of succession in the treatment of adopted children adopted before the Succession (Scotland) Act 1964 would stand up.

A limited margin?

The case the Government put to the Court was that there is a difference in the relationships between siblings and couples because couples enjoy a relationship of choice whereas siblings enjoy a relationship of consanguinity.

On 12th December 2006, the European Court of Human Rights passed their judgement, with a slim majority of 4:3, with strong dissenting judgements. Because of the importance and dissenting judgements the Grand Chamber allowed the applicants to appeal to it. The hearing took place as recently as 12 September 2007. A decision is awaited.

Admissibility

The Court found, unanimously, in the light of the applicants' age and the high probability that one of them would be liable to pay inheritance tax upon the death of the other, that they could claim to be directly affected by the inheritance law in question.

The Court did not consider that the applicants could have been expected to have brought a claim for a declaration of incompatibility under section 4 of the Human Rights Act 1998 before bringing their application to the European Court of Human Rights, a remedy which was dependent on the discretion of the executive and which the Court had previously found to be ineffective: see the admissibility decision of June 18, 2002 in *Hobbs v United Kingdom* (Application No. 63684/00).

Given that the applicants had been directly affected by a provision of domestic law and since there was no domestic remedy which the applicants could be required to exhaust, the six-month time limit for bringing a case to the European Court did not apply.

Alleged violation of Article 14 along with Article 1 of the First Protocol

The applicants did not complain that they would be prevented from acquiring property; they complained instead that the survivor would be required to pay tax on property they jointly owned. Since the duty to pay tax on existing property fell within the scope of Article 1 of Protocol No 1, Article 14 was applicable.

The applicants argued that if, as they had previously argued, they could claim to be victims of discrimination, the fact that neither had yet died could not provide a separate and substantive defence. Unlike the applicants in, the present applicants were not complaining about a provision of the English law of inheritance and, the principle that the Convention does not guarantee the right to acquire possessions on intestacy or through voluntary disposition was irrelevant. In circumstances where it was effectively inevitable that there would be significant tax to pay by the surviving sister, the facts fell within the scope of Article 1 of the First Protocol, and Article 14 was thus also applicable.

The applicants could properly be regarded as being in a similar situation to a married or same-sex Civil Partnership Act couple. While it was true, as the Government had asserted, that many siblings were connected by nothing more than their common parentage, this was far from the case with the present applicants, who had chosen to live together in a loving, committed and stable relationship for several decades, sharing their only home, to the exclusion of other partners.

Their actions in so doing were just as much an expression of their respective self-determination and personal development as would have been the case had they been joined by marriage or a civil partnership.

The powers of the domestic courts to make property orders upon the breakdown of a marriage or civil partnership did not entail that the applicants were not in an analogous situation to such couples as regards inheritance tax. Moreover, the very reason that the applicants were not subject by law to the same corpus of legal rights and obligations as other couples was that they were prevented, on grounds of consanguinity, from entering into a civil partnership. The one significant difference between the applicants and a married couple was that the applicants, being sisters, would not lawfully be entitled to have a sexual relationship. This difference was not, however, relied upon by the Government, nor could it be, given that there was no requirement in the 2004 Act for those wishing to enter into a civil partnership to be in a sexual relationship with each other.

Given that, as the Government asserted, the purpose of the inheritance tax exemption for married and civil partnership couples was the promotion of stable and committed relationships, the denial of an exemption to co-habiting adult siblings served no legitimate aim. The mere fact of being sisters did not entail a stable, committed relationship, and only a small minority of adult siblings were likely to share the type of relationship enjoyed by the applicants, involving prolonged mutual support, commitment and co-habitation.

The applicants agreed with the Government that there was no obvious reason why, if the exception were granted to siblings, it should not also be extended to other family members who co-habit, but argued that this did not support a conclusion that the difference in treatment bore any relationship of proportionality to any legitimate aim. Such an exemption would, in fact, serve the policy interest invoked by the Government, namely the promotion of stable, committed family relationships among adults.

Whilst the applicants accepted that the Court had no jurisdiction to dictate to the Government how best to remedy the discrimination, the amendments to the Civil Partnership Bill passed by the House of Lords showed that it would be possible to construct a statutory scheme whereby two siblings or other close relations who had co-habited for a fixed number of years and chosen not to enter into a marriage or civil partnership could obtain certain fiscal rights or advantages. The Government's reliance on the margin of appreciation was misplaced in the light of the recognition given to the injustice faced by those in the applicants' position when the 2004 Act was passing through Parliament.

The applicants pointed out that the Government had been unable to provide an estimate of the loss of revenue which would flow from an inheritance tax exemption along the lines proposed in the House of Lords. They could not estimate the cost either, but pointed out that the lost revenue would have to be offset by the potential gains, for example, those flowing from an increased tendency, encouraged by the exemption, of close relations to care for disabled or elderly relatives, thus avoiding the need for State-funded care.

In reply the Government emphasised that there was no right under Article 1 of the First Protocol to acquire possessions; in the Court's case-law on domestic inheritance laws, it had consistently held that, before the relevant death occurred, the presumptive heir had no property rights and that his or her hope of inheriting in the event of death could not therefore amount to a "possession" (see *Marckx*, para.50; and also *Inze v. Austria*, para. 38; *Mazurek v. France,* no. 34406/96, paras. 42-43, ECHR 2000-II). Since each applicant was still alive and her complaint, as surviving sister, concerned the potential future impact of domestic law on their power to inherit, Article 1 of First Protocol did not apply, and nor therefore did Article 14. The complaint made by each sister as the prospective first-to-die was also outside the ambit of Article 1 of the First Protocol, because there was no restriction under domestic law on the applicants' ability to dispose of their property, only a potential liability to tax arising after death, when the deceased would no longer be in a position to enjoy her former possessions.

In the alternative, if the Court were to find that the complaint fell within the ambit of Article 1 of the First Protocol, the Government denied that domestic law gave rise to any discrimination contrary to Article 14.

First, the applicants could not claim to be in an analogous situation to a couple created by marriage or civil partnership ("a couple"). The very essence of their relationship was different, because a couple chose to become connected, whereas for sisters it was an accident of birth. In choosing to become a couple by entering into a formal relationship recognised by law, the partners also made a financial commitment to each other, and agreed to give the courts powers to divide their property and to order one partner to provide for the other on separation. The special legal status of parties to a marriage had been recognised by the Commission in *Lindsay v. the United Kingdom*, no. 11098/84, Commission decision of 11 November 1986, Decisions and Reports 49, p. 181 and by the Court in *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000. No such financial commitment arose by virtue of the relationship between siblings.

The Government accepted that, if the applicants could be described as in an analogous position to a couple, there was a difference in treatment as regards exemption from inheritance tax. However, this difference in treatment did not exceed the wide margin of appreciation enjoyed by the State, both in the field of taxation and when it came to financial measures designed to promote marriage (see *Lindsay* and *Shackell*).

The policy underlying the inheritance tax concession given to married couples was to provide the survivor with a measure of financial security, and thus promote marriage. The purpose of the 2004 Act was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships, and the inheritance tax concession for civil partners served the same legitimate aim as it did in relation to married couples. Given the development of society's attitudes, the same arguments justified the promotion of stable, committed same-sex relationships. That objective would not be served by extending similar benefits to unmarried members of an existing family, such as siblings, whose relationship was already established by their consanguinity, and recognised by law. The difference in treatment thus pursued a legitimate aim.

The difference in treatment was, moreover, proportionate, given that the applicants, as siblings, had not undertaken any of the burdens and obligations created by a legally recognised marriage or civil partnership. If the Government were to consider extending the inheritance tax concession to siblings, there would be no obvious reason not to extend it also to other co-habiting family members. Such a change would have considerable financial implications, given that the annual income from inheritance tax was approximately GBP 2.8 billion.

The decision

The Chamber determined that a man and a woman outside the prohibited degrees of family relationship were generally free to choose whether or not to take on the corpus of rights and obligations involved in marriage. This was based on the earlier 2000 decision on admissibility in *Shackell v United Kingdom.*

The applicants, as sisters, did not have that choice, and indeed it went to the heart of their complaint that, despite their decision to live together in an exclusive relationship for many years, English law did not accord a level of recognition to their cohabitation approaching that given to a married or civil partnership couple.

The Court did not, however, have to decide if that lack of choice had any bearing on the question whether, for the purposes of inheritance tax, the applicants could be regarded as being in an analogous position to married and civil partnership couples, because, it considered that, even assuming that the applicants could be compared to such a couple, the difference in treatment was not inconsistent with Article 14.

The Court recalled, by reference to its finding in *Shackell*, that the difference of treatment for the purposes of the grant of social security benefits, between an unmarried applicant who had a long-term relationship with the deceased, and a widow in the same situation, was justified, marriage remaining an institution that was widely accepted as conferring a particular status on those who entered it.

The Court accepted the UK's submission that the inheritance tax exemption for married and civil partnership couples pursued a legitimate aim, namely to promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse or partner.

The Convention explicitly protected the right to marry in Article 12. The Court had held on many occasions that sexual orientation was a concept covered by Article 14. Differences based on sexual orientation required particularly serious reasons to be justified.

The State could not be criticised for pursuing, through its taxation system, policies designed to promote marriage; nor could it be criticised for making available the fiscal advantages attendant on marriage to committed homosexual couples.

In assessing whether the means used were proportionate to the aim pursued, and in particular whether it was objectively and reasonably justifiable to deny cohabiting siblings the inheritance tax exemption which was allowed to survivors of marriages and civil partnerships, the Court was mindful of the legitimacy of the social policy aims underlying the exemption, and also the wide margin of appreciation. Any system of taxation had to use broad categorisations to distinguish between different groups of taxpayers.

The implementation of any such scheme would create marginal situations and individual cases of apparent hardship or injustice, and it was primarily for the State to decide how best to strike the balance between raising revenue and pursuing social objectives.

The legislature could have granted the inheritance tax concessions on a different basis. It could have abandoned the concept of marriage or civil partnership as the determinative factor and extended the concession to siblings or other family members who lived together, and/or based the concession on such criteria as the period of cohabitation, the closeness of the blood relationship, or the age of the parties.

However, the central question under the Convention was not whether different criteria could have been chosen for the grant of an inheritance tax exemption, but whether the scheme actually chosen by the legislature, to treat differently for tax purposes those who were married or who were parties to a civil partnership from other persons living together, even in a long-term settled relationship, exceeded any acceptable margin of appreciation.

In the circumstances, the Court found by four votes to three, with Judges Bonello, Garlicki and Pavlovschi dissenting, that the United Kingdom could not be said to have exceeded the wide margin of appreciation afforded to it and that the difference of treatment for the purposes of the grant of inheritance tax exemptions was reasonably and objectively justified for the purposes of Article 14.

There had accordingly been no violation of article 14, read in conjunction with article 1 of Protocol No 1, in the applicants' case.

The dissent

Dealing first with Judges Bonello and Garlicki, they decided to dissent because they were not convinced that the prospective imposition of "full" inheritance tax on the surviving sister violates Article 14 of the Convention taken in conjunction with Article 1 of the First Protocol. In particular, they were not persuaded by the manner in which the "margin of appreciation" doctrine had been applied to the case.

They agreed that there must be a wide margin of appreciation offered to the national authorities in tax matters and that any system of taxation, to be workable, has to use broad categorisations to distinguish between different groups of taxpayers. They also agreed that, with regard to tax matters, there may be some kind of presumption that the solutions adopted by the national legislature remain within this margin of appreciation. Such presumption would mean that it is, in principle, the applicant who must demonstrate that the application of the tax legislation in his or her case exceeded the State's margin of appreciation and led to unreasonable und unjustified effects.

However, this "burden of proof" was not in their view unlimited. In their opinion, once an applicant is able to demonstrate that the way in which the tax legislation was applied created a situation of apparent hardship or injustice, the onus shifts towards the Government, who must then show that there were good reasons for their actions. Furthermore, if our Court decides to accept that such a situation of apparent hardship or injustice remains compatible with the Convention standards, it must give a full explanation as to how it applied the "margin of appreciation" concept.

They noted that the majority seemed to agree that there has been a marginal situation or an individual case "of apparent hardship or injustice" in respect of the applicants. What was missing in their view was a full explanation as to why and how such injustice can be justified. A mere reference to the margin of appreciation was not enough. It should also be recalled that, in the absence of such explanation, a problem of discriminatory treatment could arise, even outside the traditional arena of the Convention rights (see, *mutatis mutandis*, *Stec and Others v. the United Kingdom* (dec.) [GC], cited in paragraph 54 of the majority's judgment, at paras. 54-55).

The national legislature was, generally speaking, free to adopt any reasonable policy of inheritance tax exemptions. As long as the United Kingdom confined the exemptions to married couples, such categorisation might have been justified under Article 12 of the Convention.

However, once the UK legislature decided to extend the exemption to permanently cohabiting same-sex couples, the problem left the specific sphere of Article 12. Thus, any further categorisation in the area of inheritance tax-exemptions had to satisfy general standards of reasonableness and non-arbitrariness resulting from Article 14.

Once the legislature decides that a permanent union of two persons could or should enjoy tax privileges, it must be able to justify why such a possibility has been offered to some unions while continuing to be denied to others. The problem of siblings living together permanently did not escape the attention of the UK legislators and an appropriate amendment was proposed by the House of Lords. It was, however, rejected in the House of Commons on the basis of widespread agreement that the Civil Partnership Bill "is not the appropriate legislative base on which to deal with [the problem]". Such an approach may have been correct from the perspective of parliamentary technique, but it could not absolve the legislature from providing an equitable solution to the problem at a later stage.

The situation of permanently cohabiting siblings was in many respects - emotional as well as economical – not entirely different from the situation of other unions, particularly as regards old or very old people. The bonds of mutual affection form the ethical basis for such unions and the bonds of mutual dependency form the social basis for them. It is very important to protect such unions, like any other union of two persons, from financial disaster resulting from the death of one of the partners.

The national legislature may establish a very high threshold for such unions to be recognised under tax exemption laws; it may also provide for particular requirements to avoid fraud and abuse. But unless some compelling reasons can be shown, the legislature cannot simply ignore that such unions also exist.

The situation of permanently cohabiting siblings under the UK legislation has also been negatively affected by the fact that – being within the prohibited degrees of relationship – they cannot form a civil partnership. In other words, they have been deprived of the possibility of choice offered to other couples. That is why the present case could not be determined by reference to the *Shackell v. the United Kingdom* decision, since the latter was based on the fact that the persons affected were generally free to choose whether or not to enter into a formal union.

The injustice generally inherent in the UK approach appears particularly striking in the circumstances of this case. Both sisters have already attained a rather advanced age; they have been together for several decades and neither of them has children. It was obvious that the State will be able to collect its tax in full upon the death of the surviving applicant. But the State wanted to do it twice: first upon the death of the first sister and later by imposing a new inheritance tax on what still remains of the estate. As they saw it this was "scarcely compatible" with Article 14 taken in conjunction with Article 1 of the First Protocol. Of interest is that it may also raise problems under Article 8 if the extent of her tax obligations compels the surviving sister to leave her house or otherwise sacrifice the lifestyle to which she has been accustomed.

In what might be called a dissent from the heart Judge Pavlovisch said:

" *This case confirms, yet again, the truth of the words uttered by Benjamin Franklin many, many years ago, to the effect that "nothing in this world is certain but death and taxes". Practice shows that this statement is still valid, even in our 21st century."*

He provided a pithy analysis. All judicial decisions can, in theory, be split into four categories: (a) legal and fair; (b) illegal, but fair; (c) illegal and unfair; and (d) legal, but unfair.

In his view, the decision reached by the majority in this case may be placed in the fourth category. He was firmly convinced that a judicial decision, which represents, by its very nature, the highest expression of justice, cannot be unfair. Yet he had genuine difficulty in accepting the fairness of the judgment delivered in the case of *Burden and Burden.*

He argued that in reaching their conclusion that:

"... the United Kingdom cannot be said to have exceeded the margin of appreciation afforded to it and that the difference of treatment for the purposes of the grant of inheritance tax exceptions was reasonable and objectively justified..." (see paragraph 61), the majority failed to adduce any reason or argument for doing so.

This circumstance prevented him from expressing my opinion concerning the legal aspects of the above conclusion. Therefore, he focussed only on the issue of the general unfairness of this judgement.

In particular, this unfairness led him to disagree with the judgement and prevented him from sharing the majority's opinion that there has been "no violation" in the instant case.

In his opinion, the decisive element in the case before us is the nature of the property belonging to the applicants, and their personal attitude to it.

Had assets purchased by the applicants during their co-habitation been at stake, he would have had no difficulty in accepting the majority's approach and, moreover, he would have readily agreed that part of such shared assets, inherited by a surviving sibling, could and should be considered as taxable property. In the case before the Court they faced with a qualitatively different situation. The case concerns the applicants' family house, in which they have spent all their lives and which they built on land inherited from their late parents. This house is not simply a piece of property - this house is something with which they have a special emotional bond, this house is their home.

It struck him as "absolutely awful" that once one of the two sisters dies, the surviving sister's sufferings on account of her closest relative's death should be multiplied by the risk of losing her family home because she cannot afford to pay inheritance tax in respect of the deceased sister's share of it. He found such a situation fundamentally unfair and unjust. It was impossible for me to agree with the majority that, as a matter of principle, such treatment can be considered reasonable and objectively justified. I was "firmly convinced that in modern society there is no "pressing need" to cause people all this additional suffering."

Other possibilities

Article 6

Most significantly for trust and tax advisers it is well established that Article 6 of the ECHR, which provides for the right to a fair trial, does not apply in ordinary tax disputes because tax is classified as an administrative matter rather than a civil or criminal one. Many commentators have already noted that this is both anomalous and harsh on taxpayers. It also shows that human rights lawyers are probably less interested in tax than they are in torture, and perhaps rightly so.

However, it is equally settled that Article 6 does apply to cases where substantial tax penalties are sought because such penalties are a criminal charge. The ECtHR has affirmed this in *Georgiou v UK* [2001] STC 80. The English courts have applied this in, for example, *Yau v C & E Commrs.*[2001] BTC 5,328 and in *King v. Walden* [2001] STC 822 in the case of penalties under *Taxes Management Act* 1970 (TMA 1970), s. 95 for fraudulently or negligently submitting an incorrect tax return. Not all penalties will be classified as criminal, however: less severe penalties such as those contained in TMA 1970, s. 93 for failure to submit a tax return are mere administrative fines.

Where Article. 6 applies then the taxpayer is entitled to the procedural guarantees it contains which include the right to a fair and public hearing within a reasonable time by an impartial tribunal. In cases of unacceptable delay by revenue authorities the ECtHR has found several violations of Article 6 and, somewhat inconsistently, taken the view that the taxpayer's civil rights were in issue. The ECtHR has also decided that actions to recover overpayments of tax are restitutionary and concern the taxpayer's civil rights so that Article 6 applies. Article 6 will also apply to a prosecution for failing to make a disclosure in relation to money laundering.

The Convention organs have relied on the general right to a fair trial contained in Article 6 to decide that where it applies there is both a privilege against self-incrimination and a right to silence. Thus, where either serious tax penalties are or accusations of money laundering are involved the taxpayer has the right not to answer questions or produce documents.

The ECtHR has confirmed this in relation to serious tax penalties in *JB v Switzerland* (2001) 3 ITLR 663. Even if penalties are not in issue there is an argument that documents obtained under compulsory powers cannot then be used in subsequent criminal proceedings, following *Saunders v United Kingdom* (1996) 23 EHRR 313. So it is perhaps arguable that once the revenue has obtained information using the powers contained in TMA 1970, s. 20 they cannot use that information in subsequent penalty proceedings.

Article 8

The dissenting judgements in *Burden and Burden* raise the intriguing possibility that if IHT requires the family home to be sold, then in certain circumstances, that might breach Article 8 as showing a lack of respect for the right to respect for family life and home. Whether the Grand Chamber will cast any light on that remains to be seen.

But it is acceptable for state authorities to use powers of search and seizure to obtain evidence of fiscal crime, including both tax fraud and money laundering, notwithstanding Article 8 which protects the right to private and family life, home and correspondence. It is also settled that Article 8 does not prevent authorities from obtaining information under compulsory powers in non-criminal cases because that is also a justified interference with the right to privacy. Where the state uses its powers to obtain information these must be subject to proper supervision.

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