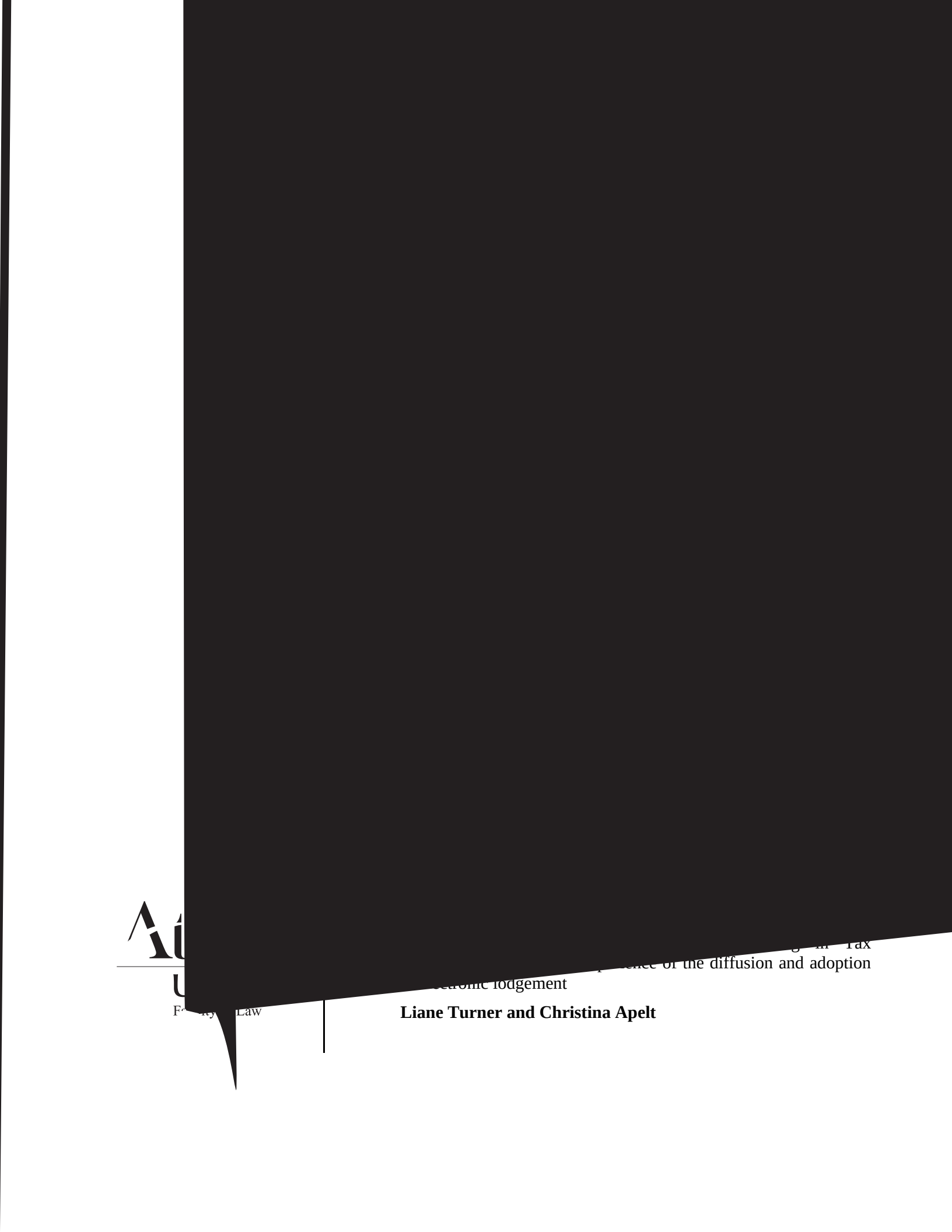

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The Effect of the Human Rights Act 1998 on Taxation Policy and Administration

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In her paper, Natalie Lee considers the im

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

That the Council of Europe and the Convention were both aimed at securing the most fundamental of values can be concluded from surrounding circumstances, the Preamble to the Convention itself and modern-day pronouncements. Thus, the Council was established, and the Convention came into being, four and five years respectively after the end of the Second World War, and one and two years respectively after the adoption and proclamation by the General Assembly of the United Nations of the Universal Declaration of Human Rights[6]. The Preamble to the Convention specifically reaffirms the "profound belief" of the members of the Council "in those fundamental freedoms which are the foundation of justice and peace in the world …." The first four of the Convention rights and freedoms are the right to life, the prohibition of torture, the prohibition of slavery and forced labour and the right to liberty and security. More recently, it was said:

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

The aim of this paper is to determine the effect to date of, and any likely future impact from, the incorporation of Convention rights into UK law by the Human Rights Act 1998 (HRA) on the formation of tax policy and tax administration. This will, however, necessitate the consideration of three preliminary issues. First, since UK citizens have enjoyed the right to take a case to Strasbourg since 1953[8] and, more recently, the protection by the common law through judicial review against interference with a fundamental right through the exercise by a public body of a very wide discretion conferred by statute,[9] why should the HRA make any significant difference? Secondly, what are the main principles of the HRA? Finally, given the fundamental values behind both the Council of Europe and the Convention, what have the Convention and the HRA to do with taxation at all?

COMPARING RIGHTS BEFORE AND AFTER INCORPORATION

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

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

[6] On 10 December 1948.

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

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

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

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

Government, were no longer perceived as British rights.[16] Indeed, it was pointed out with some force that the United Kingdom lagged some way behind the international human rights movement, with Britain remaining "in a slightly insular condition of satisfaction with its own legal institutions."[17] Secondlyons."c00041.6(ctak Tc5t6044 ofg041.6(ca041.6(cc

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

THE MAIN PRINCIPLES OF THE HUMAN RIGHTS ACT 1998

Three Main Principles

Convention rights have been incorporated into UK law by the HRA only insofar as this is consistent with parliamentary sovereignty. So, the Act, which itself can be

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

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

Secondly, although it has already been stated that no court is able to strike down or disregard legislation that conflicts with Convention rights, the High Court and above[32] may make a 'declaration of incompatibility',[33]

invalid and that it sought specifically to limit their access to justice. The European Court of Human Rights rejected the argument that there had been double taxation, and concluded that, despite the fact that the legislation did constitute an interference with

The question that needed to be answered in the case of the windfall tax was not whether it interfered with the taxpayers' enjoyment of their property (for it obviously did since they would have rather less after the imposition of the tax than before) but, rather, whether it was disproportionate to the needs of the society for whose benefit it was being levied. Opinions on the matter differed and, in the event, no challenge was ever made, possibly for the reason that the directors of the companies' concerned could not justify to their shareholders the expense of a petition to Strasbourg when compared with the actual tax owed. As a matter of conjecture, it is submitted that a challenge would not have been successful. Although in *Wasa Liv v Omsesidigt v Sweden* the Strasbourg Court held that the protection afforded by Article 1 of Protocol No 1 and other relevant provisions of the Convention is not excluded by the fact that a legislative provision involved the payment of tax, so theoretically a challenge *could* be successful,

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

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

The important issue of the margin of discretion (or appreciation) was discussed fully in another case concerning challenges in respect of certain types of widow's benefit and raising similar issues in relation to discrimination.[74] In that case, Moses J. sought to strike a bas8(j)-6(t)-7.5w.003 ov.72 Tm001w[(su8(jv.72 Tm001n,)]T[(su8hwou11.2o-18.as)-)-2.103

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

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

> it is neither possible not productive to determine with any precision the degree of deference to be paid to the legislature when the issues concern social and economic policy and the constitutionally important right not to be discriminated against on the ground of gender[79]

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

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

Using that reasoning, Moses J found that there was no objective justification for the discrimination resulting from the widow's bereavement allowance, and made a declaration of incompatibility, seemingly

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

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

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

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

[83] *Lindsay v United Kingdom* (1997) 23 EHRR 199
[84] Inheritance Tax Act (IHTA) 1984, s 18.
[85] (2003) Sp C 350; (2003) Simons Tax Intelligence 62.
[86] The proposals were published in a consultation document, *Civil Partnership: a framework for the legal recognition of same-sex couples* DTI, June 2003. The Government's response to the proposals was published in November 2003.

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

It is unlikely that the different tax provisions that apply to the employed[87] and to the self-employed[88] will ever be successfully challenged. One such provision permits employers to obtain a deduction for childcare expenses for employers as the provision of a benefit to its employees. Subject to certain conditions, an employee is not taxed on that benefit.[89] In contrast, self-employed persons can make no deduction for expenses incurred in respect of childcare. The taxpayer, a self-employed person, argued in *Carney v Nathan*[90] that the disallowance of such expenditure constituted discrimination within Article 14 in relation to Article 1 of Protocol No 1. Her argument was dismissed by the Special Comm 6.6oun2r.6ounrn2 Tc2 T,6 a Tc0-5..xr.01.068dt i-5.1(rn.6(iti

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

Tax Administration

Even though a piece of tax legislation may be Convention-compliant, it does not necessarily follow that the rules administered thereunder are similarly compliant. It is submitted that it is in this area where the HRA will have its biggest impact but, as the decision in *R (on the application of Wilkinson) v IRC*[94] demonstrates, this is more likely to be the case where the issue concerns proceedings in tax fraud cases and penalties, rather than with discretionary decisions by either the Inland Revenue or Customs and Excise. In that case, having ascertained that the legislation in question was indeed incompatible with Article 14, the taxpayer argued that, first, the Revenue had the power to make an extra-statutory concession in his favour by way of an income tax deduction equivalent to the allowance in question[95] and, secondly, they were *obliged* to grant such a concession to the taxpayer pursuant to section 6(1) of the Human Rights Act 1998. This section provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. In respect of the first argument, the Court of Appeal reviewed the authorities dealing with both the extent of the Revenue's powers to care for, manage and collect, the various taxes,[96] and their ability to make extra-statutory concessions. Despite the fact that the Revenue proceed on the basis that they are vested with a wide managerial discretion to refrain from recovering taxes which are payable under a strict application of the relevant legislation,[97] there has for many years been some considerable debate about the basis upon which extra-statutory concessions are made,[98] the nature of that debate being summarised in the words of Scott LJ when he said:

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[92] [2001] 31 EHRR 637 at p 647.

[93] *Op. cit.* n 91 at p 796.

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

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

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

Although there has been a move to incorporate some of the published concessions into the legislation,[100]

It is quite clear that despite the elation from commentators following the decision of the Strasbourg Court in *Willis v The United Kingdom*,[108] decided after the *Wilkinson* case, in which it was held that the difference in treatment between men and women regarding entitlement to the Widow's Payment and Widowed Mother's Allowance (both social security payments) was not based on any objective and reasonable justification, and was therefore in violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No 1, this case will have little bearing on the issue under discussion. Whilstle n re qation

a public authority has acted in a way which is incompatible with a Convention right must be a *victim* of that unlawful act. It is suggested that this requirement is even stricter than that of *locus standi*, and that it would be difficult for A to argue that he

That such a penalty could be criminal in nature was confirmed by the Strasbourg Court in *Georgiou v United Kingdom*,[127] and was applied in the High Court in *King v Walden*[128] where it was held that the system for imposing penalties for fraudulent or negligent delivery of incorrect tax returns was criminal for the purpose of Article 6(1) because the system was punitive. In *Han v Customs and Excise Commissioners*,[129] the Court of Appeal, in deciding that appeals against civil evasion penalties[130] were criminal proceedings for the purpose of the Convention, agreed that the concept of a 'criminal charge' within the meaning of Article 6 is an autonomous one, and applied three criteria previously enunciated by the Strasbourg Court for determining whether a criminal charge has been imposed.[131] These are, first, the classification of the proceedings in domestic law, secondly, the nature of the offence and, thirdly, the nature and degree of severity of the penalty that the person concerned risked incurring. In applying these criteria, Potter LJ said that they should not be considered separately, but as factors weighed together to decide whether, taken cumulatively, the relevant measures should be treated as criminal, and he concluded that, when coming to such a decision the second and third factors should weigh heavier than the first.[132]

In slight distinction, two more recent decisions of the Strasbourg Court have treated the three criteria as alternatives and not cumulative, unless an analysis of each did not make it possible to reach a conclusion as to the existence of a 'criminal charge'.[133] In any event, our own courts are of the view that categorisation of the proceedings in domestic law is not decisive of their nature, and provides only a starting point for the classification. Applying the criteria to the facts before them, the Court of Appeal was of the opinion that the national classification of the penalties as 'civil'[134] did not represent a decision on the part of the legislature to de-criminalise dishonest evasion of VAT. The relevant provisions applied in principle to all taxpayers and sought to punish, rather than compensate, Customs and Excise. Finally, it was sufficient that the penalty was substantial and its purpose was punitive and deterrent, and there was no requirement that it should involve imprisonment. Accordingly, looking at the substance rather than merely the form of the penalty, it was evident that it amounted to a criminal charge to which Article 6 applied. For its part, the Strasbourg Court has also taken the view that so-called 'civil' surcharges amounting to 20% and 40% of the increased tax liability were criminal for the purposes of Article 6.[135]

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

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[127] [2001] STC 80. The penalty in question was for dishonest evasion in respect of undeclared output VAT, but it was decided that there had been no infringement of Article 6 rights.
[128] [2001] STC 822.
[129] [2001] STC 1188.
[130] Imposed pursuant to the Value Added Tax Act 1994, s 60(1).
[131] In *Engel v The Netherlands*(1976) 1 EHRR 647.
[132] *Op. cit.* n 129 at pp 1208-1209.
[133] See

the VAT Tribunal concluded that serious misdeclaration penalties, default surcharges and late registration penalties were not criminal for the purposes of Article 6, a decision seemingly at odds with both the Strasbourg jurisprudence and the Court of Appeal. The Tribunal said that the penalties and surcharges in question had none of the characteristics of a criminal penalty, despite the fact that the 15% default surcharge appeared severe where the delay on payment was small,[137] and that the operation of the penalty regime under UK law adequately protected the rights of alleged defaulters, with no need for further safeguards.[138]

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

In *R v Allen*,[142] a taxpayer charged with cheating the Revenue sought to have certain evidence, provided during a Hansard interview, excluded by relying on the privilege against self-incrimination. Although the House of Lords held that it was not necessary to consider the alleged breach of Article 6 because the HRA was not in force at the relevant time and it did not have retrospective effect, it nonetheless considered the

process, designed to gather in money, and was not a criminal investigation. However, in *R v Gill and Gill*,[145]

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

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

[150] As did the Strasbourg Court in *Darby v Sweden* (1991) 13 EHRR 774.
[151] [2003] EWCA Civ 814; [2003] 1 WLR 2683.