

TAXPAYERS' FUNDAMENTAL RIGHTS IN EUROPE AND ASIA

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The fact that National Provincial Building Society lost its case before the European Court of Human Rights¹ should not be taken as an indication that the European Convention on Human Rights can be completely ignored by tax advisers. Both at a domestic and a European level the Convention is a powerful force. So far as the UK is concerned, the VAT and Duties Tribunal has relatively recently referred to the right to a fair trial (Article 6(1) of the Convention) in an excise duty case, *Hodgson v CCE*.² Perhaps somewhat unusually, a recent case before the High Court of Hong Kong, *Harvest Sheen & Another v The Collector of Stamp Revenue*,³ indicates how the Convention may apply in other contexts.

The facts of *Harvest Sheen* were that the applicant bought a property in Hong Kong for and on behalf of an unnamed company. The documents submitted to the authorities led it to believe that there were two transactions, not one. The first transaction was said to be the purchase by the applicant, the second was the sale by the applicant to the company. Stamp duty was, therefore, sought from the applicant as well as from the company. The applicant succeeded in establishing before the Hong Kong High Court that she was not liable to pay stamp duty as there was only one purchase by her acting on behalf of the company. The Convention was relevant not to the main issue in the case but to a significant subsidiary one concerning a limitation of the applicant's right to appeal.

Section 14 of Hong Kong's Stamp Duty Ordinance provided that, in order to appeal the decision of the authorities to charge stamp duty on two transactions, the applicant had to pay the stamp duty in issue. The applicant contended that this infringed Article 10 of Hong Kong's Bill of Rights Ordinance ("BOR"). Article 10 states:

¹ [1997] STC 1466.

² Case E00017 (1996).

³ (1997/98) 1 OFLR 669.

"Equality before courts and right to fair and public hearing"

All persons shall be equal before the courts and tribunals. In determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."

As Barnett J found for the applicant on the main issue, his comments on Article 10 are *obiter* but are, nevertheless, of some importance.

The judge said that he could see "no significant differences" between Article 10 BOR and Article 6 of the European Convention.⁴ In this he was surely correct. Article 6 begins:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

Having established that the decisions on Article 6(1) were in point the judge paid particular regard to *Airey v Ireland*⁵ and *Tolstoy v UK*.⁶ *Airey* concerned a complaint that lack of legal aid in Ireland was a breach of Article 6(1) of the Convention because it prevented access to the courts. *Tolstoy* concerned a complaint that a security for costs order breached Article 6(1). Both cases confirmed the view that the Convention was concerned not simply with the hearing of a litigant's case but with the right to go to court at all. As Barnett J put it:

"If a litigant is entitled to a fair trial, it must be implicit that the litigant gets to trial in the first place."⁷

In coming to this conclusion on article 10 BOR he differed from Waung J in *Kwan Kong Co Ltd v Town Planning Board*.⁸

Having concluded that the right to go to court is a protected right under the BOR it was a short step to concluding that the obligation to pay the duty infringed it.

⁴ Page 684g.

⁵ (1979) 2 EHRR 305.

⁶ (1995) 20 EHRR 442.

⁷ Page 684j.

⁸ [1995] 3 HKC 254.

The judge noted the comments made in *Tolstoy* to the effect that the state enjoyed a margin of appreciation in this context and that a right may be restricted, so long as the restriction pursues a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aim to be achieved. Nevertheless, in relation to the obligation to pay the duty on appealing, he said:

"I cannot accept that the existing fetter falls within [the] margin of appreciation or, to put it another way, is proportionate to the end which the legislative scheme seeks to achieve. There will be cases where a would-be appellant simply cannot pay the duty assessed and is therefore effectively denied access to the Court. Neither the respondent nor the Court has power to ameliorate the requirement that the whole amount of duty be paid."⁹

He continued:

"...I do not see that it would be difficult to introduce provisions for the giving of security rather than payment of duty, for the Court to defer payment or dispense with security in an appropriate case and for a document to be made enforceable pending a legitimate appeal."¹⁰

There is an obvious parallel to be drawn between the legislation in Hong Kong and the UK stamp duty legislation. Section 13 of the UK's Stamp Act 1891 gives one a right to appeal but on payment of duty. There are provisions providing for repayment of duty with interest if excess duty is charged, but no provisions permitting waiver of the obligation to pay the duty in the first place. It is, of course, impossible at the moment to rely directly upon Convention rights in UK courts. Only if one is concerned with a situation within the field of application of Community law can Article 6(1) be used by UK courts and tribunals to assist an appellant.¹¹ *Hodgson*, referred to above, was plainly concerned with a matter within the application of Community law as it related to excise duty. It is worth noting though, that the Community Customs Code gives the authorities discretionary powers to mitigate the effects of a requirement to pay duty on appealing and there are provisions permitting mitigation in the context of VAT.¹²

⁹ *Supra* page 686g-h.

¹⁰ *Supra* page 687 b-c.

¹¹ See Case C-260/89 *Elliniki Radiophonia Tileorasi v Dimotiki Etaria Porioflorissis* [1991] I-ECR 2647 and more recently Case C-299/95 *Kremzow v Austria* [1997] I-ECR 2647. The Convention can also be used to resolve ambiguity in UK law see *R v Secretary of State for the Home Department, Ex parte Brind* [1991] AC 696.

¹² See Article 244 of the Community Customs Code and the Value Added Tax Act 1994 section 84.

A trader may well wish to rely, amongst other things, on Article 6(1) of the Convention. Indeed, since preparing this note, the writer has become aware of a case before the VAT and Duties Tribunal in which legitimacy of the UK's VAT legislation is to be decided.