CONSTRUCTION INDUSTRY SCHEME – fixed and month 13 penalties —late filing of returns – no reasonable excuse – proportionality of penalties – whether within wide margin of appreciation — interpretation of s 100B Taxes Management Act 1970 — Human Rights Act 1998 – appeal allowed

IN THE UPPER TRIBUNAL **FTC/3/2013**
TAX AND CHANCERY CHAMBER

BETWEEN

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

ANTHONY BOSHER

Respondent

Tribunal: Mr Justice Warren, Chamber President
Judge Colin Bishopp

Sitting in public in London on 5 and 6 November 2013

Hui Ling McCarthy, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Keith Gordon and Ximena Montes Manzano, counsel, instructed by Mazars LLP, for the Defendants

DECISION

Introduction

1. This is an appeal from a decision ("**the Decision**") of the Tax Chamber (Judge Aleksander and Susan Hewett - "**the Tribunal**") released on 8 October 2012. Mr Bosher's appeal to the Tribunal was against penalties of £54,100 imposed on him by HMRC for his failure to make monthly returns by the due date under the Construction Industry Scheme ("**CIS**"). The Tribunal allowed Mr Bosher's appeal and cancelled 193 fixed penalties of £100 each on the grounds that they were disproportionate. The central issue on HMRC's appeal before us is whether the Tribunal had the jurisdiction to cancel these penalties. HMRC say that there was no jurisdiction to do so. But even if there was, they submit that the penalties were proportionate and that the Tribunal should not have interfered with them.

The legal framework and the penalty regime

2. The CIS is a tax compliance scheme for businesses operating in the construction industry. This is an industry that has traditionally attracted a large, itinerant workforce and often involves "cash in hand" transactions. Historically, this resulted in a significant loss of tax and national insurance contributions because many sub-contractors engaged in the construction industry "disappeared" without settling their tax liabilities, with a consequential loss of revenue to the Exchequer. The solution was described by Ferris J in *Shaw (Inspector of Taxes) v Vicky Construction Ltd* [2002] STC 1544 at [4]:

> "In order to remedy this abuse, Parliament enacted legislation, which goes back to the early 1970s, under which a contractor is obliged, except in the case of a sub-contractor who holds a relevant certificate, to deduct and pay over to the Revenue a proportion of all payments made to the sub-contractor in respect of the labour content of any sub-contract. The amount so deducted and paid over is, in due course, allowed as a credit against the sub-contractor's liability to the Revenue."

3. The legal basis of the CIS, as it has been in force from 6 April 2007, is ss 57-77 of the Finance Act 2004 ("**FA 2004**") and the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) (the "**2005 Regulations**"). As Ferris J said, the CIS requires certain payments by contractors to sub-contractors to be made subject to deduction of tax, but the sub-contractors are entitled to claim credit for tax withheld under CIS against their tax liability for the tax year in question.

4. Contractors are required to make a return no later than 14 days after the end of every tax month (a "**monthly return**") (s 70 FA 2004 and reg 4 of the 2005 Regulations). For these purposes, a tax month means the period beginning with the 6th day of a calendar month and ending on the 5th day of the following month. So a monthly return must be received by HMRC no later than the 19th day of the month. Nil returns are also required (s 70 FA 2004 and reg 4(10) of the 2005 Regulations).

5. If a monthly return is received after the filing date, it will be treated as late and the contractor will be liable to a penalty under s 98A of the Taxes Management Act 1970 ("TMA") (introduced by the Finance Act 1989 and amended relevantly by FA 2004), which provides:

> "(1) … regulations under section 70(1)(a) or 71 of the Finance Act 2004 (sub-contractors) may provide that this section shall apply in relation to any specified provision of the regulations.
>
> (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—
>
> (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, and
>
> (b) if the failure continues beyond twelve months, without prejudice to any penalty under paragraph (a) above, to a penalty not exceeding—
>
> …
>
> (ii) in the case of a provision of regulations under section 70(1)(a) or 71 of the Finance Act 2004, £3,000.
>
> (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—
>
> (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100 …."

6. It can be seen that late filing penalties are chargeable for each month during which a return is outstanding after the filing date for a maximum of 12 months and a further penalty if the return has still not been filed after 12 months. There are two types of penalty:

1. The monthly penalty of £100 for each month or part month that a return is late during the first 12 months when the employer has no more than 50 sub-contractors (as in Mr Bosher's case); and
2. A final late return (commonly referred to as the "**month 13 penalty**") if the failure to submit a return continues after 12 months. The month 13 penalty may not exceed £3,000.

The total exposure to penalty for any one return is thus a maximum of £4,200.

7. As explained at [15] of the Decision, HMRC's policy in calculating the appropriate month 13 penalty is to charge an increasing tariff based on the number of instances a return is over 12 months late in a rolling 12 month period. Thus the amounts levied in respect of the month 13 penalty for each failure in a 12 month period depend on the number of previous final penalties issued in that period. The tariff amounts are as follows:

1st failure - £300

2nd failure - £600

3rd failure - £900

4th failure - £1200

5th failure - £1500

6th and later failures - £3000.

8. Under s 100 of TMA, an authorised officer of HMRC may make a determination imposing a penalty under the provisions of the Taxes Acts; s 100(3) requires notice of such a determination to be served on the person liable. So far as material, s 100 provides as follows:

> "(1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below . . . an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.
>
> …
>
> (3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.
>
> (4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal…."

9. Section 100B of TMA is headed "Appeals against penalty determinations" and sets out the relevant right of appeal and the extent of the Tribunal's jurisdiction. It provides, so far as is material:

> "(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax, except that references to the tribunal shall be taken to be references to the First-tier Tribunal.
>
> (2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—
>
> (a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—
>
> (i) if it appears that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears to be correct, confirm the determination, or
>
> (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount,
>
> (b) in the case of any other penalty, the First-tier Tribunal may—

(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be appropriate, confirm the determination,

(iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or

(iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate."

10. It can be seen, therefore, that where the amount of the fixed penalty of £100 appears to be **incorrect**, it may be increased or decreased to the **correct** amount. This contrasts with the position in relation to the month 13 penalty (the amount of which, it will be remembered, is not a fixed amount and so will be of an amount, not in excess of £3,000, determined by the authorised officer of the Board): where the amount of the penalty appears to be **excessive** or **insufficient**, the amount may be **reduced** or **increased** to an amount which the First-tier Tribunal considers appropriate. We note in passing that Parliament has clearly entrusted the decision on the amount of the month 13 penalty to the First-tier Tribunal in cases where that Tribunal considers the determination by HMRC to be excessive or insufficient.

11. Section 118(2) of TMA states that where a person had a reasonable excuse for not doing anything which was required to be done, he shall be deemed not to have failed to do it if he did it without reasonable delay after the excuse ceased. The subsection provides:

"(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

12. Under s 102 of TMA, HMRC has a specific power to mitigate penalties. The section provides:

"The Board may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty."

13. HMRC had (and still have) a published policy on how they operate their mitigation powers under section 102. It can be found in HMRC's online Enquiry Manual at EM5310 – Penalties: Mitigation, which may be viewed at http://www.hmrc.gov.uk/manuals/emmanual/EM5310.htm. This policy applies not only to CIS penalties: it is of more general application, and some of its provisions are not relevant to the CIS regime. It states that:

"Given that Parliament has enacted the relevant penalty and the taxpayer has incurred it, HMRC will only mitigate in certain narrowly constrained circumstances. Mitigation will only be considered after

- the penalty has been determined and the taxpayer has exhausted (or abandoned) all appeal rights and/or
- the failure or error that led to the penalty has been remedied or corrected.

Mitigation will then be considered in three circumstances:

1. Where some sort of HMRC maladministration, usually delay, has caused or contributed to the size of the penalty - where delay and/or lack of co-operation by the taxpayer have caused the department additional costs that will weigh against mitigation.
2. Where to enforce payment of the penalty would cause the taxpayer genuine and absolute hardship.
3. Other exceptional circumstances such as the penalty or penalties being wholly disproportionate to the offence, the example given being of a large tax-geared failure penalty under S93(5) following upon very large S93(3) daily penalties for the same offence, or belated information revealing the type of situation set out at EM5212 ('In-built' penalty).

There is no appeal against HMRC's decision on S102 mitigation and a taxpayer wishing to litigate would need to seek Judicial Review."

14. As explained in [125] of the Decision, Schedule 55 to the Finance Act 2009 introduced a new penalty regime for the late filing of returns (including CIS returns). The regime came into force for CIS monthly returns with effect from 6 October 2011 and applies to returns due to be filed on or after 19 November 2011. In November 2010, in the light of the fact that the new CIS penalty regime would shortly come into force, HMRC introduced a revised policy for considering mitigation of penalties under s 102 of TMA for late contractors' monthly returns. This policy was announced on HMRC's website. HMRC compared the penalties charged under s 98A of TMA with the amounts that would be charged under Schedule 55. If the penalties under the new regime were less, HMRC offered to mitigate the s 98A penalties to the lower amount, using their discretion under s 102 of TMA.

15. HMRC's new policy results in one of the following three outcomes:

1. If a contractor accepts the lower penalty amount, the penalties are reduced under s 102 of TMA.
2. If a contractor wishes to challenge the fact that a penalty is due despite the offer of mitigation, he can appeal in the normal way. However, HMRC will not reduce the amount beforehand. If the tribunal determines the penalties at the higher figure, once the appeal process has been exhausted, HMRC will reduce the amount of the penalty under s 102 of TMA in any event. If the contractor feels that further mitigation is due for reasons such as hardship, this will be considered in the normal way.

3. If a contractor agrees that a penalty is due but feels that it should be mitigated further, his reasons will be considered in the normal way.

The European Convention on Human Rights and the Human Rights Act 1998

16. It is convenient to set out, without comment at this stage, certain provisions of the European Convention on Human Rights ("**ECHR**") and of the Human Rights Act 1998 ("**HRA 1998**") which have featured in argument:

1. Article 1/1 of the First Protocol to the Convention ("**A1P1**"):

> "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."

2. Section 3 of HRA 1998 (headed "Interpretation of legislation") ("**section 3**"):

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.…"

3. Section 6 of HRA 1998 (headed "Acts of public authorities") ("**section 6**"):

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> ….
>
> (3) In this section 'public authority' includes—
>
> (a) a court or tribunal…."

The Tax Chamber

17. The appeal referred to in s 100(4) now lies to the Tax Chamber. In our decision in *Revenue and Customs Commissioners v Hok Ltd* [2012] UKUT 363 (TCC), [2013] STC 225 at [36], we referred to the creation and purpose of the First-tier Tribunal and made some observations. It has a wholly statutory jurisdiction. We held that, in relation to fixed penalties, it has jurisdiction under s 100B of TMA to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In particular, neither that provision nor any other gives the tribunal a discretion to adjust a penalty of the kind imposed in *Hok* (or, it would follow, in the present case), because of a perception that it is unfair or for any similar reason. To repeat what we said there, it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust, a penalty because of a perception that it is unfair. Mr Keith Gordon, counsel for Mr Bosher, however,

has raised new arguments not addressed by us in *Hok* which, if correct, would lead to some qualification of how we put the matter there. We will come to those arguments in due course.

The facts

18. The Tribunal made a number of findings of fact. We do not need to go into its findings in detail, but we set out the background facts (in accordance with the findings) briefly in order to set the context of the points of principle which are disputed.

19. In summary, Mr Bosher appealed to the Tax Chamber against penalties of £54,100 imposed by HMRC because he had failed to file on time numerous monthly returns due under the CIS. A summary of the CIS returns and when they were made along with the penalties relating to each return is set out in the Appendix to the Decision.

20. In outline, penalties were originally determined in a total sum of £64,400. However, as explained in [2] of the Decision, the penalties for periods ending on or after 5 June 2009 were cancelled. This resulted in the following penalties (totalling £54,100) remaining:

1. 193 fixed penalties of £100 imposed pursuant to s 98A(2)(a) of TMA (when read together with s 98A(3)(a)); and
2. 17 variable month 13 penalties totalling £37,800 imposed pursuant to s 98A(2)(b) of TMA.

21. On 25 January 2011, HMRC offered to reduce the penalties to £14,600 under s 102 of TMA. This offer was made in accordance with the process announced on HMRC's website on 17 November 2010. Mr Bosher turned down the offer so that the appeals before the Tribunal related to the £54,100 total referred to above. HMRC's position has remained throughout, as confirmed to the Tribunal at that stage and to us as well, that in the event that the appeals against the penalties are dismissed, HMRC will stand by this offer and, if he makes one, will also consider any request that Mr Bosher might make to reduce the penalties in accordance with the published guidance.

22. Before the Tribunal, Mr Bosher argued that (i) he had made each CIS return on time and (ii) he had not received a significant number of HMRC's penalty notices. HMRC argued that Mr Bosher made 18 late returns under the CIS; and all penalty notifications were sent to him on time.

23. The Tribunal rejected Mr Bosher's evidence and found it (variously) implausible and not credible, holding that the dates of receipt of the relevant CIS returns by HMRC were as set out in the Appendix to the Decision. The Tribunal also found that Mr Bosher did not have a reasonable excuse for the late delivery of his returns.

24. Furthermore, the Tribunal found that under the old CIS (prior to 2007), Mr Bosher had had a poor compliance record and failed to submit CIS36 annual returns on time for 2004/05, 2005/06 and 2006/07, incurring penalties of £1,200 for each of the tax years 2005/06 and 2006/07. It also concluded that HMRC had

properly issued the penalty notices which are the subject of the appeal. They were properly served by HMRC having been posted to the correct address shown on their computer system within a reasonable time. It rejected Mr Bosher's evidence that he did not receive in excess of 200 penalty notices as implausible and not credible.

The Tribunal's conclusions

25. The Tribunal agreed with HMRC that the month 13 penalties were not disproportionate given that the Tribunal had full discretion to mitigate these penalties under the legislation (s 100B(2)(b)(iii) of TMA) and that there was no need for HRA 1998 to be invoked. The Tribunal considered that the amounts levied by HMRC were "excessive" within the meaning of that provision and decided to reduce them pursuant to s 100B(3) to an amount equal to the greater of £100 or the CIS tax (if any) shown as payable in respect of the relevant return. The Tribunal calculated the aggregate of the month 13 penalties, on this basis, to be £6,287.25.

26. As regards the fixed penalties, the Tribunal held that the £100 penalties were "correct" in the sense that each of the penalties imposed had in fact been incurred and were imposed in the correct amount on an ordinary construction of the legislation. However, it went on to determine that s 3 of HRA permitted the Tribunal to read the word "incorrect" in s 100B(2)(a)(iii) of TMA in such a way as to include penalties which are disproportionate and therefore breach a taxpayer's rights under A1P1. It reduced the penalties to zero.

27. The Tribunal viewed the month 13 penalties and the fixed penalties together. Thus, in reducing the fixed term penalties to zero they "did not condone Mr Bosher's repeated defaults, as he will continue to be liable to the month 13 penalties". It considered the adjusted month 13 penalties "to represent a proportionate sanction for his failure to file CIS returns in the particular circumstances of this case".

Mr Bosher's case

28. Although the second paragraph of A1P1 qualifies the right to peaceful enjoyment under the first paragraph, it is common ground that the qualification is not absolute. An interference with A1P1 rights has to be justified, and it can only justified if it is "proportionate" as that concept is understood in accordance with the jurisprudence of the European Court of Human Rights. Mr Gordon submits that the question whether A1P1 rights have been infringed is to be looked at on an individual basis. In other words, it does not have to be shown that the penalty regime *per se* is somehow flawed in a relevant way but only that the application of that regime to an individual taxpayer results in an infringement of the A1P1 rights of that taxpayer. We do not think that HMRC dispute that proposition. It is, in any case, in our view correct. It is the view we took when we considered the point in our decision in *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), [2013] STC 681 at [74] to [78]. We do not wish to add to what we said there.

29. Mr Gordon then submits that the penalty regime as applied to Mr Bosher on the facts of the present case has resulted in penalties which are not proportionate so that his A1P1 rights have been infringed. This is what the Tribunal decided, a finding which in Mr Gordon's submission is a finding of fact which we cannot go behind.

30. Accordingly, the relevant legislation must be construed so as to provide the Tax Chamber with a power, on appeal, to reduce the penalty to a proportionate amount, this interpretative imperative being found in s 3. This is what the Tribunal did in reading the word "incorrect" in s 100B(2)(a)(iii) as including "penalties which are incorrect by virtue of being disproportionate and breach the taxpayers rights under [A1P1]". Mr Gordon has an alternative route to the same destination. He submits that the £100 monthly penalty under s 98A(2)(a) is not "a penalty which is required to be of a particular amount" within the meaning of s 100B(2)(a) because the £100 monthly penalty is itself subject to HMRC's power to mitigate under s 102 and not, therefore, fixed in the first place.

HMRC's answers

31. Three answers are given by HMRC against those conclusions:

1. First, even if (which is in any event contested) the penalties imposed on Mr Bosher are disproportionate, they are subject to HMRC's power to mitigate under s 102 of TMA. A failure by HMRC to mitigate so as to produce a result which was not disproportionate would be susceptible to judicial review. The scheme of the penalty regime taken as a whole (*ie* including s 102) coupled with a right to seek judicial review is a sufficient protection or method of vindication of a person's Convention rights. There is no need to depart from the ordinary interpretation of s 100B (*ie* to adopt the ordinary meaning of "incorrect" in s 100B(2)(a)(iii)) so that section 3 is not engaged. Mr Bosher's only route to challenge the eventual amount of the penalty after any mitigation under s 102 is by way of judicial review in the Administrative Court (or in the Upper Tribunal if an application for review is transferred to it by the court).

2. Secondly, even if (as in 1. above) the penalties imposed on Mr Bosher are disproportionate, section 3 does not bring about the result for which Mr Gordon argues. There is a limit on the extent to which the interpretative, and not legislative, provisions of s 3 can rewrite s 100B and what Mr Bosher seeks goes beyond that limit.

3. Thirdly, the penalties are not disproportionate in any case.

We look at those answers in turn.

The adequacy of mitigation and judicial review as a vindication of Convention rights

32. The first point to make under this heading is that proportionality is to be assessed in relation to the person concerned by reference to the penalty actually imposed. Although penalties totalling £54,100 have been imposed on Mr Bosher,

they are subject to HMRC's power to mitigate under s 102. Even assuming that the figure of £54,100 (or elements of it) can be said to be disproportionate, that is not the correct figure, in our view, by which to assess proportionality. The correct figure will be that which HMRC determine after mitigating under s 102 in accordance with their published policy and after further hardship or other mitigation. There is, we consider, no justification for stopping at the stage of initial penalty because the interference with Mr Bosher's A1P1 rights is not the amount of the initial penalty, but that which he actually has to pay.

33. The next point to make is that where there is a disproportionate interference with a person's A1P1 rights, he must be provided with an adequate remedy by which he can vindicate those rights in the face of that interference. Conventionally, this will be through a judicial process. Indeed, that is precisely what Mr Bosher himself seeks, with Mr Gordon submitting that the judicial process is to be interposed at the stage of an appeal from the initial penalty: in effect, the Tax Chamber is the appellate tribunal in relation to the amount of the penalty and should be entitled to substitute its own view of the correct amount, that is to say the amount which would represent a proportionate penalty in all the circumstances. And it is entitled to do so at a stage before HMRC has decided whether, and if so how, to exercise its powers of mitigation under s 102.

34. In that context, Mr Gordon points out that HMRC are able to exercise their powers of mitigation under s 102 at any time; it is only as a matter of policy that they do so only after the appeal process has been exhausted. Having chosen to delay the exercise of their powers in that way, they cannot, it is suggested, at the same time say that the initial penalty is not the datum point from which to assess proportionality.

35. Ms Hui Ling McCarthy, counsel for HMRC, has explained to us the policy reasons for postponing consideration of mitigation until after appeals on the correctness of the fixed penalties has been dealt with. In particular, if mitigation were to be dealt with before an appeal had been heard, the mitigation could only be provisional in the sense that a different penalty (following appeal) might result in a different amount of mitigation. Moreover, dissatisfaction with the amount allowed by way of mitigation falls to be dealt with by judicial review; it would be unsatisfactory, and probably confusing, if a taxpayer had to protect his position by launching judicial review when the underlying amount of the penalty remains in dispute.

36. We do not consider that the judicial oversight has to be interposed at the stage of an appeal from the initial penalty itself (ignoring, for the moment, the argument in relation to s 3). Suppose, for instance, that the legislation expressly conferred a right of appeal to the First-tier Tribunal in relation to the amount of the mitigation allowed by HMRC. We do not think that it could sensibly be argued that that was an insufficient method by which to vindicate a taxpayer's A1P1 rights. And that is so even in the light of the current policy to consider mitigation only after an appeal on the correctness or otherwise of the initial penalty. In other words, in that scenario, we would reject any argument that, in order to render the legislation Convention compliant, a right of appeal against the amount of the initial penalty needs to be provided as the only way effectively to

vindicate a taxpayer's A1P1 rights notwithstanding the existence of an express right to appeal the amount of the mitigation.

37. The legislation does not, of course, in fact provide for such a right of appeal against the amount allowed by way of mitigation. But what English law does provide is right to seek judicial review of the exercise of the power of mitigation. The question, then, is whether that right is a sufficient vindication of a taxpayer's A1P1 rights.

38. Mr Gordon submits that it is not. He says that judicial review is a costly process in which a taxpayer, if he is to be represented at all, must be represented by lawyers having the appropriate rights of audience in the High Court. It is procedurally complex. Further, the grant of any remedy is discretionary; there is not sufficient certainty in the process to be sure that a taxpayer's A1P1 rights will, in fact, be vindicated.

39. We reject his submission. It is true that judicial review can be costly and that a taxpayer such as Mr Bosher is exposed to the risk of an adverse costs order (in relation to which Ms McCarthy is not right to say that a protective costs order would be available); and it may well be correct that a taxpayer's costs in the Tax Chamber in dealing with the proportionality of a penalty will be (possibly substantially) less than the costs of the equivalent judicial review challenge in the Administrative Court (not least because of the different rights of audience). But that is no reason, in our view, for concluding that judicial review does not represent an adequate and effective way to protect the taxpayer's rights. The fact that there may be a cheaper and possibly more appropriate forum where the matter could be adjudicated does not mean that judicial review is either inadequate or ineffective. It is only if the hurdles facing a taxpayer in seeking judicial review are so great as to amount, in practice, to a denial of access to justice that the point has any validity; we cannot possibly conclude that that is so.

40. As to the point that the grant of a remedy is discretionary, we do not think there is anything in the point. Section 6 makes it unlawful for the Court, as a public authority, to act in a way which is incompatible with a Convention right. If the Court found that there was, *prima facie*, a disproportionate penalty, it would be bound to grant a remedy: it would be unlawful not to do so. There may, we suppose, be special circumstances where the court considers that remedy should not be granted, but in such a case we would think it likely that this would be because what appeared, *prima facie*, disproportionate was, in those special circumstances, proportionate. But whatever the position may be, we perceive the ordinary position being that a disproportionate penalty would be remedied on judicial review.

41. So far as the authorities are concerned, they support the proposition that judicial review affords an adequate protection in vindication of Convention rights. We refer to only one of them, the conjoined appeals in *R (Alconbury Developments Ltd) v S o S for the Environment, Transport and the Regions, R (Holding & Barnes plc) v S o S for the Environment, Transport and the Regions* and *S o S for the Environment, Transport and the Regions v Legal and General Assurance Society Ltd* [2001] UKHL 23, [2003] 2 AC 295. These cases are, on their facts, far away from the present case. They all involved challenges to

determinations by the Secretary of State on planning matters. Those determinations were said by the objectors to the planning applications to infringe their rights under Article 6 of the Convention – the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Secretary of State himself was not Article 6 compliant. But as Lord Slynn noted at [29] of his opinion:

> "The European Court of Human Rights has, however, recognised from the beginning that some administrative law decisions which affect civil rights are taken by ministers answerable to elected bodies. Where there is a two-stage process, i e there is such an administrative decision which is subject to review by a court, there is a constant line of authority of the European court that regard has to be paid to both stages of the process. Thus even where 'jurisdictional organs of professional associations' are set up:
>
> > 'None the less, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1).'
>
> See *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para 29. See also *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, *Golder v United Kingdom* (1975) 1 EHRR 524."

42. The same applies, we consider, to a decision taken by HMRC whether or not to mitigate a penalty. There is a two stage process: first that decision, second a review (*ie* judicial review by the Administrative Court or the Upper Tribunal on transfer to it). The Convention requires control by a judicial body which "has full jurisdiction" which does provide the guarantee of Article 6(1) in relation to the determination of civil rights and obligations or any criminal charge.

43. As part of that exercise, the relevant judicial body must apply the principle of proportionality. And so we find Lord Slynn at [51] and [52] saying this:

> "51. The European Court of Justice does of course apply the principle of proportionality when examining such acts and national judges must apply the same principle when dealing with Community law issues. There is a difference between that principle and the approach of the English courts in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. But the difference in practice is not as great as is sometimes supposed. The cautious approach of the European Court of Justice in applying the principle is shown inter alia by the margin of appreciation it accords to the institutions of the Community in making economic assessments. I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the Human Rights Act 1998 however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied:

> see *R v Secretary of State for the Home Department, Ex p Turgut* [2001] 1 All ER 719; *R (Mahmood) v Secretary of State for the Home Department* [2000] 1 WLR 840.
>
> 52. This principle does not go as far as to provide for a complete rehearing on the merits of the decision. Judicial control does not need to go so far. It should not do so unless Parliament specifically authorises it in particular areas."

44. We gain considerable assistance from this decision as a whole and in particular from the passages which we have cited from the opinion of Lord Slynn. In our judgment, the control of HMRC's exercise of their discretion under s 102 of TMA by judicial review results in a guarantee that Article 6 of the Convention will be respected and provides a fully effective vindication of the rights of a taxpayer under A1P1 in the context of penalties under the CIS regime.

45. It is convenient at this stage to deal with an argument raised by Mr Gordon in relation to the approach to statutory construction in the light of section 3. He submits, if we understand the submission correctly, that there is a single process of construction of domestic legislation. The starting point is to have HRA 1998 in mind and to search for a construction which gives the greatest effect possible to Convention rights. We may have misunderstood his submission; but it does not matter if we have because we consider the correct approach to be perfectly clear. The correct approach is to interpret the legislation according to ordinary canons of construction, bearing in mind the Convention as one would bear in mind any treaty, but not having regard to the powerful interpretative direction found in s 3. Where the legislation is ambiguous, then an interpretation which better reflects the Convention rights is clearly to be preferred. It is only where the unambiguous meaning (or each of a set of ambiguous meanings) is clearly incompatible with the Convention rights that section 3 comes into play. In other words, there is a two stage process: construe the legislation and, if that construction is not compatible with the Convention rights, find a construction which is compatible "so far as it is possible to do so". This, it seems to us, was the approach adopted in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 ("***Ghaidan***").

46. On that approach, it is clear that the powers of the Tax Chamber under section 100B(2)(a)(iii) relate only to the correctness of the amount of the penalty ascertained in accordance with the provisions of s 98A(2). In the present case, there is no doubt that the penalties under appeal were not "incorrect" in that sense. We do not understand Mr Gordon to disagree with that. His whole challenge is to the proportionality of the total amount of the penalties which is why he seeks, under s 3, to impose an interpretation of s 100B which on any ordinary reading it does not bear.

47. The upshot of all this, in our judgment, is as follows:

a. All of the penalties with which we are concerned – that is to say the 193 £100 penalties as well as the 17 month 13 penalties - were properly imposed in accordance with the legislation as construed according to ordinary canons of construction ignoring section 3.

b. Mr Bosher has a right to appeal but only to the extent that the penalties were "incorrect", which the fixed £100 penalties clearly

were not. His appeal to the Tax Chamber should not have succeeded and, subject to a further argument to which we come shortly, HMRC's appeal to us must be allowed.

c. Once his appeal has been determined (by us) HMRC must consider the application of s 102. As a matter of fact, they have committed themselves to mitigating the penalties to the extent already explained.

d. If Mr Bosher considers that the penalties, once they have been mitigated, are not proportionate and infringe his A1P1 rights, he may challenge HMRC's decision by seeking to bring judicial review.

e. His right to bring judicial review is a sufficient guarantee of his Article 6 rights enabling him to vindicate his A1P1 rights.

f. There is no scope for the application of section 3 since the scheme of the legislation is compliant with the Convention.

g. Since the Tax Chamber has itself no judicial review powers (see our decision in *Hok*) the application for judicial review must be commenced in the Administrative Court. It may, in due course, be transferred to the Upper Tribunal.

48. Save for the further argument to which we come at para 69 below, that is enough to dispose of the appeal in favour of HMRC. Subject to the outcome of that argument, the decision of the Tax Chamber should be set aside and the 193 fixed £100 penalties confirmed. There was no challenge by either party to the Tribunal's determination of the month 13 penalties, which we do not disturb.

49. We do not wish to leave matters there since other points have been fully argued and a decision on them may be useful to practitioners and HMRC alike.

Section 3

50. If we are wrong in our conclusions so far, the issue arises whether section 3 can avail Mr Bosher. The assumptions underlying this issue are (i) that, as before, the penalties are disproportionate and (ii) that Mr Bosher is entitled to some sort of remedy at the stage of imposition of the penalty and does not have to wait until questions of mitigation have been dealt with. We note that the consequence, if he is right, is that HMRC's mitigation power would be significantly reduced in its application if not altogether rendered redundant: the Tax Chamber would be able, in effect, to mitigate the penalty without HMRC ever having considered the question. This would be a very surprising result to our minds.

51. The leading authority on section 3 for current purposes is the decision of the House of Lords in *Ghaidan*. The issue was whether the defendant, who had lived for many years in a stable and permanent homosexual relationship with the protected tenant of a flat, was a person living with the tenant "as his or her wife or husband". It was held that the defendant's Convention rights were infringed since application of the ordinary meaning of the words "as his or her wife or husband" resulted in the defendant being treated less favourably than survivors of heterosexual relationships without any rational or reasonable ground for such discrimination. It was further held that section 3 required that the legislation be

given a Convention-compliant meaning wherever possible, subject only to the modified meaning remaining consistent with the fundamental features of the legislative scheme. The majority (Lord Millett dissenting) held that it was possible to read the relevant provision of the 1977 Act as extending to same-sex partners without contradicting any cardinal principle of that Act.

52. The general principles are not in dispute. Reference can usefully be made to the speeches of Lord Millett (at [59] to [68]) and Lord Rodger (at [106] to [116]) although the flavour can perhaps best captured in the speech of Lord Nicholls from [25] to the end of his speech. Included are the following passages:

> "30 …… the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
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> 31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.
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> 32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> 33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve.

> Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

53. A similar approach to the construction of domestic legislation in the light of Directives can be found in *HMRC v IDT Card Service* [2006] STC 1252 at [90] to [92] (*per* Arden LJ) and *HMRC v EB Central Services Ltd* [2008] STC 2209 at [49] (*per* Mummery LJ) and [81] *(per* Dyson LJ). The principles can be found summarised also by the Chancellor (Sir Andrew Morritt) in *Vodafone 2 v HMRC (No 2)* [2009] STC 1480 (CA) at [37] to [38].

54. We have no doubt that the unambiguous meaning of the language used in s 100B(2)(a)(iii) is that the word "incorrect" means not of the correct fixed amount as prescribed by the legislation: it does not include penalties which are incorrect by virtue of being disproportionate and breach the taxpayer's rights under A1P1. Mr Gordon can succeed on his argument only if his interpretation is compatible with the underlying thrust of the legislation, construed so that it does not go against the grain of the legislation; or, to use the words of Arden LJ, if it does not involve a departure from a fundamental feature of the legislation.

55. In that context, Mr Gordon identifies the fundamental features of the penalty regime as follows:

1. First, and obviously, it imposes penalties.
2. Secondly, it provides for an appeal to the Tax Chamber from a determination by HMRC.
3. Thirdly, it provides a defence of reasonable excuse.
4. Fourthly, it provides for mitigation.

56. There is, he says, nothing in those features which is inconsistent with the interpretation for which he contends and nothing which goes against the grain of the legislation. Addressing the last two sentences of [33] of Lord Nicholl's speech in *Ghaidan*, he acknowledges that where there is more than one substantive way in which the legislation may be made Convention-compliant, a choice may have to be made which only Parliament can make. There are, to use a metaphor, two routes leading to two different destinations. However, where there is only one substantive result which is appropriate to achieving a Convention-compliant interpretation, it does not matter that, at a detailed level, there may be different ways to reach the result. In other words, there is a single destination albeit there may be two routes to it. Mr Gordon submits that there is only one destination – the imposition of a proportionate penalty – albeit different routes may be available, for instance a wide interpretation of s 102 rather than his favoured interpretation of s 100B.

57. It is convenient here to return to the other interpretation suggested by Mr Gordon. He submits that the power to mitigate under s 102 means that the monthly penalties are not "required to be of a particular amount" and so do not fall within s 100B(2)(a). Instead, they are "any other penalty" and so fall within s 100B(2)(b); accordingly, the Tax Chamber has a power, on appeal, to adjust the penalty. That interpretation is, obviously, not correct as a matter of the ordinary meaning of the words used. If a Convention-compliant interpretation can be forced onto the legislation by section 3, we think that Mr Gordon's preferred route (the meaning of "incorrect") represents a more realistic way of doing so. We would reject this alternative route to the destination as too full of pot-holes.

58. If the fundamental features are identified, exclusively, in the way in which Mr Gordon identifies them, then there is force in what he says. But to state the fundamental features in that way may simply be to beg the question. It is not a full explanation to say that the regime provides for an appeal to the Tax Chamber since that explanation fails to identify what it is that can be appealed against, namely the determination of a penalty because it has been fixed at an amount which does not accord with the prescription of the legislation. Nor is it a full explanation to say that the regime provides for mitigation since that explanation fails to reveal that the mitigation, in the case of a fixed penalty, is to be made by HMRC with no right of appeal. Reverting to the metaphor, the single destination which he identifies may in reality be two different destinations, one with the penalty being fixed by statute and level of mitigation being determined by HMRC, the other with the apparently fixed penalty being subject to an appeal (in the same way as the month 13 penalty): there would then be no scope, in practice, for the application of s 102 since it is to be expected that the Tax Chamber would take into account all aspects of the appropriateness of the amount of the penalty on the appeal.

59. In our view, Mr Gordon's approach leads to a result which is incompatible with the underlying thrust, and goes against the grain, of the legislation. Parliament has imposed a fixed penalty for monthly defaults in failing to make returns and has also given a power to HMRC to mitigate any penalty with no provision for an appeal against a decision on mitigation. It would be entirely contrary to a fundamental feature of that scheme if the Tax Chamber were to be able to impose its own view of the appropriate amount of the penalty at the date of determination under section 100(1) of TMA at a time before mitigation had even been considered by HMRC under s 102. Once that is recognised, it can be seen that the real complaint is the absence of an appeal from a decision of HMRC under s 102: but in that regard, a taxpayer's Convention rights are, for the reasons already given, adequately protected by his right to apply for permission to bring judicial review.

60. In reaching its conclusion that it could discharge the £100 fixed penalties, the Tribunal expressed itself this way:

> "As we consider that the absence of any power of mitigation is the prime mischief in this case, we consider that 'incorrect' in subsection (2)(b)(iii) should be read to include penalties which are incorrect by virtue of being disproportionate and breaching the taxpayer's rights under [A1P1]."

61. However, HMRC do have a power to mitigate: this complaint is therefore directed at an absence of a power in the Tax Chamber to mitigate a penalty on an appeal. Parliament, however, clearly did not intend that the First-tier Tribunal should have such a power. The control of HMRC's powers of mitigation is therefore to be found in judicial review which (as explained in *Hok*) are not exercisable by the Tax Chamber.

62. We accordingly reject Mr Gordon's submissions based on section 3.

The penalties were proportionate

63. Mr Gordon submits that the penalties imposed were disproportionate. In doing so, he refers to the penalties totalling £54,100. On his approach to the legislation, the figure of £14,600, to which HMRC have committed themselves after mitigation, does not arise for consideration. Mr Bosher's case is that the decision of the Tribunal should not be disturbed, leaving a penalty of only £6,287. It will be remembered that the Tribunal cancelled the 193 penalties of £100, so that the £6,287 reflects the Tribunal's determination of the total of the month 13 penalties, a determination which, as we have said, HMRC do not now challenge.

64. Mr Gordon's first point is that the penalties should be looked at in the round. A penalty of £54,100 (or indeed £14,600) is he says wholly disproportionate to the defaults of which Mr Bosher was guilty; it is not right to view the case as 193 separate monthly defaults giving rise to 193 separate penalties of £100 and 17 separate month 13 penalties. Instead, Mr Bosher's whole course of conduct should be looked as a whole and the overall penalty assessed accordingly. Pausing there, if that submission were right in principle, it would surely be right, too, to judge proportionality by reference to the figure of £14,600 which is the maximum which will be imposed.

65. Mr Gordon actually takes an extreme position on this point. He submits that it is appropriate to take into account a taxpayer's entire course of conduct in determining the amount of a penalty: thus had Mr Bosher been guilty of defaults in making VAT or income tax returns, and suffered penalties as result, the penalty in relation to his failures to file CIS returns should reflect the fact that he has already paid other penalties so that the CIS penalty should be set at a level at which the overall penalty is not disproportionate. We have no hesitation in rejecting that extreme position. We find it hard to envisage a situation in which it would be appropriate to take into account a completely unrelated penalty in judging the appropriate level of a CIS penalty even if Mr Gordon's interpretation of the legislation were correct. In any case, if it were right, we would have thought there would be a case for increasing, rather than decreasing, the penalty to reflect the poor (or worse) conduct of the taxpayer overall.

66. We also reject the proposition that the defaults leading to the 193 penalties of £100 should be looked at in the round as if they were aspects of a single continuing default. There are two slightly different aspects to consider here. The first is to note that Mr Bosher failed to deliver on time a number of monthly returns. The second is to note that each of those defaults gave rise to successive penalties for each month that the relevant return remained outstanding. We can see no reason why the default in relation to one return (and the penalties which the

monthly failures to make that return gave rise to) should have any impact on the default in relation to another return (and the penalties which the monthly failures to make that return gave rise to). There is slightly more in the point that successive monthly penalties where a return is outstanding for several months might, in theory, give rise to a disproportionate penalty. But in relation to the actual monthly penalty of £100 for a maximum of 12 months in the context of the CIS regime, we consider it to be unarguable that the penalty for each month is excessive or that a total of £1,200 is excessive, given that there is a power to mitigate under s 102 and given the reasonable excuse provisions to be found in the legislation.

67. Mr Gordon submits that the Tribunal's decision on the disproportionality of the penalties is a finding of fact which is binding on us, the appeal being only on a point of law. As to that, the consequence, if our conclusions concerning the inadmissibility of looking at matters in the round are correct, is that the Tribunal applied a wrong approach; if so, that is an error of law, and we can accordingly substitute our own view. It is unnecessary for us to decide whether, absent an error of approach, a finding that a penalty is disproportionate is a finding of fact, a finding of law or a mixed finding, and we do not do so.

Conclusions

68. We accept HMRC's arguments on each of the main points so that:

1. The scheme of the legislation coupled with the right to apply for judicial review does not infringe a taxpayer's rights under A1P1.
2. If that is wrong, and there is an infringement of a taxpayer's rights under A1P1, section 3 does not enable the tribunals and the courts to read the legislation in a way which gives effect to those rights.
3. In any case, the penalties (subject to mitigation in any particular case) imposed by the regime in general are not disproportionate; the penalties actually imposed (that is to say, the penalties totalling £54,100 and *a fortiori* those totalling £14,600) are not disproportionate.

The further point

69. In his skeleton argument served shortly before the hearing, Mr Gordon identified a new point of law which he wished to argue. It arises this way: s 100(1) of TMA envisages that an authorised officer of HMRC may make a determination of a penalty, setting it at such an amount as, in his opinion, is correct or appropriate. Fixed penalties in relation to the CIS regime are computer-generated: in relation to fixed penalties, there is no officer who, on an individual case-by-case basis, actually makes a determination or who considers the correctness of the amount. Mr Gordon wishes to argue that the notices of determination served on Mr Bosher are all void. We heard argument on whether to allow this point to be raised. If we do allow it to be raised, HMRC must be given the opportunity to file further evidence to explain how the system operates in practice and to demonstrate why, in their submission, Parliament cannot have intended the result for which Mr Gordon contends.

70. There are other cases in which this point, or one similar, has been raised. One of those cases, *Barrett*, is proceeding in the Tax Chamber; HMRC will be adducing in that case the evidence on which they would seek to rely were we to allow the point to be raised in the present appeal. We have decided to defer making a decision on Mr Bosher's application to raise the new point. We considered that it would be better to await the outcome of *Barrett* (subject to any further direction) before doing so and have already made case-management directions in the present appeal accordingly. HMRC did not oppose this course.

Disposition

71. In consequence, we cannot at the moment deal finally with HMRC's appeal in the present case. We will need to deal with Mr Bosher's application to raise the new point in due course in the light of the evidence adduced, and the findings of fact made, in *Barrett*. We have, nonetheless, considered it appropriate to give our decision on the points which were argued before us. We have power to do so under a combination of our case management powers (see rule 5 of the Upper Tribunal Rules) and our statutory power in relation to appeals (to hear appeals on a point of law). We see no reason why we should not give a decision on a point of law even though it does not finally dispose of the appeal.

72. It is plainly undesirable that this matter should proceed further through the appellate system (to the Court of Appeal) at the present stage. We envisage that, once the decision in *Barrett* is known, this tribunal will then be able to deal with the point (either by way of appeal in *Barrett* or as a new point in the present appeal or as a conjoined appeal) on the basis of the relevant evidence and findings of fact in *Barrett*. That, of course, is subject to any further directions which may be made in the meantime. Accordingly, we extend, subject to any such further direction, the time for applying for permission to appeal under Rule 44 of the Upper Tribunal Rules until 1 month after, as the case may be, (i) dismissal of Mr Bosher's application to raise the new point or (ii) grant of that application and release of the subsequent decision on the new point.

Mr Justice Warren
Chamber President

Judge Colin Bishopp
Upper Tribunal Judge

Released 19 November 2013