TC02910

Appeal numbers: TC/2010/2825, TC/2010/2719, TC/2010/3004 & TC/2010/5291

VAT –regulations requiring online filing of VAT return and electronic payment of VAT – whether the tribunal had jurisdiction to consider in respect of online filing (a) HMRC's alleged failure to exercise discretion or (b) lawfulness of regulations – whether tribunal had jurisdiction to consider consequential liability to make electronic payment - whether online filing regulations (a) a breach of the human rights of old or disabled people (b) a breach of EU law as disproportionate (c) a breach of human rights as requiring taxpayer to use (allegedly) unsafe means of payment – appeals of first three appellants allowed – fourth appellant's appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

L H BISHOP ELECTRIC COMPANY LIMITED (1)

ALLAN FREDERICK SHELDON
T/A AZTEC DISTRIBUTORS (2)

WINSTON ROBERT DUFF TAY
T/A RHOS FILING STATION (3)

BRINKLOW MARINA LIMITED (4) **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Civil Justice Centre, Birmingham on 2, 5-9 November 2012, at the Competition Appeals Tribunal, London on 23-25 January 2013 and at Bedford Square, London on 19 February 2013.

Ms A Redston, Counsel, instructed by BDO LLP, for the first three Appellants

Mr R De Mello, Counsel, instructed by the fourth Appellant

Mr A Macnab, Counsel, and Mr P Woolfe, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Glossary of terms used	
A1P1	Article 1 of the First Protocol to the Convention: the right to property
A6	Article 6 of the Convention: right to a fair hearing
A8	Article 8 of the Convention: right to respect for private and family life
A14	Article 14 of the Convention: non-discrimination
CJEU	The Court of Justice of the European Union
Charter	Charter of Fundamental Rights of the European Union
Convention	The European Convention on Human Rights
ECA	The European Communities Act 1973
ECHR	European Court of Human Rights
EQIA	Equality Impact Assessment
FA	Finance Act
HRA	The Human Rights Act 1998
HMRC	The Commissioners of Her Majesty's Revenue and Customs
Reg	Regulation
RIA	Regulatory Impact Assessment
VATA	The Value Added Tax Act 1994

Overview of the cases

General

1. All four appellants appeal against Notices served by HMRC mandating them to file their VAT returns online and pay VAT electronically.

2. Compulsory VAT online filing was introduced for all businesses with a turnover of over £100,000, and any newly registered business, with effect from 1 April 2010 and for all businesses with effect from April 2012. HMRC refers to businesses liable to registered for online filing from April 2010 as "first tranche" and those only required to be registered from 2012 as "second tranche". All four appellants were in the first tranche.

3. The hearing was in the nature of a test case. Approximately 100 taxpayers have filed appeals against notices to file online, mostly in VAT cases but also in PAYE cases.

4. The Tribunal (with HMRC's knowledge) notified all appellants lodging appeals against the requirement to file online that the Low Income Tax Reform Group would consider offering free representation. The first three appellants (which I refer to as the 'joint appellants') were selected as test cases from the pool of appellants who had contacted the LITRG and would therefore be represented at the hearing. This was on the basis that the issues were complex and the Tribunal would be assisted by both parties being legally represented. The selection from within the group of represented taxpayers was on the grounds that the joint appellants offered a representative selection of fact patterns of persons who might have difficulties in filing online.

5. The fourth appellant ('Brinklow') was in a rather different position. It was represented by Mr De Mello under direct access. Its complaint was not that it would have difficulties in filing online, but that the risks in filing VAT returns and paying VAT online were such that (in its view) the law should not compel it to do so.

6. There is another, separate, very small, group of cases in which the objection to online filing is on religious grounds. The first of these was heard in August 2013 and the decision (*Blackburn & another)* is released simultaneously with this one.

7. There is yet another group of cases where the objection to online filing is made by persons mandated in what HMRC refer to as the second tranche. The hearing of the Tribunal in *Le Bistingo Ltd* was (so far as I am aware) the first hearing of a second tranche appeal and my decision in that case is also released simultaneously with this one.

8. The hearing of the joint appellants' case was originally set down for hearing in 2011. It was adjourned as there seemed to be a possibility of the first three appellants, through the intermediation of the LITRG, reaching a settlement with HMRC. No settlement was reached. The suggested settlement turned on HMRC's offer of telephone filing in January 2012: the appellants rejected the offer. At a case

management hearing the fourth appellant's case was joined to be heard at the same time, and this decision is therefore in respect of all four appeals.

Background to the appellants' cases

9. In early February 2010, the first appellant ("Bishop") received a notice from HMRC stating that from 1 April 2010 it must file its VAT returns online. Mr Bishop asked for a review of this decision. On 11 March 2010, HMRC upheld its decision that the company must file online. The letter informing Mr Bishop of this decision in addition said:

> "Whilst there will not be an alternative to filing online, there are options available to customers so that they can fulfil their obligations. For example, you could ask family or friends who have a computer to offer you Internet access or employ the services of an agent who could file the return on your behalf, although this may incur a modest fee.
>
> Please note that filing online is straightforward and similar to filing on paper……
>
> For further help and support, go to www.hmrc.gov.uk.
>
> If you disagree with this decision, you can appeal to an independent tribunal within 30 days of the date of this letter. You can find out more at www.tribunals.gov.uk or telephone [number given].

10. The company lodged an appeal on 20 March 2010.

11. Mr Tay was informed by notice from HMRC dated 19 February 2010 (but received in early February) that he must file his VAT returns online. He replied by letter dated 11 February 2010 objecting to the notice. On 15 March 2010 HMRC replied in terms identical to that reported for Bishop.

12. Mr Sheldon was notified by HMRC on 8 February 2010 that he would be required to file his VAT returns online from 1 April 2010. With the efficiency which leads him to file his self assessment returns 10 days after the end of the tax year, Mr Sheldon had already applied for exemption on the grounds of disability a few days earlier. A letter dated 11 March 2010 from HMRC in reply to this notified him that he was not entitled to exemption from online filing. This had the same wording as I have already reported in respect of Bishop's letter. Mr Sheldon appealed this on 16 March 2010.

13. Brinklow Marina Limited ("Brinklow") was notified on 8 February 2010 that it was required to file online. As with the joint appellants, the letter of notification said:

> "This notice is to advise you that, for VAT periods starting on or after 1Aapril 2010, you **must** file VAT returns online and pay any VAT due on the returns electronically……
>
> If you do not agree that you must file online/pay electronically, because:

- You think our calculation of your turnover is wrong, or
- You fall into one of the (very limited) categories of VAT customers who, by law, are not obliged to file online

you can ask for our decision to be reviewed by an HMRC officer……"

14. Brinklow did ask for the decision to be reviewed. This led to the decision being confirmed. Brinklow appealed the reviewed decision and that decision is the one which is at issue in this appeal.

The law at issue in the appeal

15. Primary legislation (ie an Act of Parliament) authorised HMRC to make secondary legislation (ie regulations within a Statutory Instrument) providing for the use of electronic communications. Primary legislation contained in s 132 of the Finance Act 1999 ("FA 1999") provided as follows:

> **s 132 power to provide for use of electronic communications**
>
> (1) Regulations may be made, in accordance with this section, for facilitating the use of electronic communications for –
>
> (a) the delivery of information the delivery of which is authorised or required by or under any legislation relating to a taxation matter;
>
> (b) the making of payments under any such legislation.
>
> (2) The power to make regulations under this section is conferred –
>
> (a) ….
>
> (b) on the Commissioners of Customs and Excise in relation to matters which are under their care and management.
>
> (3) For the purposes of this section provision for facilitating the use of electronic communications includes any of the following –
>
> (a) provision authorising persons to use electronic communications for the delivery of information to tax authorities, or for the making of payments to tax authorities;
>
> (b) provision requiring electronic communications to be used for the making to tax authorities of payments due from persons using such communications for the delivery of information to those authorities;
>
> ….
>
> (g) provision imposing conditions that must be complied with in connection with any use of electronic communications for the delivery of information or the making of any payment;
>
> (h) provision, in relation to cases where use is made of electronic communications, for treating information as not having been delivered, or a payment as not having been made, unless conditions imposed by any such regulations are satisfied;

…

(10) In this section –

"electronic communications" includes any communications by means of an electronic communications service

….." (my emphasis)

16. The definition of "electronic communications service" was substituted by Schedule 17 of the Communications Act 2003, and although this does not appear to be expressly stated, was intended to bear the meaning given to that expression in that Act which was (from section 32(2):

> "electronic communications service" means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.

17. It was these provisions under which the regulations on electronic payments which were the subject of the fourth appellant's appeal were made.

18. The regulations, which were the subject of the joint appellants' appeal and also the fourth appellant's appeal in so far as related to online filing, were made under a later Finance Act. As can be seen from above, the FA 1999 did not permit mandatory online filing to be imposed.

19. Section 135 FA 2002, however, provided:

> **s 135 Mandatory e-filing**
>
> (1) The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") may make regulations requiring the use of electronic communications for the delivery by specified persons of specified information required or authorised to be delivered by or under legislation relating to a taxation matter.
>
> (2) Regulations under this section may make provision -
>
> (a) as to the electronic form to be taken by information delivered to the Revenue and Customs using electronic communications;
>
> ….
>
> (e) for treating information as not having been delivered unless conditions imposed by any of the regulations are satisfied;
>
> …..
>
> (4) Regulations under this section may –
>
> (a) allow any authorisation or requirement for which the regulations may provide to be given or imposed by means of a specific or general direction given by the Commissioners;
>
> ….
>
> (7) The power to make provision by regulations under this section includes power –

…

(c) to make different provision for different cases.

(8) References in this section to the delivery of information include references to any of the following (however referred to) –

(a) the production … to a person of any information, account, record or document

….

(d) the making of any return, claim, election or application.

....."

20. I move on to consider the regulations which were made by statutory instrument under these two Acts of Parliament. Regulation 25 of the Value Added Tax Regulations 1995/2518 ("VAT Regulations") requires VAT registered persons to file VAT returns every three months. There is no dispute about the appellants' liability to file returns. The dispute relates to the method by which they are required to file their returns.

21. Regulation 25A was inserted by HMRC into the VAT Regulations in reliance on s 135 FA 2002. This provided that with effect from 12 December 2009.

25A

(1) Where a person makes a return required by regulation 25 using electronic communications, such a method of making a return shall be referred to in this Part as an 'electronic return system'.

(2) Where a person makes a return on the form numbered 4 in Schedue 1 to these Regulations ("Form 4") or, in the case of a final return, on the form numbered 5 in Schedule 1 to these Regulations ("Form 5"), such a method of making a return shall be referred to in thi Part as a 'paper return system'.

(3) A specified person must make a specified return using an electronic return system.

(4) In any case where an electronic return system is not used, a return must be made using a paper return system.

(5) In this regulation a 'specified person' means a person who –

(a) is registered for VAT with an effective date of registration on or after 1 April 2010 whether or not such a person is registered in substitution for another person under regulation 6 (transfer of a going concern), or

(b) is registered for VAT with an effective date of registration on or before 31 March 2010 and has as at 31 December 2009 or any date thereafter an annual VAT exclusive turnover of £100,000 or more whether or not that person's turnover falls below this level,

provided that, in each case, that person has been notified as required by paragraph (7) below.

(6) However a person –

(a) who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications, or

(b) to whom an insolvency procedure as described in any of paragraphs (a) to (f) of section 81(4B) of the Act is applied at the time when he would otherwise be notified under paragraph (7) below

is not a specified person for the purposes of this regulation.

(7) Where the Commissioners consider that a person is a specified person, they shall notify that person of that fact in writing.

(8) Where an electronic return system is used, it must take a form approved by the Commissioners in a specific or general direction.

(9) ….

(10) A direction under paragraph (8) above may in particular –

(a) modify or dispense with any requirement of Form 4 or Form 5 (as appropriate),

(b) specify circumstances in which the electronic return system may be used, or not used, by or on behalf of the person required to make the return.

For the purposes of sub-paragraph (b), the direction may specify different circumstances for different cases.

……..

(13) No return shall be treated as having been made using an electronic return system unless it is in the form required by paragraph (8) above.

The requirement in paragraph (8) above incorporates the matters mentioned in paragraph (10) above.

(15) In relation to returns made for prescribed accounting periods which end on or after 31 March 2011, a specified person who fails to comply with paragraph (3) above is liable to a penalty.

(16) But a specified person who has a reasonable excuse for so failing to comply is not liable to a penalty.

(17) The table below sets out the penalties depending on the level of turnover.

……" (my emphasis)

22. Regulation 40(2) deals with the obligation to make electronic payment and was made under s 132 FA 1999.

(2) any person required to make a return shall pay to the Controller such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return.

(2A) Where a return is made or is required to be made in accordance with regulations 25 and 25A above using an electronic return system, the relevant payment to the controller required by paragraph (2) above shall be made solely by means of electronic communications that are acceptable to the Commissioners for this purpose.

(2B) With effect form 1st April 2010, where a person makes any payment to the Controller required by paragraph (2) above by cheque (whether or not in contravention of paragraph (2A) above) –

(a) the payment shall be treated as made on the day when the cheque clears to the account of the Controller, and

(b) that shall be the day when payment of any VAT shown as due on the return is to be treated as received by the Commissioners for the purposes of section 59 of the Act.

23. Regulation 40(2A) allowed HMRC to specify the means of electronic communication which were to be used for payment by persons making online returns. There was no dispute between the parties between what these were, and I find that HMRC had specified:

(a) Direct debit

(b) Credit or debit card payment with Billpay service (ie internet)

(c) BACS direct credit

(d) Internet banking transfer

(e) Telephone banking transfer

(f) Faster payment service from bank or building society

(g) CHAPS payment

(h) Bank Giro payment

Jurisdiction

24. As I have said the joint appellants' cases were that the decisions that they should file online were wrong in law and the fourth appellant's case was that the decision letter which informed him that he must file online and pay electronically was wrong in law.

25. HMRC's position, at least initially, was that I had no jurisdiction to consider the appellants' cases under public law or the European Convention on Human Rights ("the Convention"). In Mr Macnab's view there was therefore nothing for this Tribunal to do but dismiss the appeal for lack of jurisdiction: the appellants' only challenge to the notices requiring them to file online should have been to initiate a judicial review of HMRC in the administrative division of the High Court or make a complaint to the European Court of Human Rights. HMRC's view on the Convention modified during the hearing; their view on public law was, if anything, reinforced by

the Upper Tribunal decision in *Noor* [2013] UKUT 71 (TCC). I consider their views in detail below.

26. Ms Redston's view is that there are three circumstances in which the Tax Chamber will have jurisdiction to consider public law and human rights issues and those are where:

- If within scope of the statutory appeal right
- Raising public law in defence
- EU or ECHR permits such arguments.

27. I am unable to agree. Tribunals are statutory bodies and their jurisdiction can only be what Parliament has given them. Tribunals have no inherent jurisdiction and neither the Treaty establishing the European Union nor the Convention on Human Rights can confer jurisdiction on it. The Tribunal is a statutory body and only has jurisdiction to hear cases which statute has given it authority to hear. The tribunal only has jurisdiction over questions of EU law or human rights or public law if Parliament has conferred such jurisdiction on it.

28. The starting point in considering the limits of this Tribunal's jurisdiction is therefore VATA.

Jurisdiction under VATA

29. This Tribunal's jurisdiction in VAT matters is contained in s 83(1) of VATA. None of the sub-subsections of s 83(1) are applicable to the issues in this appeal other than s 83(1)(zc) which provides as follows:

> "**Section 83(1) VATA**
>
> …an appeal shall lie to a tribunal with respect to any of the following matters –
>
> ….
>
> (zc) a decision of the Commissioners about the application of regulations under section 135 of the Finance Act 2002 (mandatory electronic filing of returns) in connection with VAT (including, in particular, a decision as to whether a requirement of the regulations applies and a decision to impose a penalty).
>
> …" (my emphasis)

Was there a 'decision'?

30. In so far as the joint appellants were concerned there was no issue here. Under Reg 25A(5) and (7), cited in §21 above, a person was only liable to file online if, amongst other things, they received notification to that effect from HMRC. All the appellants in this appeal received such notification and I have already referred to these at §§9-14 above.

31. The fourth appellant's primary case was that it was unlawful for HMRC to compel him to pay his VAT electronically. HMRC's reply was that s 83 VATA gave the Tribunal no jurisdiction to hear such a complaint, because, amongst other matters, there was no right of appeal under s 83(1).

32. The appellant points out that his notification letter said there was a right of appeal. It said:

> "If you do not agree that you must file online/pay electronically…you can appeal to an independent tribunal…"

But whatever the letter said, it could not create a right to appeal where one does not exist. HMRC cannot give this tribunal a jurisdiction it does not otherwise have simply by saying in a letter that there is a right of appeal.

33. I agree with HMRC that the only possibly relevant provision under s 83 is s 83(1)(zc). The problem for the fourth appellant is that it relates to a "decision" and that decision must be a decision under s 135 FA 2002. Yet the fourth appellant's liability to make online *payments* arises under regulations made under s 132 FA *1999* and the only decision HMRC could issue or has issued is that the fourth appellant is liable to make online *returns*. Under the regulations, liability to pay electronically appears to follow automatically once a taxpayer is liable to file online: see Regulation 40(2A) VAT Regulations 1995 (at §22 above).

Was the decision about regulations under the 2002 FA?

34. Therefore, the legislation appears to give the fourth appellant no ability to have the legality of Regulation 40(2A) tested in this Tribunal. Mr De Mello said this was a breach of the appellant's fundamental right to access to justice. He considered that I should read s 83 as if it gave this Tribunal jurisdiction to consider the legality of Regulation 40(2A), even though on a plain reading it did not. This argument by Mr De Mello relied on the Convention. It makes more sense to deal with it after I have considered my jurisdiction on Convention matters in general, as I do in §§212-229 below.

35. To summarise my conclusion reached below, I do not agree with Mr De Mello's argument that I must read s 83(1)(zc) as giving me jurisdiction to directly consider the legality of Regulation 40(2A). Nevertheless, in so far as I have jurisdiction to consider the legality of the obligation to file online, I consider that I would necessarily have jurisdiction to consider the legality of the obligation to pay electronically to the extent that the latter follows automatically from the former. The decision that the fourth appellant must file online is in effect a decision that he must pay electronically.

36. Yet whether the liability to pay electronically did follow automatically from liability to file online was not agreed. While Regulation 40(2A) uses the word "shall" Mr De Mello said it had to be read as "may". To reiterate Reg 40(2A) reads as follows:

> "where a return is …required to be made….using an electronic return system, the relevant payment ..shall be made solely by means of electronic communications…."

37. Yet, in Regulation 40(2B) provides as follows

> "With effect form 1st April 2010, where a person makes any payment to the Controller required by paragraph (2) above by cheque (whether or not in contravention of paragraph (2A) above) –
>
> (a) the payment shall be treated as made on the day when the cheque clears to the account of the Controller, and
>
> (b) that shall be the day when payment of any VAT shown as due on the return is to be treated as received by the Commissioners for the purposes of section 59 of the Act."

38. In other words, a payment by cheque is still payment. This means that a taxpayer who paid by cheque could not be penalised for non-payment. And as there are no penalty provisions which relate specifically to in Regulation 40(2A), he could not be penalised for failing to pay by electronic means either.

39. In practice, as the law stands, the fourth appellant could continue to pay by cheque without risking any penalties. It was nevertheless HMRC's position was that it would be unlawful for it to so do.

40. While in these circumstances, the use of the word "shall" in (2A) might seem rather more like a "may", as argued by Mr De Mello, nevertheless I agree with HMRC that as a matter of law the fourth appellant, if required to file online, is automatically required to pay electronically even though it faces no penalties for a failure to do so.

41. Therefore I can consider the lawfulness of the requirement to pay electronically *because* and to the extent I can consider the lawfulness of the requirement to file online. So I would not strike out the fourth appellant's appeal.

42. But to what extent in respect of any of the four appellants do I have jurisdiction to consider the legality of a decision made under Regulation 25A, which is a regulation made under s 135 FA 2002?

The application of the regulations

43. The parties did not agree the scope of the words "the application of the regulations".

44. HMRC favoured a narrow interpretation that it allowed this tribunal only to consider (a) whether a penalty for failure to file online had been properly imposed or (b) whether the appellants were specified persons. In HMRC's view, the former was irrelevant in this appeal as no penalty has yet been imposed on the appellants and the latter was irrelevant as the appellants have conceded that they are specified persons for the purpose of online filing.

45. The joint appellants did not agree. Ms Redston made the undeniable point that the structure of s 83, and in particular the reference in brackets in (zc) to the Tribunal's jurisdiction "including" whether a requirement of regulations applies or the imposition of a penalty, necessarily implies that this tribunal's jurisdiction covers more than just those two items.

46. I find that there is nothing in the legislation which assists interpretation of (zc). Mr Macnab pointed to Regulation 25A(18) which restricts the grounds on which a taxpayer may appeal the imposition of a penalty. It provides that a person may only appeal a penalty on the grounds that:

(a) The person is not a specified person;

(b) The amount of the penalty is incorrect;

(c) The person did file online;

(d) Or the taxpayer has a reasonable excuse for not filing online.

However, this subsection is specifically limited to an appeal against the imposition of a penalty and I find has nothing to say about the Tribunal's jurisdiction under Regulation 83(1)(zc) in general.

47. The Tribunal's jurisdiction is, as s 83(1)(zc) provides, over "a decision of the Commissioners about the application of [the online filing] regulations…." So I need to determine what "the application of [the online filing] regulations" means?

48. Ms Redston contends that it would include whether HMRC have acted lawfully when making a decision to apply the regulations: in other words, the joint appellants' contention is that the jurisdiction of this tribunal is not merely whether HMRC have properly applied the regulations so far as the black letter law as set out in s 135 but also in the public law context of whether HMRC have acted lawfully.

49. I agree that as a matter of normal use of language, "a decision of the Commissioners about the application of [the online filing] regulations…." would normally be taken to refer to the *lawful* application of regulations. A decision to apply unlawful regulations is a wrong decision or an unlawful decision to apply the regulations is a wrong decision. There is nothing in the wording of (zc) that indicates the very narrow interpretation given by HMRC was intended by Parliament.

50. What the argument between the parties comes down to is whether, in considering the lawfulness of HMRC's decision on the application of the regulations, the Tribunal is confined to considering the regulations in isolation or whether it can also consider the regulations in their full legal context and in particular whether the regulations are lawful and/or whether HMRC acted lawfully in applying them. All the appellants' cases were that I could consider both issues of public law and the Convention when considering legality.

Can the Tribunal consider questions of public law?

51. Whether the regulations themselves are lawful and whether HMRC have acted lawfully in applying them are questions of public law. It is a well established and fundamental rule of common law that the High Court, whose jurisdiction derives from the common law itself and not from statute ("inherent jurisdiction"), can, as a matter of common law, consider the lawfulness of legislation and the lawfulness of actions of public authorities and grant certain remedies (eg to quash a decision of a public authority). This is known as an action for judicial review. The lawfulness of the actions of public authorities normally depends on whether they have made a decision taking into account irrelevant matters, made a decision without taking into account relevant matters, or reached a decision that nobody acting reasonably could have reached. It can include other issues such as whether a public authority has acted in breach of a person's legitimate expectations.

52. A Tribunal does not have inherent jurisdiction and cannot as such judicially review public authorities. But it can consider questions of public law if Parliament gives it the jurisdiction to do so.

53. Mr Macnab's view is that the Tribunal can only consider issues of public law if statute explicitly gives it authority to do so. There must be something in the view that Parliament would not have intended to give the Tribunal a jurisdiction which is exclusively in the purview of the courts with inherent jurisdiction and to allow persons to raise the unlawfulness of the acts of a public body anywhere other than on an action for judicial review in the administrative division of the High Court would be an abuse of process.

54. However, an alternative view is that Parliament would not have intended to deny justice and the practical effect of restricting consideration of public law issues to actions for judicial review may in many cases amount to just that. Judicial reviews are complex and expensive and unlikely to be initiated by the ordinary taxpayer in an ordinary case.

55. S 83 VATA does not explicitly mention public law, but there is at least some High Court authority that that does not mean Parliament did not intend to give this Tribunal jurisdiction to consider at least some public law issues. As Mr Justice Sales in *Oxfam* [2009] EWHC 2078 said:

> "[68] I do not think it is a valid objection to this straightforward interpretation of s 83(1)(c) according to its natural meaning that it has the effect that sometimes the tribunal will have to apply public law concepts in order to determine cases before it. It happens regularly elsewhere in the legal system that courts or tribunals with jurisdiction defined in statute by general words have jurisdiction to decide issues of public law which may be relevant to determination of questions falling within their statutorily defined jurisdiction. No special language is required to achieve that effect….
>
> [70] ...there is clear public benefit in construing s 83 by reference to its ordinary and natural meaning which strongly supports that

> construction. It is desirable for the tribunal to hear all matters relevant to determination of a question under s 83 … because (a) it is a specialist tribunal which is particularly well positioned to make judgments about the fair treatment of taxpayers by HMRC and (b) it avoids the cost, delay and potential injustice and confusion associated with proliferation of proceedings and ensures that all issues relevant to determine the one think that HMRC and the taxpayer are interested in…are resolved on one occasion in one place. It seems plausible to suppose that Parliament would have had these public benefits in mind when legislating in the wide terms of s 83."

56. I am not aware of any binding authority which says that this Tribunal's jurisdiction on public law is limited to situations where it is explicitly conferred: therefore I rely on Mr Justice Sales' decision in *Oxfam* and reject this contention by HMRC. The Tribunal must apply normal rules of statutory construction to determine whether and to the extent that Parliament in giving it jurisdiction over a tax matter intended it to consider public law principles.

The law of precedent

57. As I do not accept HMRC's contention that this Tribunal only has public law jurisdiction where explicitly given it by Parliament, I move on to consider some of the many and not entirely consistent authorities on to what extent public law questions can be considered in Tribunal but first make a few general points.

58. In general this Tribunal is bound by all decisions of higher courts, and would carefully consider the decisions of equivalent jurisdiction. Nevertheless, I am not so bound where any such decision was:

- Made without consideration of a binding higher authority ('per incurian');
- Inconsistent with a decision of equivalent authority which I prefer;
- If the views expressed did not form part of the actual judgment of the court. Such non-binding views are referred to as "obiter". Nevertheless, I am bound to give such obiter views expressed by a higher authority considerable respect and would be likely to follow them unless I considered they did not properly reflect a decision of even higher authority or were inconsistent with one of equivalent authority which I preferred.

59. I find it easiest to consider the current state of authorities by looking at the "leading" cases in the sense that they are decisions of the House of Lords. I will then look at lower but still binding authorities, particularly the most recent, to see what they add to what the House of Lords (now the Supreme Court) has said.

J H Corbitt (Numismatists) Ltd [1980] STC 231

60. The company dealt in antiques and claimed the benefit of secondary legislation which permitted a taxpayers dealing in antiques and which kept records to a standard

specified by HMRC by notice to account for VAT under a margin scheme. The company accounted for VAT under this margin scheme. HMRC assessed the company on the basis that it had not been entitled to use the margin scheme because it had not kept its records to the specified standard. The company's complaint in essence was that HMRC should have recognised its records as sufficient.

61. The House of Lords ruled that the Tribunal had no jurisdiction to consider HMRC's decision not to exercise its discretion to specify the taxpayer's records as sufficient. Nevertheless, Lord Lane giving the leading judgment said that (1) the Tribunal could not review HMRC's exercise of discretion but (2) could consider whether the requirements had in fact been met:

> "…It cannot be and is not disputed that the value added tax tribunal has no jurisdiction to review the requirements as to books and records which the commissioners have laid down (as the 1972 Act authorises them to do) in the various appendices to the Blue book. Their task on an appeal is confined on this aspect to an enquiry whether the trader's books and records in fact comply with the requirements of the Blue Book….

62. The exercise of discretion by public bodies arose in rather different circumstances in another line of cases:

Wandsworth LBC v Winder [1985] AC 461

63. In this case the local Council increased Mr Winder's rent and he refused to pay. The council took enforcement action against him in the County Court. Mr Winder's only defence was that the rent increase was unlawful because it was unreasonable. In other words, he challenged the Council's exercise of its discretion in increasing his rent. The House of Lords decided that he was entitled to raise this public law argument in a statutory court (ie the County Court) in defence. Lord Frazer said:

> "the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims…
>
> It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour."

64. The Lords did not decide whether or not the rent increase was unlawful: they merely decided that the defendant had the right to question its lawfulness in the

County Court and that the County Court had the jurisdiction and indeed the obligation to rule on that issue, despite having no judicial review function.

65. While the decision of the House of Lords was that the County Court's statutory jurisdiction was intended to encompass questions of the lawfulness of the actions of public bodies when raised in defence, this does not necessarily mean that other statutory appeal bodies, such as tribunals and in particular this tribunal, was intended by Parliament to have such a jurisdiction.

66. *Winder*, of course, was not a case about taxation. Nevertheless, it is clear that the decision in *Winder* applies to tax cases as it was so applied by the Court of Appeal in a tax case *Pawlowski v Dunnington* [1999] STC 550. In that case, the Inland Revenue (now HMRC) took enforcement action in the county court against a taxpayer, who was an employee on whom they had issued an assessment for PAYE. At the time (the law has since been corrected) the assessment carried no right of appeal to the General Commissioners (the forerunner of this tribunal). The taxpayer defended the enforcement action on the grounds that the assessment was (he alleged) unlawful as it depended on an (alleged) unlawful exercise of discretion by the Inland Revenue in making a direction to transfer liability for unpaid PAYE from the employer to the himself, the employee.

67. The decision of the Court of Appeal was that the county court had jurisdiction to consider whether the Revenue's decision, and in particular its exercise of discretion, was lawful as a matter of public law. Simon Brown LJ said:

> "the central question …[is whether]…the defendant to collection proceedings of this kind [is] entitled to raise a public law defence which puts in issue the legality of directions underlying the assessment…there is no true distinction to be made between this case and *Winder*…the taxpayer is entitled to advance his public law defence in the county court."

68. The principle in *Winder* is not restricted to the County Court, as can be seen from the following decision.

Boddington v British Transport Police [1999] 2 AC 143

69. In this case an accused person wished to defend himself in a criminal court against criminal liability imposed under a byelaw for smoking on a train. He claimed that the byelaw (secondary legislation) was ultra vires the primary legislation (the statute). ('Ultra vires' means it went beyond what was permitted). The House of Lords held, overruling the earlier decision in *Bugg*, that an accused person can raise the unlawfulness of secondary legislation in criminal proceedings and was not limited to making a challenge by way of judicial review. Lord Steyn said that to rule otherwise would be "incompatible with the traditions of the common law". Lord Irvine gave a concurring judgment and cited *Wandsworth LBC v Winder* [1985] AC 461 in support.

70. *Boddington* is of course a case involving criminal proceedings and did not raise the question of whether, in a civil matter, Parliament intended the jurisdiction it conferred on a statutory tribunal to extend to consideration of lawfulness as a matter of public law. It is of limited direct relevance in this case although it does clearly indicate that the House of Lords considered that earlier authorities, to an extent, were wrong to limit consideration of public law matters to actions for judicial review.

Relevance of these cases to proceedings brought by appellants

71. It was also not an issue in *Winder* or *Pawlowski* whether a taxpayer could raise a public law issues as a matter of right in this tribunal. HMRC say that a taxpayer cannot. Their explanation of *Winder* and *Pawlowski*, and *Boddington* too, is that the doctrine espoused by the House of Lords in those cases was to protect defendants. Only defendants, say HMRC, can raise public law issues in defence. Appellants who wish to raise public law issues must do so in an action of judicial review: unlike a defendant they have (say HMRC) a choice of arena in which to bring their dispute. And of course the taxpayer in this Tribunal is the appellant and the person who initiates the judicial process.

72. I am unable to agree that theoretically HMRC's position is the right one. Were it not for s 83 VATA (or the equivalent provisions relating to direct tax and other indirect taxes), a taxpayer would have no right of appeal to this tribunal. Instead, his only method of challenging an assessment would be when HMRC took enforcement action in the High Court or County Court (as Mr Dunnington did in the *Pawlowski* case). The reason the taxpayer is the appellant is because Parliament has chosen to provide a specialist tribunal to resolve tax disputes and provided as a matter of law that an assessment is valid unless successfully challenged in this Tribunal. If the appellant wishes to challenge an assessment, he *must* do so in this tribunal: he cannot wait for HMRC to bring enforcement proceedings as by then it is too late.

73. Therefore, in reality, an appellant in this Tribunal is defending an assessment. He is in effect in exactly the same position as the defendants in *Winder, Pawlowski* and *Boddington*. He does not, as Lord Frazer said, "select the procedure". He has no choice but to become an appellant in this Tribunal if he wishes to defend the assessment. A similar comment is made by Lord Bridge in the *Foster* [1993] AC 794 case which I discuss below:

> "there can be no abuse of process by a party who seeks a remedy by the very process which statute requires him to pursue…"

74. But HMRC's case is that all these considerations are irrelevant as I am bound (they say) by the Court of Appeal decision in *Thorpe* that the rule in *Winder* and *Pawlowski* does not apply in this Tribunal.

Thorpe [2010] EWCA Civ 339

75. The appellant was the sole beneficiary of an approved pension scheme. He caused the pension scheme to pay out the entire sum to him. He was assessed to tax on two bases: firstly, the payment out was in breach of the scheme rules, and secondly

that HMRC retrospectively exercised their discretion to withdraw approval from the scheme and that this triggered tax liability under a separate provision governing the tax treatment of approved pension schemes.

76. The taxpayer defended the first assessment on the basis (he said) that irrespective of the written rules of the scheme, he had the right under trust law (known as the rule in *Saunders v Vautier)* as the sole beneficiary to the whole of the trust fund and so the payment out was not a breach of the scheme rules and not subject to tax. He lost on this point in this tribunal, in the High Court and ultimately in the Court of Appeal.

77. The taxpayer defended the alternative assessment on the basis that (he alleged) the Revenue's exercise of discretion to withdraw approval from the scheme, on which the alternative assessment depended, was unlawful on public law grounds. On the second ground of defence, the tribunal concluded that it did not have jurisdiction to consider what amounted to a public law defence. The point was not taken in the High Court but was taken in the Court of Appeal. Lloyd LJ said on this:

> "[31] I will not decide either way, even if I could on this appeal, whether in principle the analogy of *Pawlowski v Dunnington* could be applied in defence to a claim for payment of tax under an assessment under s 591C. However I agree with the special commissioner and, so far as he said anything about it with the judge, that the point is not open to be taken on this statutory appeal."

78. This appears to be clear authority that a taxpayer could not rely on public law matters in this tribunal to challenge an assessment on the grounds the assessment depended on a prior unlawful exercise of discretion by HMRC. However, Ms Redston's position was that it was not binding. Indeed, it appears to me that it is obiter (a non-binding aside which is not part of the actual decision) because the appellant had already lost the appeal against the first assessment. The legal position on the alternative assessment was therefore irrelevant as the taxpayer could not be assessed twice in respect of the same payment.

79. Nevertheless, obiter statements by the Court of Appeal are normally very persuasive. However, I find this view less than persuasive for a number of reasons.

80. Firstly, the reasoning appears to be that public law points can not be raised because this is a "statutory" appeal (see §31 of the decision cited two paragraphs above). Lloyd LJ refers to the Special Commissioner's decision but the basis of that decision was as follows:

> "It has been argued on behalf of the Respondents that the Appellant's conduct in November and December 1998 and, in particular, his expressed intention to remove the Pensioneer Trustee (without any intention of appointing a replacement) and his expressed intention to terminate the trust and to transfer the trust property to himself, were sufficient grounds to warrant the discontinuance of approval of the Scheme. That may well be so. It is not, however, a matter that I have jurisdiction to determine. I am satisfied that there exists no right to

> appeal the decision to withdraw approval under section 591B(1) ICTA. The Appellant has not sought to challenge the decision to withdraw approval by way of judicial review, which would have been the appropriate remedy for him to seek if he felt that the apparent exercise of the statutory discretion was unreasonable or otherwise *ultra vires*. In the circumstances, therefore, I must proceed on the assumption that the decision to withdraw approval was valid and effective from 2 December 1998."

81. The Special Commissioner's decision therefore appears to be that the existence of the judicial review remedy in the High Court excluded any possibility of the tribunal considering whether the Revenue's action, on which the assessment depended, was lawful. No mention was made of *Winder*, which was directly in point. *Winder* was considered in the Court of Appeal, however, but the Court of Appeal's decision cannot be supported by reference to what the Special Commissioner said because the Special Commissioner did not consider it. The basis of the Court of Appeal's decision, therefore, seems to be that jurisdiction was excluded because this was a *statutory* appeal.

82. Yet that begs the question. It was a statutory appeal: the question is to what extent does the statute confer jurisdiction? The answer cannot be found in the question.

83. Secondly, I am unpersuaded by this decision because it suggests that the appropriate remedy for a taxpayer who wishes to challenge the lawfulness of an action by HMRC on which an assessment depends is by defending enforcement proceedings in the County Court. Yet it is quite clear that Parliament intended to remove all jurisdiction on questions of liability to tax from the County Court and place it with this specialist tribunal. Not only that, the solution is unwieldy and impracticable, requiring a taxpayer to raise some of his arguments in defence in this tribunal and the rest in the County Court. Parliament cannot be supposed to have intended that.

84. Lastly, I am unpersuaded as it seems that this issue was not fully argued and all relevant authority was not drawn to the attention of the Court. Although the taxpayer was represented in the Court of Appeal, it seems that the appellant's counsel's argument centred on the *Saunders v Vautier* point, and it was left to counsel for HMRC (Ms Simler) to draw to the court's attention the decision in *Oxfam.* Neither counsel referred the court to the relevant House of Lords' decision in the case of *Foster* discussed below.

85. It is perhaps not surprising that the matter of public law jurisdiction was dealt with without the fullest of consideration as the *Saunders v Vautier* point had already disposed of the appeal and, even if public law had been considered, the court was of the opinion, in the particular circumstances of the case, that HMRC's actions were entirely reasonable and lawful.

86. In conclusion, I see no reason why *Winder* should not apply in this tribunal. The last House of Lords' authority in this area of which I am aware is the case of *Foster,* submissions on which were made by Mr De Mello.

Foster v Chief Adjudication Officer [1993] AC 794.

87. The case concerned entitlement to social security benefit. The appellant appealed against a decision of the relevant Government department that she was not entitled any longer to receive a benefit known as the severe disability premium. The basis of her claim was that the decision depended on a change to secondary legislation (a statutory instrument) that was beyond the scope of ('ultra vires') the primary legislation (the statute).

88. The House of Lords decided that the tribunal did have jurisdiction to decide this matter of public law, although on the particular facts of the case, ruled that the secondary legislation was not ultra vires the statute.

89. Lord Bridge said:

> "(page 762) …. It is common ground that the principle of *O'Reilly v Mackman* [1982] 3 All ER 1124 … has no application, since there can be no abuse of process by a party who seeks a remedy by the very process which statute requires him to pursue. It was further rightly accepted by [counsel] before your Lordships that a decision giving effect to secondary legislation which is ultra vires is, indeed, in the ordinary meaning of the words 'erroneous in point of law'….
>
> (page 766) My conclusion is that the commissioners have undoubted jurisdiction to determine any challenge to the vires of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law. I am pleased to reach that conclusion for two reasons. First, it avoids a cumbrous duplicity of proceedings which could only add to the already over-burdened list of applications for judicial review awaiting determination by the Divisional Court. Secondly, it is, in my view, highly desirable that when the Court of Appeal, or indeed your Lordships House, are called upon to determine an issue of the kind in question they should have the benefit of the views upon it of one or more of the commissioners, who have great expertise in this somewhat esoteric area of the law.

90. While it may be said that the decision applies only to the social security commissioners, it is difficult to see why the principle should be so limited. It is clear that Lord Bridge (see paragraph at the end of page 762) considered his decision applied to first level appeals and not just upper tribunals. I see no reason why the principle would not apply to the first tier tribunal tax chamber.

91. The question is, as the Lords said, whether a decision by a public authority is "erroneous in law". While that was the phrase used in the legislation giving the social security tribunal jurisdiction, nevertheless, as I have already said, an appeal against a

decision of HMRC by its very nature is a challenge to its lawfulness. An appeal against an assessment is always a question of whether the assessment was erroneous in law. So I find it difficult to see why the ratio in this case should be restricted to social security cases.

92. The decision of the House of Lords in *Hoffman-La Roche (F) & Co v* Sec *of State for Trade and Industry* [1975] AC 295, although actually a case about whether an undertaking for damages should be given before an injunction was imposed included a statement that ultra vires statutory instruments were valid unless challenged by due process (ie by judicial review). Apart from being strictly unnecessary to its decision in that case and therefore obiter, it seems to me that this conflicts with its later decision in *Foster,* and the later decision has to be preferred.

93. The Immigration Appeals Tribunal in *IH Eritrea* [2009] UKIAT 12 said at §82 of the decision in *Foster*:

> "The law lords were concerned to dispel reliance by the prosecution upon the (then) championed 'exclusivity rule' in public law cases following *O'Reilly v Mackman* [1983] 2 AC 237. That rule, now fallen out of favour, was even then of no application where the challenge to the public law decision was raised as a defence (whether in a civil or criminal context) as it is difficult to sustain the argument that a defendant has abused the court's process (the jurisprudential basis for *O'Reilly)* where he has not initiated the procedure *(see Wandsworth LBC v Winder)* and the cases referred to in Lord Steyn's speech above.) Of course, proceedings before the Tribunal are brought by the claimant and so the abuse of process argument might have some potential application here: but it does not. An appeal to the Tribunal is a statutory procedure specifically set up to allow challenge to an immigration decision. We do not see how in these circumstances initiating that procedure where part of the claim is that a statutory instrument is *ultra vires* can be properly described as an abuse of process …."

94. *Eritrea* was an Immigration Appeals Tribunal decision. The question was whether the immigration tribunal had jurisdiction to consider whether secondary legislation was ultra vires primary legislation. It considered the matter at great length and after an analysis of *Foster* concluded:

> "[112] Consequently, it is difficult to avoid the conclusion as a result of Foster that if a decision-maker (or lower tribunal) in the social security context errs in law by applying "law" derived from an *ultra vires* statutory instrument, so too, it would seem, the decision-maker acts "not in accordance with the law" in applying *ultra vires* "law" in the immigration or asylum context. We recognise the significance of this if correct. It would not, however, be our view unless we were driven to reach it by Foster. For the reasons we are about to develop, it is not necessary for us to reach any concluded view in this appeal on the impact of Foster to the AIT's jurisdiction because we have concluded that the 2004 Order is not in fact *ultra vires* the enabling power in s.72 of the 2002 Act."

95. In other words, the IAT did not reach a concluded view on the issue. In an earlier decision, the IAT did apply *Foster:* *Shafique v SSHD* (18448) (16 September 1998) and did not follow earlier authority which predated the higher authority of *Foster*.

96. As I have said, the position in the tax chamber of the First-tier Tribunal may not be identical to that of the position in other tribunals but whatever is the position in other tribunals, it is accepted in the tax chamber that its jurisdiction under s 83 extends to determining whether UK primary and secondary legislation is lawful under the Principal VAT Directive. The cases where the tax tribunal has applied the Principle VAT Directive in place of national legislation are legion and authority scarcely needs to be cited. Of course, the Principle VAT Directive only has supremacy in this country's law because the European Communities Act 1972 says that it does. But it would be odd proposition if this Tribunal's jurisdiction under s 83(1) extends to jurisdiction to deciding whether primary or secondary legislation is ultra vires the Principle VAT Directive but does not extend to deciding whether secondary legislation is ultra vires the primary legislation. This consideration suggests that there is no reason to distinguish the reasoning in *Foster*.

97. Where does this leave my jurisdiction? Putting aside cases of highest authority I look at those cases of lesser (but nevertheless binding) authority which specifically considered the public law jurisdiction of the tax tribunal.

Oxfam [2009] EWHC 2078

98. Oxfam had an agreement with HMRC which governed how it would calculate the recovery of VAT which it paid on expenditure (input tax) which related to both business and non-business activities. The agreement had been reached some years before and in particular before a decision of the VAT Tribunal which led to a change in people's understanding of what should be classed as a business activity. Oxfam argued that as a result of this its agreed method of input tax should be read in a particular way which would generate a repayment of tax relating to earlier years. HMRC did not agree and the dispute came before Mr Justice Sales in the High Court.

99. He had to decide to what extent the Tribunal had jurisdiction to consider the agreement between Oxfam and HMRC on the method for attributing input tax between business and non-business activities. I have already cited in my §55 what Sales J said at §§68 and 70 of his decison. He concluded that the Tribunal did have jurisdiction to consider the agreement:

> "[75] It is clear that s 83 … does not confer any general supervisory jurisdiction on the tribunal, but it seems to be to be a non sequitur to say that the tribunal has no power to apply public law principles if they are relevant to an appeal against … a decision of HMRC which falls within the terms of one of the headings of jurisdiction set out in s 83"

100. Sales J relied on *Wandsworth v Winder* as authority for his decision.

HMRC v Hok Limited [2012] UKUT 363 (TCC)

101. This case concerned the imposition of penalties on the taxpayer. As a matter of 'black letter law' the penalties were properly imposed: the taxpayer's case was that nevertheless HMRC acted unfairly (in the particular circumstances of the case) in imposing the penalties.

102. The Upper Tribunal in *Hok* appeared to accept the decision in *Oxfam* but distinguished it:

> "[54] …. the issue in [the *Oxfam* case] and the issue here are quite different. There, the tribunal was required to decide the amount of input tax which Oxfam could recover, a question which as Sales J said at [63], comes four-square within the ambit of s 83(1)(c) of VATA. Here, the question is not the amount of a penalty, or even whether one is due as a matter of law – there is no dispute that s 98A was engaged, and that it imposed a liability for five monthly penalties of £100 each – but whether HMRC should be precluded from imposing the penalties prescribed by that section, or from collecting them if imposed. That, in our judgment, is a quite separate question of administration, one which, in accordance with the authorities to which we have already referred, is capable of determination only by way of judicial review and therefore not by the First-tier Tribunal."

103. The Upper Tribunal did consider *Winder* in reaching its conclusion that it had no jurisdiction to consider the lawfulness in a public law sense of the penalties or at least the refusal to exempt the taxpayer from penalties which had arisen as a matter of statute. It said of *Winder:*

> "[52] What was in issue in both of those cases [*Winder* and a similar case] was not whether the councils' actions were fair or reasonable, or indeed an general principle of the common law, but whether the actions they had taken had the effect for which they argued – that is, whether the rent had been validly increased, and whether the compulsory purchase order had been vitiated by a subsequent change of mind. Those questions may well have given rise to issues of public law, but they did not give rise to matters for which the only possible remedy is by way of judicial review; and they went, in each case, to the core of the individual's defence of the claims made against him."

104. HMRC's view of this passage is that it means that *Winder* only applies to a defendant to an action. I cannot agree. There is nothing in this passage that looks at the question of whether an appellant in tax proceedings is or is not in an equivalent position to a defendant to enforcement proceedings. For the reasons explained in §§ 71-86 above, I consider *Winder* could be relied on by an appellant in this Tribunal.

105. This passage in *Hok* seems to me to make a distinction between an exercise of discretion by a public authority on which a person's liability to the assessment depends, and a refusal by a public authority to exercise a discretion to exempt a person from a liability which has already arisen. *Winder* was the first of these scenarios: *Hok* was of the second type.

106. Mr Noor attended at an office of HMRC and asked for advice on his tax position and in particular about the recovery of VAT on certain invoices. He asked if he should immediately register for VAT. He was given erroneous advice that he could delay registering for VAT. He relied on this advice to his detriment: when he ultimately sought registration he found that it was too late to recover the VAT on the invoices. He appealed to the Tribunal. It was accepted that as a matter of VAT legislation he was not entitled to recover the VAT on the invoices. The question was whether the Tribunal had jurisdiction to hear an appeal based on Mr Noor's expectations arising from the erroneous advice from HMRC.

107. As in the *Oxfam* case, the question was whether s 83(1)(c) gave the Tribunal jurisdiction to consider legitimate expectations when considering "the amount of any input tax which may be credited to a person".

108. The Upper Tribunal said:

> "[31] It does not follow from the analysis above that the F-tT can never take account of or give effect to matters of public law, and in particular legitimate expectation….It would, however, be open to the F-tT to consider public law issues only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction. The central question in the present case is whether it was open to the Tribunal to consider Mr Noor's case based on his legitimate expectation in decision an issue within its jurisdiction. The answer to that question turns on the extent of the jurisdiction which is conferred by section 83(1)(c) VATA 1994, which comes down to a point of statutory construction."

109. The conclusion of the Upper Tribunal was that s 83 VATA did not give it jurisdiction to consider the public law issue of legitimate expectation where HMRC acted outside their powers.

> "[87] In our view, the F-tT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle is correct in his submission that the right of appeal given by section 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation….That does not mean that under section 83(1)(c) the F-tT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate legislation relation to the entitlement to input tax credit, and adjudicate on whether the discretion has been exercised reasonably….That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers."
>
> "[92] For our part, we consider that the ordinary meaning of the language used in the context of VATA 1994 as a whole is that it is concerned with the right to a credit arising under the terms of the VAT legislation (including, on one view, HMRC's care and management powers)……

110. The Tribunal clearly considered that HMRC had acted outside its powers in this case, and in particular outside its care and management powers, because the advice it gave to the taxpayer was *erroneous.* This, it seems to me, is enough to distinguish the decision from the decision in *Oxfam.* In that case there could be no suggestion that HMRC had acted beyond its powers in agreeing with the taxpayer a special method of attribution of business/non-business VAT.

111. Indeed the Tribunal in *Noor* recognised that the Tribunal might have jurisdiction to decide a matter of contract law between the taxpayer and HMRC – as long as the contract was one within HMRC's powers to enter into (see § 60 of the decision) but it reached no concluded view. As it was its view that HMRC had no power to make erroneous representations, the only remaining question was whether the taxpayer could rely on legitimate expectations (§61) raised by reliance on the erroneous advice. In this, the decision in *Noor* departed from *Oxfam.* The Upper Tribunal did not consider that this Tribunal has power to consider public law issues of legitimate expectations in so far as HMRC had gone beyond its statutory powers. In summary, while both cases accept that this Tribunal has some public law jurisdiction, *Oxfam* took a wide view of it and *Noor* a slightly narrower view.

112. Where does that leave this Tribunal as both decisions are of equal authority?

113. In §6 of *Noor,* the Upper Tribunal makes the comment that its decision is binding on the First Tier Tribunal. All Upper Tribunal decisions are binding when directly in point unless any of the three points mentioned in § 58 above apply. I have therefore struggled to understand what the Upper Tribunal here meant as virtually the entirety of the case dealt with the rightness or wrongness of Mr Justice Sales' decision in *Oxfam,* which was a decision of equivalent authority with that of the Upper Tribunal in *Noor,* and therefore, if they cannot be distinguished, I am bound only to follow the one which I prefer.

114. That is of course only true if the *Oxfam* decision on public law was not obiter. In *Noor,* the Upper Tribunal concluded that the decision in *Oxfam* was probably not obiter (see §50). However, I have to decide this issue. I do not wish to lengthen this already long decision by setting out the complicated question of whether the decision in *Oxfam* was obiter. Suffice it say that for the reasons given by the Upper Tribunal in *Noor,* I consider that the decision was not obiter. It is therefore of equivalent authority with *Noor.*

115. Therefore, as Mr Macnab conceded, I am able to chose between the two. He urged me to prefer the decision in *Noor,* as it was the most recent, it was decided with *Oxfam* in mind, and, of course, HMRC consider it to have been rightly decided.

116. The Upper Tribunal itself in *Noor* noted that it did not have the benefit of representations on behalf of the taxpayer and that this reduced the persuasiveness of the decision: however the same criticism can be levelled against *Oxfam* as Mr Justice Sales did not have the benefit of reasoned argument from HMRC on the point.

117. Ms Redston's view was that I did not need to decide which of the two decisions I preferred. The joint appellants no longer pursued an argument based on legitimate expectations and so did not rely, in that narrow sense, on the decision in *Oxfam*. Rather they relied on the views expressed in *Noor* that the Tribunal did have jurisdiction to consider whether HMRC's exercise of discretion was reasonable.

118. I reach a concluded view on this in §§138-142 after consideration of other relevant cases.

National Westminster Bank plc [2003] STC 1072.

119. This case is of equivalent authority with *Oxfam* and *Noor* but predates them. The case was about allegation that HMRC treated different taxpayers differently and that therefore HMRC had acted unfairly. In particular, the taxpayer had overpaid tax which HMRC refused to repay by invoking the statutory defence of 'unjust enrichment'. However, the appellant claimed it was unfair of HMRC to rely on this defence because HMRC had repaid other taxpayers in very similar circumstances without invoking such a defence. The High Court decided that the VAT Tribunal had no jurisdiction to consider unfairness and that in any event on the particular facts HMRC had no acted unfairly. Mr Justice Jacob said:

> "[47] The commissioners reposte by arguing that this complaint of unfair treatment is essentially one about their conduct. It is not a point involving the facts of Lombard's individual case or the law applicable to those facts. The proper remedy for unfair treatment is judicial review, not an appeal to the tribunal. The tribunal is not a body entrusted with a supervisory, public law, jurisdiction. Here there is a question of discretion involved.
>
> [48] I think that the commissioners are right. The actual decision impugned is that to invoke unjust enrichment in the case of Lombard. It is not a decision to invoke unjust enrichment in the case of Lombard but not others. That is what happened in fact but there never was a decision to that effect."

120. Mr Justice Jacob applied the House of Lords decision in *J H Corbitt* but made no mention of their decisions in *Winder* or *Foster*, which, I presume, were not cited to him.

United Biscuits [1992] STC 325

121. In this case, the second division of the Inner House of the Court of Session (a Scottish court equivalent to the Court of Appeal in England and Wales), indicated that the VAT tribunal did not have power to adjudicate on the terms of an extra-statutory concession. It gives no reasoning for this view and in any event, it did not consider the relevant House of Lords' decision in *Winder* and it pre-dated the House of Lords' decision in *Foster*. HMRC relies on this case but in so far as the binding nature of this authority is concerned, it seems to me that it is no authority at all as the point on jurisdiction was conceded by both parties and therefore was something on which the court was not called to reach a decision.

Arnold [1996] STC 1271

122. In this case, the taxpayer claimed benefit of an extra statutory concession ("ESC") which applied to recovering VAT on construction of a house. HMRC refused the repayment on the grounds he did not meet the terms of the ESC. The Tribunal held that he did meet the terms of the ESC and that therefore he was entitled to repayment. On appeal, the High Court reversed the decision on the basis that the tribunal had no jurisdiction to decide whether the terms of an ESC were met. This is a decision which, subject to the rules set out in §58, is binding on me.

123. There have also been a number of tribunal decisions where a tribunal has decided that it did not have jurisdiction to adjudicate on extra statutory concessions, such as *Greenwich Property Ltd* VTD 16746. One of the most recent is the decision in *Prince* [2012] UKFTT 157 (TC). These decisions may be persuasive but they are not binding on me.

Conclusion on the Tribunal's public law jurisdiction

124. None of the decided cases concern s 83(1)(zc) but that does not mean they are not binding. While statutory jurisdiction will depend on the particular section of a statute which actually confers jurisdiction, in most cases it will simply require the Tribunal to consider the lawfulness of a decision by HMRC and that begs the question to what extent Parliament intended the Tribunal to have public law jurisdiction and the answer to that question without some distinguishing words or other distinguishing feature, likely to be the same for any of the subsections under s 83.

125. There are different sorts of public law issues. It does not necessarily follow that a Tribunal would have jurisdiction over all of them even if it has jurisdiction over some of them (HMRC's position is of course it has jurisdiction over none of them.) It is clear from the foregoing analysis of cases that the Tribunal has jurisdiction in some matters of public law but not in others. What general principles can be discerned from these cases? It seems to me that the cases are understood by looking at the different sorts of public law issues which might arise in this Tribunal. An appellant might allege:

- The secondary or tertiary legislation was unlawful as ultra vires the primary legislation under which it was made or for some other reason;
- That a government body (in this case HMRC) has unlawfully failed to apply tertiary legislation or an extra statutory concession ("ESC");
- (in so far as not within above heading) that HMRC has acted in breach of a person's legitimate expectations;
- A government body (in this case HMRC) has unlawfully exercised a discretion;
- That a government body (in this case HMRC) has unlawfully failed to exercise a discretion;

126. Does this tribunal have jurisdiction over all or any of these matters when considering a case brought under s 83(1)(zc)?

Allegation that secondary legislation unlawful

127. Does this tribunal have jurisdiction to consider whether secondary legislation is ultra vires primary legislation? Although a decision on social security law, *Foster* indicates that this tribunal does have such jurisdiction. There is no binding authority to the contrary which was brought to my attention.

128. I note that the Immigation Appeals Tribunal, in the case of *IH Eritrea*, expressed concerns on the ability of a tribunal to determine matters of public law. It said "a challenge that entails the argument that "law" itself is unlawful is a more deep-rooted and fundamental challenge going beyond the legality of the 'immigration decision' itself. It is not one which we consider to be contemplated by the 2002 Act. It is properly the domain of judicial review…." To me, this concern seems a little out of place in the tax chamber where, in respect at least of its VAT jurisdiction, it is routine for the tribunal to decide whether UK primary and secondary legislation is lawful under the Sixth (now Primary) VAT Directive. This Tribunal is also used to deciding, in certain types of cases where it is expressly given supervisory jurisdiction, whether a decision of HMRC is unreasonable and therefore unlawful in the public law sense.

129. In these circumstances, despite concerns expressed by the IAT in *IH Eritrea*, I consider that what the House of Lords said in *Foster* is equally applicable in the Tax Tribunal. It is House of Lords' authority and I see no reason to distinguish it because it is consistent with the tribunal's accepted jurisdiction to determine whether secondary (and indeed primary) legislation on VAT matters is ultra vires EU law.

130. It follows that this Tribunal must have jurisdiction to determine whether tertiary legislation is lawful. This is not really relevant to this case. While the fourth appellant complains about the methods of electronic payment specified by HMRC, which I have set out at §23 above, its complaint is not that the tertiary legislation is unlawful, but that it does not go far enough: it particular its complaint is that HMRC have not exercised its discretion to include payment by cheque as one of the authorised methods of electronic payment. I deal with this argument at §182.

Alleged failure to apply tertiary legislation or ESC

131. It is accepted that this Tribunal has jurisdiction to determine if HMRC issued a decision which failed to apply primary or secondary legislation. This does not require consideration of public law at all. So-called tertiary legislation, which is where HMRC (or another Government department) publishes rules under a legislative authority to do so, is not true legislation and therefore is properly a matter, it seems, of public law. This is even more true of an extra-statutory concession. ESCs are rules published by HMRC without any specific legislative authority to do so but in reliance on HMRC's general care and management powers as a public body.

132. Non-binding dicta of Lord Lane in *Corbitt* (see §61) was that this Tribunal was given jurisdiction by Parliament to consider a failure by HMRC to apply tertiary legislation. The decision of the High Court in *Arnold* was that the Tribunal has no authority to consider a failure by HMRC to ESCs. I disregard *United Biscuits* as the point was not the subject of a reasoned decision.

133. I find it difficult in principle to distinguish between tertiary legislation and ESCs. In both cases HMRC publish 'rules' which they say exempt taxpayers from liability if followed. While ESCs are made under general care and management powers and tertiary legislation is made under statutory powers specific to the rules concerned, I do not see why Parliament would have intended one to be justiciable in this Tribunal and the other not.

134. But HMRC and the appellants were agreed that concessions are not justiciable in this Tribunal and the authority of *Arnold* supports their position on this.

135. My view is rather different. I am not satisfied that concessions are not justiciable in this Tribunal. *Arnold* is only binding if not inconsistent with another decision of equivalant authority and it seems to me it is inconsistent with *Oxfam* and the views expressed in *Noor*. The basis that a taxpayer would be entitled to rely on a concession is legitimate expectation: because it is published and available to all this would be a case where no detrimental reliance need be shown. *Oxfam* is authority that taxpayers can rely on their legitimate expectations in this Tribunal and I prefer that authority to *Arnold*. I note in any event that *Arnold* appears inconsistent with dicta of Lord Lane in *Corbitt* in respect of tertiary legislation as I can see no good reason to treat tertiary legislation differently from ESCs. I am aware that in taking this view I am departing from some other first tier tribunal decisions, such as that in *Prince*. So far as *Noor* is concerned, the basis of its decision appears to be that while the Tribunal would have power to take account of expectations raised by HMRC in the exercise of their statutory powers and duties, it does not have jurisdiction to consider legitimate expectations raised by HMRC acting outside its statutory powers and duties (see §§87). Although it was not the ratio of the decision, this view is consistent with the Tribunal have jurisdiction over the application of ESCs.

136. The issue was important in this case because of telephone filing, which the appellants (perhaps opportunistically) claimed had to be excluded from consideration of this Tribunal because it was concessionary, and concessions, all parties were agreed, were not justiciable in this Tribunal. HMRC adopted the even less appealing 'have your cake and eat it' stance that while concessions were not justiciable by *appellants* nevertheless *HMRC* were entitled to rely on them in defence to an allegation that they had applied law which was in breach of a person's human rights or disproportionate under the Principle VAT Directive. My view is that HMRC could rely on a published ESC in this Tribunal because an appellant could do so too.

137. In the event, for reasons explained below, it was not its concessionary status that prevents HMRC relying on the telephone filing concession. See §§477-516.

Legitimate expectations

138. As already noted, *Oxfam* and *Noor* conflict on whether this Tribunal has jurisdiction over all questions of a taxpayer's legitimate expectations. The question of jurisdiction over allegations of breach of legitimate expectations ceased (save in respect of the justiciability of concessions) to be relevant in this appeal as the joint appellants dropped their arguments on legitimate expectations near the end of the hearing. To the extent it is relevant, I prefer what I see as the *Noor* gloss on *Oxfam,* which is that Parliament would have intended this Tribunal to have jurisdiction over the application of tertiary legislation and ESCs and contracts and special methods entered into by HMRC, but not over more general questions of legitimate expectation and in particular this Tribunal could not hold HMRC to unlawful exercise of its statutory powers and duties.

Liability depends on a prior exercise of discretion by HMRC

139. The main cases to address a similar issue are *Winder, Pawlowski* and *Boddington* and *Thorpe.* None of the first three deal with the position of an appellant in a tax tribunal although as I have said I cannot see any reason why the principle of those cases could not be relied on by an appellant in the tax tribunal. For reasons already given, I would decline to follow the obiter comments in *Thorpe* to the contrary. I also note that the Upper Tribunal in *Hok* and *Noor* appeared to indicate that in this type of case this tribunal would have jurisdiction.

So applying *Winder,* normal statutory interpretation of s 83 means that, where this tribunal has jurisdiction to consider an assessment, it can consider whether a prior exercise of a discretion by HMRC, on which the validity of the assessment depends, was lawful in the public law sense.

However, so far as this case is concerned the issue of the decision to the appellants that they must file online did not depend on a prior exercise of discretion by HMRC. It was merely an application of the regulations: ie an application of secondary legislation.

Nevertheless, the justiciability of whether HMRC's exercise of a discretion was lawful was relevant to this case as the joint appellants' criticised HMRC's reliance on the telephone filing concession. I consider the legality of this concession and therefore whether HMRC could rely on it below: §§477-516.

HMRC have refused to exercise discretion to exempt taxpayer

140. This covers the sort of case where the application of statutory law has led to the imposition of a tax liability on the appellant and the appellant's complaint is that HMRC ought to have exercised their discretion (presumably under their care and management powers) to exempt the taxpayer from that tax liability.

141. The cases which have dealt with this type of issue include *Hok, Nat West* and *Corbitt,* and also the Court of Appeal decision in *Asplin v Estill [1987] STC 72* which I have not previously mentioned. The House of Lords' binding decision in *Corbitt* is

that this tribunal has no jurisdiction in such a case. That is also the effect of the binding Court of Appeal, High Court and Upper Tribunal decisions in *Asplin*, *Nat West* and *Hok*. The only way to challenge a refusal to exercise a discretion to exempt from liability is by judicial review.

142. I recognise that Mr Justice Sales in *Oxfam* (§§76-77*)* considered Lord Lane's view on this obiter and inconsistent with the House of Lords' decisions in *Winder* and *Boddington*. The Upper Tribunal in *Noor* (below) did not agree with this assessment. Respectfully I agree. I do not consider the decision in *Corbitt* to be inconsistent with the decisions in *Winder* and *Boddington*, and in particular the application of *Winder* in the tax sphere in the case of *Pawlowski*, and I prefer to follow *Noor* than *Oxfam* on this point. This is because I think that the case law draws an important to distinction between, on the one hand, a complaint that HMRC have assessed the appellant in reliance on an unlawful act by HMRC, and, on the other hand, a complaint that, while lawfully assessed, HMRC have unlawfully failed to exempt the taxpayer from liability. *Pawlowski* was of the former kind and *Corbitt* of the latter kind. There is therefore no conflict between the decisions.

143. The *Corbitt, Hok, Asplin* line of cases are not only binding on this Tribunal but they must be right. In cases where the taxpayer is claiming that HMRC should have exercised a discretion to exempt the taxpayer from liability, the taxpayer is in reality claiming that in the particular circumstances of his case, the imposition of tax on him was not fair. Parliament cannot be supposed to have intended that the tax tribunal should have what amounts to jurisdiction to consider whether the imposition of tax was *fair*.

144. It seems to me essential that there should be a filter for cases in which appellants aver that tax is not fair. Parliament must have been intended such unrestricted jurisdiction to be limited to judicial review cases in the High Court where first parties must obtain leave to bring the action and second do so in a short time scale. This should weed out unmeritorious claims.

145. And if such claims were not restricted to the courts with inherent jurisdiction, this Tribunal would be bound in virtually every case to consider whether the imposition of the tax was fair. This cannot have been intended by Parliament.

146. Even in such cases where the amount at stake may not justify a judicial review action, I still consider that Parliament cannot have intended this Tribunal to have jurisdiction to consider whether the imposition of the tax was fair. Such a challenge by its nature needs perhaps not only to be restricted to meritorious cases but also cases of significance. In any event I am bound by authority that this Tribunal has no jurisdiction in such cases.

147. But I do not think that the same applies to other aspects of public law. The sorts of cases in which on this analysis the tribunal would have jurisdiction to consider matters of public law will in practice be few and far between. Further they fall into two categories. The first is to look at the legality of secondary legislation, a task this tribunal should be easily able to do with its background in VAT. The second is to

look at an exercise of discretion already taken by HMRC, either because an assessment depends on it or because (in the case of a published or individual concession not applied to the appellant) HMRC are (allegedly) refusing to abide by a lawful exercise of their discretion.

Decision on jurisdiction in the joint appellants' case

148. I consider that s 83(1)(zc) gives this Tribunal jurisdiction to consider whether HMRC's decision that the joint appellants were liable to file online was correct. The decision would not be correct if as a matter of law HMRC could not require the appellants to file online. Therefore, by implication the Tribunal has jurisdiction to consider whether HMRC's decision was lawful.

149. However, it follows from what I have said at §§140-146 above, that that jurisdiction does not extend to considering the public law question of whether, if the appellants are liable to file online, HMRC ought to have exercised a discretion to exempt them from liability.

150. The joint appellants' case was that HMRC has a discretion under Regulation 25A(10) to exempt old and disabled persons from liability to file online, which discretion HMRC have unlawfully failed to exercise. It was their case that a failure to give the joint appellants exemption as old and/or disabled was a breach of their human rights under the Convention and in failing to recognise this by giving them an exemption which HMRC had power to give, HMRC unlawfully failed to exercise a discretion.

151. This falls at the first hurdle: for reasons already explained I consider that this Tribunal has no power to adjudicate on whether HMRC has unlawfully failed to exercise a discretion which it possesses.

152. I note that Ms Redston relied on *Noor* in support of her proposition that the Tribunal would have jurisdiction in such a case but I consider that to be a misunderstanding of *Noor*. The discretion which *Noor* considered to be justiciable was one which HMRC had already exercised in the form of tertiary legislation or a published ESC. In no way did *Noor* depart from the decision of the same panel in *Hok* that this Tribunal has no jurisdiction over a failure by HMRC to exercise a discretion.

153. I note in passing that I also do not accept, for the reasons given in §§ 155-177 immediately below, that HMRC had a discretion under Reg 25A(10) which they failed to exercise, although I do accept that their care and management powers give them a general discretion to issue an ESC exempting certain persons for online registration, which they have not exercised. But I do not consider that that is justiciable in this tribunal.

154. Nevertheless, that is not the end of the joint appellants' case. While the joint appellants did not allege that Regulation 25A was ultra vires the primary legislation, their case had to be understood as a case that the obligation to file online was

unlawful under the Convention and under the European Communities Act. Whether I have jurisdiction to consider the Convention, I look at below in §§188-211.

Did the regulations include a discretion?

155. In case the matter goes further I record my views on this although it follows from §151 above, that it is not relevant to this decision.

156. The joint appellants' case is that HMRC acted in breach of its public law duties in failing to exercise a discretion which the regulations gave them. It is well established that a public authority must give reasoned consideration to the exercise of discretion which it has been given before deciding not to exercise it: *R v LCC ex p Corrie* [1918] 1 KB 68. The joint appellants' case is that regulation 25A(10) gave HMRC a discretion to exempt persons from the obligation to file online and HMRC has not exercised this discretion and should have done in order:

(a) not to breach the appellants' Convention rights (discussed below);

(b) To give effect to the undertaking in the RIA (§247)

157. The dispute centres on regulation 25A(10). I have set out most of Reg 25A at §21 above; I have extracted the relevant passages here:

> **25A**
>
> (1) Where a person makes a return required by regulation 25 using electronic communications, such a method of making a return shall be referred to in this Part as an 'electronic return system'.
>
> (2) Where a person makes a return on the form numbered 4 in Schedule 1 to these Regulations ("Form 4") or, in the case of a final return, on the form numbered 5 in Schedule 1 to these Regulations ("Form 5"), such a method of making a return shall be referred to in this Part as a 'paper return system'.
>
> …..
>
> (8) Where an electronic return system is used, it must take a form approved by the Commissioners in a specific or general direction.
>
> (9) ….
>
> (10) A direction under paragraph (8) above may in particular –
>
> (a) modify or dispense with any requirement of Form 4 or Form 5 (as appropriate),
>
> (b) specify circumstances in which the electronic return system may be used, or not used, by or on behalf of the person required to make the return.
>
> For the purposes of sub-paragraph (b), the direction may specify different circumstances for different cases.
>
> ……..

> (13) No return shall be treated as having been made using an electronic return system unless it is in the form required by paragraph (8) above.
>
> The requirement in paragraph (8) above incorporates the matters mentioned in paragraph (10) above.
>
> ……"

158. Reg 25A(10) clearly gives HMRC a discretion. But to do what? HMRC's contention is that it merely allows them to specify a different kind of electronic filing return. They have exercised this power to specify an online filing system called GIANT which is used by the NHS and other government departments.

159. The appellants' case is that Reg 25A(10) would allow HMRC to specify a return system that was not electronic: in other word the appellants claim that HMRC have a discretion to allow disabled and old persons to file by paper.

160. I accept HMRC's contention that the scope of Reg 25A(10) is clearly delimited by regulation 25A(8) as (10) starts with the words "where an electronic return system is used".

161. The joint appellants do not necessarily dispute this. They say the joint appellants are specified persons and on the face of the regulations must use an electronic return system. This brings them within (8). But HMRC can under (10)(b) then 'specify circumstances' (such as age or disability) in which the electronic return system is 'not used'.

162. HMRC do not agree that the regulations can be read like this. They consider the broad ability in (10)(a) and (b) to dispense with various parts of the paper return and electronic return was not intended to allow HMRC to entirely exempt a person from filing online: it was meant to allow HMRC to provide for different types of online filing by different classes of taxpayer. If it had been intention to give HMRC power to exempt groups of persons from online filing, Reg 25A would have allowed HMRC to add to the categories of non-specified persons in sub-section (6).

163. The joint appellants' case is that this is not right: by putting the discretion into (10) Parliament intended to allow HMRC to deem paper returns by certain groups to be electronic returns.

164. My conclusion is that the appellants' is a strained and not a purposive interpretation of (10). I agree with Mr Macnab's points recited above. The joint appellants' case leads to the bizarre result that a person could be allowed to file a paper return (by HMRC deeming paper returns to be online returns) but nevertheless still be liable to make an electronic payment (as that liability follows liability to make an online return). In any event, a paper return is not a type of electronic return.

165. <u>HMRC have exercised (10) power to specify a paper return:</u> The appellants pointed out that HMRC have (purportedly) exercised their power under Reg 25A(10) in order to specify that certain appellants can make paper returns. This was done by notice described by HMRC as C17. This is a three page document dealing with

various online return matters (such as GIANT returns and setting out approved methods of electronic payments). So far as relevant it reads:

> "These are the conditions for submitting returns electronically. The wording in **bold** is a direction for this purpose having the force of law.
>
> ….
>
> **If you have appealed against a mandation notice issued under regulation 25A(7) or have requested a formal review, you are not required to submit VAT returns electronically while the issue is being determined.**
>
> **NOTES**
>
> The legal basis for these conditions is in the Value Added Tax Regulations 1995 (SI 1995/2518)."

166. HMRC accept that the only relevant discretion which HMRC could have been exercising to make this purported piece of tertiary legislation was Reg 25A(10). But their position in the hearing was that it was beyond HMRC's powers to use Reg 25A(10) to allow appellants who have lodged appeals to submit paper returns. I understood Mr Macnab to accept that the concession could be and was lawfully made under HMRC's care and management powers.

167. I agree with HMRC that the fact they purported to use Reg 25A(10) to treat a paper return as an electronic return does not mean that that is what Parliament intended it to be used for. The views of the author of C17 as to the vires of the concession are irrelevant to my determination of what Reg 25A(10) means.

168. <u>There was a promise to give HMRC discretion:</u> The joint appellants' position is also that in construing Reg 25A(10) I should take account of HMRC's public position at the time the regulations were under consideration. The RIA contained a promise that there would be a direction making power to exempt specific customer groups who would have difficulties filing online (see §247). Unless Reg 25A(10) is interpreted as such a direction making power, HMRC are in breach of their promise.

169. HMRC's stance on this is that (a) what was said in the RIA is irrelevant to statutory interpretation and (b) the RIA did not promise that there would be an exemption for VAT registered businesses.

170. I do not agree with HMRC on (b) because, while the RIA promise did apply to all taxes, it did not state that VAT was exempt from the promise. Nevertheless so far as (a) is concerned, I consider HMRC is right. There is no rule of statutory interpretation that statutes or regulations must be given a strained and unnatural reading in order to keep the government to publically made promises.

171. I agree with Ms Redston that Miss Allen's hearsay evidence that HMRC took a positive decision not to exempt disabled persons on the grounds that exemption was difficult to enunciate, and help could be given by other means, should be disregarded. Firstly, it was hearsay evidence of a dubious sort: Miss Allen's evidence was vague

and even she did not know whether it was right. Secondly, it is not relevant to a question of statutory interpretation.

172. HMRC have specified non-electronic payment methods: By analogy it was suggested that, as HMRC had exercised its powers under Regulation 40(2A) (see §418) to specify, as methods of electronic payment, payment methods that were not electronic, then they must have been intended to have the power to specify paper returns as electronic return systems.

173. This argument fails on two grounds. Firstly even if the appellants are correct in their hypothesis, a misuse by HMRC's of their powers to specify types of electronic payment methods would not affect the interpretation of other regulations (nor, indeed, the actual regulations).

174. Secondly, the appellants have not made out (to the extent it was their case) that any of the specified methods of payment were not electronic methods. I have dealt with the bank giro payment at §419 and give my reasons for considering it to be an electronic method of payment. The other methods were not specifically considered at the hearing but all appear prima facie to involve the payment arriving electronically in HMRC's bank account (eg payment by direct debit, by credit card, by CHAPS).

175. Reg 25A(10) should be given a strained meaning: This was not specifically addressed although it must have been implicit in the appellants' case that because the Tribunal is addressing the appellants' human rights, Reg 25A(10) should be given a strained meaning in order to avoid a breach of their human right under A6 to a fair hearing because otherwise the appellants would be unable to get their case heard.

176. In so far as this was a part of the joint appellants' case, I reject it. I consider for the reasons already given that I do have jurisdiction to consider whether the regulations themselves are in breach of the Convention. The appellants' A6 rights to a hearing are therefore met without giving a strained interpretation to Reg 25A(10).

177. Conclusion: I do not consider that the joint appellants have made out a case that HMRC unlawfully fettered a discretion given to them by Reg 25A(10). But this is irrelevant in that I do not accept that the Tribunal would have jurisdiction to make such a determination in any event.

Decision on fourth appellant's public law case

178. It is convenient to deal with the fourth appellant's case on public law here – although I recognise that the question of jurisdiction to hear the fourth appellant's case is outstanding (see § 34-41 above) and I revert to this below at § 212-229.

179. I have determined that to the extent that the Tribunal can consider the lawfulness of the decision that the fourth appellant file online, this automatically brings in consideration of whether automatic consequence of this which is to pay electronically was lawful.

180. Like the joint appellants, a part of the fourth appellant's case was that HMRC had unlawfully failed to exercise a discretion which it possessed. In the fourth appellant's case this was that HMRC had a discretion to specify the types of payment that would qualify as electronic payment and HMRC should, says the fourth appellant, have exercised their discretion to specify payment by cheque. The methods actually specified are set out by me at §23 and these do not include payment by cheque.

181. As I have said at §140-147, I consider that this Tribunal does not have jurisdiction to consider whether HMRC have unlawfully failed to exercise a discretion to exempt the appellant from liability. I cannot therefore consider this claim.

182. In any event, I note in passing that I do not agree that HMRC does have a power to specify payment *by cheque.* This is because Regulation 40(2A) only permits them to specify "means of electronic communications" (see §22). The definition of "electronic communications" in s 132 FA 1999 (see § 15 above) is "any communications by means of an electronic communications service". And the definition of that (see §16) appears to be conveyance by electronic network of signals. I am satisfied that when a taxpayer sends a cheque to HMRC no electronic communications system is utilised. I have noted that this is not the case with bank giro payments which do involve electronic communications (see §§418-419 below).

183. I have determined that this Tribunal does have jurisdiction to consider whether the electronic payment regulations (secondary legislation) are lawful and in particular whether they are beyond the scope ('ultra vires') the primary enabling legislation.

184. The fourth appellant considers Regulation 40(2A) unlawful on a number of grounds:

(a) That the 1999 and 2002 Finance Acts do not permit secondary legislation requiring payment to be by electronic means;

(b) Regulation 40(2A) was unlawful under the Convention.

185. So far as (a) is concerned, I accept that I do have jurisdiction to consider this case. But it can be dealt with very shortly. As I understand it, the fourth appellant considers that there is a fundamental right to pay by cheque and, it says, nothing in the two FAs expressly overrides this. But the appellant failed to show me any authority in support of this somewhat surprising claim to a fundamental right to pay by cheque. I consider Mr Macnab is correct to say there is no right to pay by cheque: it is simply a means of payment which the payee might choose to accept. In the commercial world, there is no right to pay by cheque. Shops can and sometimes do refuse to accept payment by cheque. I do not consider that HMRC is in any different position to a commercial trader. They can refuse payment by cheque. I dismiss this ground of appeal

186. In any event, in law, as noted above at §37-38, HMRC have not refused to accept payment by cheque, although as I have said HMRC do not rely on this as a defence.

187. So far as (b) is concerned, I deal with this below.

Jurisdiction to consider the Convention?

188. Although my jurisdiction is defined by s 83(1)(zc) VATA, as I have said this gives this Tribunal the obligation to consider whether HMRC's decision to require the four appellants to file online was lawful, and to a limited extent to consider matters of public law when considering that question.

189. Nevertheless, most of the case turned on the European Convention on Human Rights ("the Convention"). To what extent is the Convention relevant when considering the lawfulness of the decision that the four appellants should file online?

Interpretation of the law

> **"3 Interpretation of legislation.**
>
> (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.
>
> (2)This section—
>
> (a)applies to primary legislation and subordinate legislation whenever enacted;
>
> (b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

190. The effect of this is that primary and secondary legislation must be read in so far as possible as consistent with the Convention. This goes well beyond giving legislation a purposive interpretation: the legislation must be read as consistent with the Convention if at all possible to do so. And this applies whenever this Tribunal exercises its jurisdiction under s 83.

191. However, where it is not possible even on a strained interpretation to read primary legislation as consistent with the Convention, then the primary legislation must be applied and the human rights overridden. But the same does not apply to secondary legislation as I explain below.

192. Needless to say, HMRC do not accept that compulsory online filing breaches anyone's human rights and do not consider it necessary for the regulations to be given any kind of a strained interpretation.

193. It is not only s 3 HRA which is relevant. S 4 of the HRA provides as follows:

> **4 Declaration of incompatibility.**
>
> (1)Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2)If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3)Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
>
> (4)If the court is satisfied—
>
> (a)that the provision is incompatible with a Convention right, and
>
> (b)that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
>
> it may make a declaration of that incompatibility.
>
> (5)In this section "court" means—
>
> (a)the Supreme Court;
>
> (b)the Judicial Committee of the Privy Council;
>
> (c)the Court Martial Appeal Court;
>
> (d)in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;
>
> (e)in England and Wales or Northern Ireland, the High Court or the Court of Appeal.
>
> (f)the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.
>
> (6)A declaration under this section ("a declaration of incompatibility")—
>
> (a)does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
>
> (b)is not binding on the parties to the proceedings in which it is made.

194. In short, certain courts (basically those with a judicial review function) are empowered to declare where appropriate that primary legislation (and secondary legislation the form of which is dictated by primary legislation) is incompatible with the Convention.

195. It is a sister provision to s 3. Incompatible legislation must be applied despite the breach of human rights, but the senior courts have the right to make a declaration of incompatibility, although this has no legal consequences.

196. Everyone is agreed I do not have power to make a declaration of incompatibility and therefore it seems clear to me that while (applying *Foster)* this tribunal does have power to consider whether secondary legislation is ultra vires the primary legislation, it was not intended by Parliament to have power to consider whether primary legislation is incompatible with the Convention. (I note that the position is be different under the European Communities Act and I address this below).

197. But we are concerned in this case with secondary legislation. Mr De Mello relied on s 6 of the HRA which provides:

> **6 Acts of public authorities.**
>
> (1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2)Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3)In this section "public authority" includes—
>
> (a)a court or tribunal, and
>
> (b)any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
>
> (4). . . . . .
>
> (5)In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
>
> (6)"An act" includes a failure to act but does not include a failure to—
>
> (a)introduce in, or lay before, Parliament a proposal for legislation; or
>
> (b)make any primary legislation or remedial order.

198. Mr De Mello's case is that this tribunal is as much a public authority as HMRC because (if for no other reason) s 6(3)(a) says so. This tribunal must act compatibly with the appellants' human rights. Therefore, says Mr Mello, it must give effect to the appellant's human rights by allowing the appeal. If this tribunal were to find that the requirement to file online breaches the appellants' human rights, S 6 not only gives

this tribunal to jurisdiction to allow the appeal, it compels it to do so, says Mr De Mello.

199. There are exceptions to this. S 6 does not apply where primary legislation is incompatible with the ECHR and it does not apply to secondary legislation which is compelled by the terms of the primary legislation to be incompatible with ECHR. But it applies to any other secondary legislation.

200. I also note that even if Mr De Mello's reading of s 6 might be thought at first glance to go beyond what Parliament may have had in mind, nevertheless s 3 of the HRA compels me to read s 6 of the same Act as consistent with the Convention if at all possible. To be consistent with the Convention s 6 should be read as allowing this tribunal to allow appeals where otherwise the appellant's human rights would be breached.

201. In any event, during the course of the hearing HMRC accepted Mr De Mello' argument on s 6. Their previous position was that the HRA only gave me power to construe the regulations to be consistent with the ECHR: and if I could not do this, then the appellants were without remedy in this tribunal.

202. After hearing Mr De Mello's argument, Mr Macnab said that HMRC accepted that "neither of the exceptions in section 6(2) would apply if the FTT were to consider that reg 25A or reg 40(2A) infringed a convention right….HMRC accept that the FTT would be entitled, in deciding the appeal and within the scope of its jurisdiction, to 'disapply' a provision of regulation 25A or 40(2A) if and to the extent that [the appellant] is able to establish infringement of any Convention right and if and to the extent that the FTT is unable to interpret or give effect to such provisions in such a way as to be compatible with such Convention right."

203. In other words, HMRC accepted Mr De Mello's submission that this tribunal has jurisdiction to allow an appeal against a decision which depends upon *secondary* legislation which is incompatible with the appellants' human rights subject to the provisos that

> (a) that secondary legislation must not be incompatible with the Convention because the terms of the primary legislation compel it to be so; and
>
> (b) that first this tribunal must in so far as possible and as provided by the HRA construe the secondary legislation to be compatible with the Convention.

204. This interpretation of s6, which I accept and which was conceded by HMRC, is entirely consistent with the scheme of s 3 and s 4 of the HRA. Primary legislation (and any secondary legislation which is compelled to be in the form it is by the primary legislation) cannot be challenged in this (or any other) tribunal. Even the superior courts cannot strike it down: they can merely declare its incompatibility with the Convention. But all other secondary legislation is 'fair game' to an appellant in tribunals and courts. It can in effect be disapplied or struck down by any court and

tribunal to the extent it is incompatible with the appellant's human rights (although the first recourse of the tribunal or court is to construe it to be compatible if possible).

205. There is also authority in support of this view. In the first instance decision in *Preddy v Bull* the county court judge held that he had no power not to apply subordinate legislation which was incompatible with ECHR. On appeal to the Court of Appeal (reported at [2012] 1 WLR 2514 CA) the appeal was dismissed on other grounds, but in a non-binding aside ("per curiam") Rafferty LJ said:

> "[28] I can deal briefly with [the Judge's] conclusion as to the powers of a judge sitting in the county court. He was wrong to say that he had no alternative but to apply the Regulations even if they were incompatible with the convention. Unless the primary legislation dictates the contents of the Regulations…, any judge can strike down subordinate legislation: see section 4(3) of the Human Rights Act 1998."

Although Rafferty LJ did not expressly refer to s 6, what her ladyship said is entirely consistent with Mr De Mello's interpretation of s 6. The compatibility of (most) secondary legislation with the Convention is something over which the HRA gave this and all other tribunals jurisdiction.

206. There is a limit to the Tribunal's jurisdiction and this is contained in s 7 of the HRA. This provides as follows:

> **7 Proceedings**.
>
> (1)A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a)bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b)rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> (2)…[not relevant]….
>
> (4)…[not relevant]…
>
> (5)Proceedings under subsection (1)(a) must be brought before the end of—
>
> (a)the period of one year beginning with the date on which the act complained of took place; or
>
> (b)such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.
>
> (6)In subsection (1)(b) "legal proceedings" includes—
>
> (a)proceedings brought by or at the instigation of a public authority; and

(b)an appeal against the decision of a court or tribunal.

(7)For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8)Nothing in this Act creates a criminal offence.

(9)….[not relevant]….

(10)In making rules, regard must be had to section 9.

(11)The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—

(a)the relief or remedies which the tribunal may grant; or

(b)the grounds on which it may grant any of them.

(12)An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13)"The Minister" includes the Northern Ireland department concerned.

207. This is a long provision but in brief it means that the tribunal only has jurisdiction if the appellant has "victim" status. "Victim" status is as defined in Article 34 of the ECHR.

208. It is not relevant to the joint appellants' case. If the requirement to file online is a breach of their legal rights, they are therefore 'victims' of the decision by HMRC that they must file online.

209. There is however a question of whether the fourth appellant has 'victim' status and I refer to this again at § 651.

210. If this tribunal finds that the requirement for online filing in respect of all or some of the appellants would be a breach of the ECHR, the tribunal must (as conceded by HMRC) act to prevent that breach. That would mean the appeal must be allowed. This is consistent with s 8 HRA which sets out the judicial remedies as follows:

8 Judicial remedies.

(1)In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2)But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3)No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a)any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b)the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4)In determining—

(a)whether to award damages, or

(b)the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5)A public authority against which damages are awarded is to be treated—

(a)in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b)for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6)In this section—

"court" includes a tribunal;

"damages" means damages for an unlawful act of a public authority; and

"unlawful" means unlawful under section 6(1).

211. HMRC accept that s 8 applies to this Tribunal. By the end of the hearing, they had accepted that if the requirement to file online is a breach of the appellants' human rights, then I must allow their appeals. It was of course their case that the requirement to file online and/or pay electronically was not in breach of the appellants' human rights.

Jurisdiction and the obligation to pay electronically

212. As I mentioned at § 34, Mr De Mello relied on the right to a fair hearing as part of his submission that this Tribunal has jurisdiction to determine whether the fourth appellant has an obligation to file online. Article 6 provides:

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

213. A47 of the Charter provides in similar but not identical terms:

> "**Article 47 Right to an effective remedy and to a fair trial**
>
> Everyone … has the right to an effective remedy before a tribunal….
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal …."

214. Mr De Mello also relies on the principle of equivalence in that other VAT obligations of the taxpayer can be adjudicated upon in the tax chamber. HMRC object to reliance on this principle because it applies to require member States to give equivalent remedies in respect of exercise of EU and national rights. As Mr Macnab points out here Mr De Mello is merely comparing different treatment in national laws on the application of VAT.

215. In any event, Mr De Mello might also have preyed in aid the principle of proportionality (on the basis it is not proportional to create an obligation but no right to have the limits of it determined in court) or, as he did, the Charter itself.

216. All these are EU law principles but, as with the Convention, even if the principles of EU law are breached or the appellant's human rights breached, by a failure to give a right to a fair hearing to determine the appellant's civil rights and duties, it does not alter the position that neither the Convention nor EU law can confer on this Tribunal a jurisdiction it has not been given by Parliament.

217. This tribunal's jurisdiction can only be conferred by statute. There is nothing in s 83(1) that gives this tribunal jurisdiction in respect of s 132 FA 1999 so to succeed, Mr De Mello needs to show that there is some other statute that confers jurisdiction. The only two contenders are the HRA and ECA.

218. HMRC have accepted (see §§ 202-203 below) that the effect of s 6 HRA is that, in so far as secondary legislation (not in the form dictated by primary legislation) is concerned I am required by Parliament to act in accordance with a person's human rights, because it says:

> **6 Acts of public authorities.**
>
> (1)It is unlawful for a [tribunal] to act in a way which is incompatible with a Convention right.

219. But so far as the HRA is concerned, s 83 cannot be disapplied in the way that Regulation 25A or 40(2A) can: s 83 of VATA is primary legislation and s 6 HRA does not apply to it. In any event, disapplying s 83 which is the section which confers jurisdiction, would be of no help to the appellant whose complaint is that s 83 fails to give this Tribunal jurisdiction.

220. The relevance of HRA can go no further than a question of interpretation as provided by s 3 HRA:

> **"3 Interpretation of legislation.**

> (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.
>
> (2)This section—
>
> (a)applies to primary legislation and subordinate legislation whenever enacted;
>
> (b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

221. S 3 would appear to go beyond requiring a purposive construction and demand that a strained construction be given if necessary to give effect of Convention rights. Nevertheless, to read s 83(1) as applying to regulations made under s 132 FA 1999, when s 83(1) makes no mention of them, goes beyond giving legislation a strained interpretation; it involves completely ignoring what the primary legislation says, and this s 3 gives me no power to do.

222. In any event there is a more fundamental problem. Article 6 of the Convention applies to "civil rights and obligations" and the ECHR has decided that tax matters are not *civil* matters: *Ferrazzini* [2001] ECHR 464. Rather oddly, therefore, the right to a fair trial under the Convention simply does not apply to tax matters.

223. In conclusion, the HRA cannot be relied upon to confer jurisdiction on this Tribunal where s 83(1) does not otherwise confer it.

224. There is a right to a fair trial under common law, but that right cannot confer jurisdiction on a statutory tribunal. It merely permits the appellant to raise the matter in a court with inherent jurisdiction.

225. What of the ECA? Potentially the ECA gives far more scope to the appellant's complaint. The CJEU would require member States to give taxpayers the right to a hearing in respect of their VAT liabilities. For instance, the Charter at Article 47 grants the right to a fair trial in all matters and it does not suffer from the *Ferrazzini* limitation. I explain the relevance of the Charter at § 825 when I consider EU law. At this point, I note that so far as the EU Treaty is concerned, the taxpayer is guaranteed a right to a fair trial in tax matters as well as in other civil matters. However, s 3 HRA applies only to the Convention and not to the Charter. While the taxpayer has the right under the Charter to a fair hearing, that does not give this Tribunal the power to "interpret" legislation to grant itself the jurisdiction to give the taxpayer a fair hearing where the legislation does not give it jurisdiction on an ordinary reading. The same criticism applies to the fourth appellant's reliance on any other EU rights.

226. Therefore, while it seems it is unlawful for the UK government under the EU Treaty and Principle VAT Directive (applicable in the UK because of the ECA) to

impose obligations on a taxpayer without giving the taxpayer a right to challenge them, that does not permit this Tribunal to confer jurisdiction on itself in order to give taxpayers the right to challenge the obligation.

Jurisdiction sufficient to hear complaint?

227. However, that is not the end of the matter because I also need to consider whether the jurisdiction which I do have (to consider the lawfulness of the regulations made under s 135 FA 2002) would necessarily take into account, when assessing that lawfulness, all automatic consequences following from a decision by HMRC that the appellant must file online, and including its liability to pay electronically.

228. I have decided that the notice to file online automatically obliges the taxpayer to pay electronically (see § 36-40 above). So the right to appeal a notice under 83(1)(zc) on the grounds that regulation 25A was unlawful as it (allegedly) involved a breach of the taxpayer's human rights, must inevitably bring into consideration whether regulation 25A was unlawful because its inevitable effect was to bring the appellant into the scope of a different regulation requiring electronic payment, and whether the electronic payment obligation by itself was a breach of the appellant's human rights. I do not see this as a strained interpretation of s 83(1)(zc) but simply consideration of one aspect of the lawfulness of the online filing regulations.

Conclusion

229. HMRC's case was that I had no jurisdiction to consider the fourth appellant's case so that I need go no further in my consideration of it other than rejecting it on the grounds of jurisdiction. For the reason given in the immediately preceding paragraph, I consider that I do have jurisdiction under s 83(1)(zc) to consider the lawfulness of the decision that the appellant must file online, and to include in that review the consequential liability to pay electronically.

Jurisdiction on EU law matters

230. It was accepted by all parties that s 83(1)(zc) gave this Tribunal jurisdiction to consider whether regulation 25A was lawful under the Principle VAT Directive and EU Treaty, as this jurisdiction is conferred by the European Communities Act 1973. I deal with EU law matters at § 812 onwards.

The facts

The evidence

231. There was a large quantity of documentary evidence before the tribunal largely comprising the various consultation papers and similar published by or on behalf of HMRC.

232. The Tribunal also heard oral evidence from all four appellants, Mr Williamson of the LITRG, and three HMRC officers.

The history behind the regulations

Lord Carter's report

233. As can be seen from the provisions of FA 1999, HMRC were obliged to offer a voluntary system to file VAT returns on line since the turn of the millennium, and have done so. In July 2005 the paymaster general announced a review of HMRC's online services and Lord Carter was appointed to carry it out. Its objectives were:

> "… to look at ways of increasing take-up of online services for income tax self assessment, VAT, corporation tax and PAYE, and maximising benefits for customers whilst ensuring that the department continues to deliver a sustainable and efficient service that supports compliance"

234. I note in passing that all the reports mentioned below refer to HMRC's "customers". While this is a regrettable misuse of language by HMRC as it implies people have a choice whether to interact with HMRC and that therefore the payment of taxes is voluntary, nevertheless it is clear that references to "customers" are meant to be references to taxpayers. Needless to say the payment of taxes is not voluntary despite the misnomer and the submission of VAT returns by VAT registered entities is a legal requirement.

235. In March 2006, Lord Carter published his "Review of HMRC's Online Services".

236. The report recommended mandation for online tax returns. Its summary said as follows:

> **Executive summary**
>
> …Online services…can help customers to fulfil their tax obligations accurately, more quickly and provide them with greater certainty. For Government, customer use of online services will provide opportunities to free up resources from low value tasks, such as processing and error correction, to focus on more complex activities such as compliance and customer support….
>
> Widescale adoption of online services is an essential element in realising the efficiencies that technology can offer….

> 5.3 Increased use of HMRC online services will enable savings to be made on high volume, low value tasks such as data entry and error correction. Basic processing alone of an individual's paper SA return costs over £8 more than the equivalent online return. Use of software and online services will promote cleaner data and underpin wider savings both for HMRC and for businesses.
>
> 5.4 ….We recommend that government should set an aspirational goal for HMRC that it should aim for universal electronic delivery of business tax returns by 2012. HMRC should also aim for universal electronic delivery of individuals' tax returns from IT literate groups by the same date.
>
> 5.5 There will be a variety of ways of achieving that goal, but we think that as a principle HMRC should only require use of an online service where the particular service meets the needs of the main users and it has been tested to show that it can meet demand, and provide a good customer experience, at the peak times. Equally, compulsory requirements for filing online should take account of the IT abilities of the main users.
>
> …
>
> 5.8 A relatively small number of businesses have no need for IT and do not use an agent. Equally some individuals who complete their own returns may not have IT skills or equipment. Taking account of this, our view is that the Government's medium-term approach should be to require online filing by agents and by businesses, with an exception for the smallest businesses. That exception should be reviewed in the run up to 2012, taking account of internet penetration and IT skills among the UK SME population at that time…
>
> 5.19 …
>
> - All traders with an annual turnover in excess of £100,000 should be required to file their VAT returns online, and make payments electronically, for accounting periods starting after 31 March 2010.
>
> Paper filing will remain an option for traders with turnover below £100,000 but the Government should review the need for this exception in the run up to 2012."

237. The Government accepted the recommendations and moved to implement them. That led to the regulations on mandation of VAT returns at issue in this appeal: it exempted, as Lord Carter recommended, businesses with turnovers of less than £100,000.

238. Lord Carter's report did recommend that all persons mandated for online returns should make electronic payments. Its reasons are very briefly stated as:

> "HMRC have assured us that they take security and taxpayer confidentiality very seriously, and all their online filing services for tax incorporate industry best practices to ensure that transaction online with these systems is both safe and secure"

239. HMRC published a Regulatory impact assessment ("RIA") in March 2007. It was called the "HMRC Online Services: Increasing Use of Online Filing and Electronic Payment" and applied to corporation tax, PAYE, self assessment returns as well as VAT returns.

240. HMRC also published in April 2009, on the same day as it published the draft legislation, an Equality Impact Assessment. Again this looked at issues relating to the compulsory online filing of all tax returns and not just VAT returns. It said:

> "HMRC did want to check that no-one would be adversely affected by the proposals, so undertook an Equality Impact Assessment (EQIA) which it published in July 2008, entering into public consultation for three months. The assessment concluded that, in the vast majority of cases, there was no diversity impact. However, HMRC have been in regular discussion with the voluntary sector organisations 'Tax Aid' and 'Tax Help for Older People' and the representative organisation LITRG (Low Income Tax Reform Group) to decide how best to achieve support for our most vulnerable customers, with particular focus on the elderly and those who are unfamiliar with computers."
>
> "We have identified no negative impacts in terms of age, gender, race (except language), sexual orientation, marital status, political opinion or those with dependants from the proposals for compulsory online filing of company tax, VAT and PAYE returns and forms.
>
> However, our early consultation and later research have identified some possible issues and impacts with regards to language, religion and disability. This EQIA sets out these impacts, along with the arrangements that have been applied (or are planned) to mitigate them, where appropriate."

241. The EQIA report has a large section headed disability and recognises that taxpayers can be disabled and that some will have disabilities that will making using a computer difficult or painful. It identified some disabilities that might cause problems with online filing and these were vision loss; arthritis; learning disabilities; hearing loss; mobility impairment and dyslexia and dyspraxia. The EQIA said it expected the number of VAT customers with a disability which would make it difficult to file online "will be very low".

242. Rather oddly, it states in its 'summary' that there were no negative impacts on age whereas, in its more detailed section, it referred to problems from disability and race (language) and referred to these being exacerbated by age issues. It notes that the percentage of disabled people in self employment was greater than the percentage of able-bodied people in self employment, although it also noted that disabled people's business were often small and often below the VAT registration threshold.

243. The EQIA was much criticised by the joint appellants. While HMRC's witness Ms Pattison was involved in drafting the questions, she was unable to state who, if anyone, had read the responses. It was (in Ms Redston's opinion) an odd conclusion for it to reach that disability but not age could be a problem as (a) some disabilities are caused by increasing age; (b) at least the LITRG response (to which Mr

Williamson could attest) mentioned age as a specific problem and (c) the report itself recognised that computer illiteracy was a problem and that would also be associated with age. The report recognised that internet useage was greatest amongst people aged less than 45.

244. The EQIA was drafted after HMRC had carried out research. But I find that the research was about people's attitudes to computers. HMRC's research stuck people into 5 categories determined solely on their supposed attitudes to computer use and did not consider those who might find it difficult to use a computer and those who did not know how to use a computer.

245. There is no evidence HMRC carried out any research into how disability or age or computer illiteracy or location would affect a person's ability to file online.

246. In the joint appellants' view HMRC's conclusion stated in the EQIA that they had identified no negative impact deu to age was because they had not carried out any research into the issue, and then proceeded to overlook the responses such as from the LITRG that said age would be an issue.

247. Following responses HMRC updated its RIA which had been published the previous year. In the April 2009 version they said, in respect of mandation of all tax returns:

> "An …EQIA…has indicated that the main diversity issues surrounding this package of measures have been addressed by not making online filing of SA returns mandatory for any individuals…A small number of very small employers may choose to use an agent to file where they have not before. Special rules will be in place for businesses run entirely by individuals that have a religious conscience objection to using IT. The regulations will also be drafted to include a direction-making power which will enable us to exempt specific customer groups. This will be used should we find that there are some customers who, despite the measures we are taking to support those filing online, are still unable to use the service or face significant difficulties in doing so."

248. HMRC's position was that the VAT regulations carried no such power to exempt specific customer groups, and the RIA did not contain a promise that the direction-making powers that it promised would be applied to VAT returns. The appellants' position was that HMRC had failed to keep to its promise as there is nothing in the above passage to exclude the VAT regulations from the general statement that there would be a general exempting power.

249. Whether the regulations were in breach of this promise in this RIA is largely irrelevant to this hearing as, towards the end of the proceedings and in light of the decision in *Noor* published shortly before the final day of the hearing, Ms Redston decided no longer to rely on her submissions that HMRC had acted in breach of the appellants' legitimate expectations.

Consultation documents on tranche 2

250. On 8 August 2011 HMRC published two consultation documents, one relating to VAT and one relating to direct tax. Both included proposals on "assistance into digital".

251. On 6 December 2011 HMRC published a summary of the responses and at paragraph 2.4 the document reads:

> "However, concerns were expressed (to differing degrees) by virtually all respondents about the potential for difficulty which might be experienced by one or more of the following:
>
> - Those living in rural areas, with little or no reliable access to the internet (or where the internet was available only at very slow speeds)
> - People who were not IT literate, and were reluctant or unable to learn
> - People with disabilities, which might make it very difficult or impossible for them to file online
> - Those on low turnovers/profit margins, who might be unable to afford to buy computers, the software and access to the internet
> - Elderly customers, who might – as a group – be more likely to be unfamiliar with computers/the internet, and who might additionally experience one or more of the other issues above.
>
> These were all groups which had previously been identified as potentially vulnerable by HMRC, and which had also participated in the Tranche 1 mandation. No new groups of people were identified.

252. At paragraph 2.8 the document reads:

> "Government remains of the view that mandation should go ahead, as planned, in April 2012; and that the draft regulations putting mandation into effect will not create further exemptions from online filing, since Government policy remains to encourage businesses to go online wherever possible, providing customers with the necessary support (ie assistance into digital) to do so."

253. Tranche 2 mandation did indeed go ahead without any further exemptions.

The questions to which I need answers.

254. The appellants' case is that online filing is a breach of their human rights, a breach of domestic public law and a breach of their rights under EU law. In order to determine this as a matter of law, I need to establish the facts. In particular, it would assist me to know the answers to at least the following questions:

(a) Why don't the appellants use a computer?

(b) how much money does online filing save HMRC?

(c) How much money does a computer cost?

(d) How much money does using a profession agent cost?

(e) Is a disabled person less likely to use a computer?

(f) Is an older person less likely to be able to use a computer?

(g) Is an older person less likely to own a computer?

(h) Is it harder for an older person to learn to use a computer?

(i) How long would it take to learn to use a computer to file online?

(j) What is a bank giro payment?

(k) How safe is it to use the internet or make online payments?

Below I summarise what the witnesses said and then attempt to answer these questions based on the evidence I was given.

255. Mr Macnab's position was that I should treat the appellants' evidence with caution as, he implied, they were being difficult and unhelpful with the Tribunal and their unhelpful attitude was demonstrated, he said, in that none had properly investigated the option of telephone filing offered to them by HMRC.

256. My view of their evidence was quite different. All four appellants did have strong, negative feelings about the obligation to file online. This is no surprise: if they did not feel strongly about it, why would they have gone to the time and trouble of appealing and agreeing to be part of the test case? Strong feelings do not by themselves make evidence unreliable. I also take account of the manner in which the appellants were questioned and the nature of some of the questions that they were asked. Mr Tay was asked six times in a row how long he took to serve a customer; it was put to Mr Bishop he exaggerated his disability; it was put to Mr Sheldon (a severely disabled man) that the only reason he objected to online filing was because he resented the Plymouth Brethren being given an exemption. While Counsel is entitled to ask these questions, the witnesses are permitted to react like normal humans beings, and the fact that they were somewhat antagonised by the cross examination does not of itself make their answers unreliable. I saw nothing to make me think that what the appellants said was unreliable. As with all the other witnesses, I found them to be helpful and honest.

257. The joint appellants' failure to investigate phone filing also seems entirely understandable. I accept their evidence that they considered that it would be very inconvenient to them (see §§434-443 below) and that therefore they preferred to litigate, particularly as pending the outcome of which they were allowed to submit paper returns.

258. The actual findings of fact I made on the evidence of all the witnesses I set out below.

Mr Tay

259. Mr Tay was 62. He is self-employed. His business is selling petrol and groceries from a filling station and shop attached to the cottage where he lives in the Brecon Beacons in Wales.

260. It is not a profitable business. Mr Tay takes no salary and employs no staff yet the annual profit/loss recently have been around £1,000 (plus or minus). He survives on his state pension of about £140 per week.

261. He has chosen to keep this rather unprofitable business running for a number of reasons. It is the only shop left in the village and local farmers rely on it for fuel: therefore he considers he is providing a service to the local community by keeping it going. The business was started by his late mother in the 1950s and it was important to her (and therefore, by implication, to him) to keep it alive. Selling the business would mean selling the cottage where he lives which might result in Mr Tay being forced to leave the village where he has lived all his life.

262. Use of professionals/friends & family: He pays an accountant to prepare the annual accounts and complete his self assessment. The business was originally registered for VAT in 1973, and Mr Tay himself took over the VAT registration on his mother's death in 2008.

263. He leaves the business to go to the bank (the bank is about 4.5miles away down country lanes) about once a month. In between he gives cheques to friend to drop off at bank for him, and once every quarter he goes to a cash and carry. Otherwise, supplies are delivered to the business.

264. Computer literacy. Mr Tay is not IT literate. He does not own a computer. He has never learnt to use one.

265. He does not want to own or use a computer. He does not have a mobile phone or microwave. He chooses to avoid what he describes as electro magnetic fields.

266. He is reluctant to use public computers, such as those available in libraries. Not only is it a long way from where he lives and conducts his business, he does not trust the security and is concerned that hackers might discover his bank details. He thinks, were he to attempt to use a computer, his lack of knowledge about computers would make him vulnerable to computer based scams and hacking.

267. Internet access: He made enquiries and has been told that there is very limited or no broadband availability in the village where he lives and trades. A company trading under the name "Broadband Whereever" offered him broadband with an installation cost of £699 and £25 per month service charge.

268. Dial up internet access is available but he has been told by his neighbour who has it that it is very unreliable due to the distance from the telephone exchange.

269. Telephone filing Mr Tay has not had a good experience of using HMRC's telephone *helpline* – he has never tried the telephone filing system. Helpline calls are

not always answered and he is sometimes passed from one adviser to another and sometimes the connection is lost while this is done. Secondly, when he was successful in talking to an adviser in February 2012 about online filing, he was given the impractical advice that he should attend a computer training course at a library which is an hour's drive from his business and which would require him to close his business in order to attend.

270. In January 2011 Mr Tay was told he could participate in HMRC's telephone filing service which was a pilot scheme for 12 months. He rejected this option. Later an offer of telephone filing on the new terms (described below) was communicated to him via solicitors. He has rejected this offer too. The reasons for this I explain in more detail below under the general findings of fact on telephone filing.

Mr Bishop

271. Mr Bishop is the majority shareholder and director of the appellant L H Bishop Electrical Company Ltd. The company was established in 1964 by Mr Bishop's late father. It has been VAT registered since the introduction of VAT in 1973.

272. Mr Bishop was 56 years old when he gave evidence. He lives and works in the Midlands. His mother, with whom he lives, is now 80 years old and disabled. He looks after her.

273. The company is an electrical contracting business. Mr Bishop does the work himself or sub-contracts out the work. Mr Bishop and his mother between them take about £13,000 per annum in wages and the company's net profits have varied between about £1,000 to £8,000 over the last few years.

274. He works to make money to live.

275. Disability: Since 1975 Mr Bishop has suffered from a condition known as hydrocephalus. A shunt has been inserted from the top of his spine and into his head. Its purpose is to keep the fluid in his brain level. He gets neck pains from the shunt. He considers sitting at a computer would be likely to make it worse.

276. He only has good vision in only one eye, the loss of sight in the other being a result of the hydrocephalus.

277. Another side effect of his condition is that flickering from fluorescent lights makes him feel unwell and may give him a headache or cause him to lose consciousness.

278. He explained that the problem with fluorescent lighting and screens was to do with "inverters" which cycle regularly. Fifty cycles per second will be perceived by the human eye as a flicker and will cause him the above mentioned problems. Cathode ray computer screens have inverters cycling 50 times per second and he would not chose to look at these. Modern fluorescent lights cycle at 10,000 times per second and he can tolerate them. He has a special television at home with a high cycle rate and most of the time he can watch this without difficulty. He did not know

whether a modern LCD/LED computer screens would cause him problems: the conclusion I drew from his evidence was that it was now possible to purchase a computer screen with a sufficiently high rate of cycles not to cause him this "flicker" problem, although this may be more expensive than a normal computer screen.

279. At the hearing HMRC did not accept that Mr Bishop is so disabled that he could not use a computer. This is in contradiction to the view taken by HMRC earlier that his disability qualified him for the offer of telephone filing assistance.

280. He can legally drive, he can use a mobile phone and has taught himself to send text messages on it, he can read wiring diagrams and his job involves him completing intricate wiring connections.

281. Further, his initial appeal against online filing was on the basis he could not afford a computer. He did not mention his disability. In fact, his notice of appeal included a sarcastic offer to file online if only HMRC would provide a free computer. I accept Mr Bishop's evidence that when he said this he had no realistic expectation that HMRC would take up his offer and that he prefers not to mention that he has a permanent tube in his head.

282. My conclusion is that, as long as provided with the correct computer screen, Mr Bishop's could use a computer if he was trained to do so, but nevertheless the I accept his evidence that the shunt in his neck would probably make this painful. I am not able to judge how much more painful this would be than sitting at a desk and filing in a VAT return by hand. Nevertheless, the distinction with a paper return is that he already knows how to do this whereas he would have to learn to use a computer and I am satisfied that (see § 408) that this would take time and for Mr Bishop this will involve discomfort or pain not suffered by other persons having to learn to use a computer.

283. Use of professionals/friends & family: The company employs an accountant to do the corporation tax assessment, PAYE and the P11s. This costs about £2,000 per annum. The accountant makes the self assessment and PAYE returns online. Mr Bishop's mother used to deal with the VAT returns but she is now old and disabled so Mr Bishop himself deals with the quarterly VAT returns on paper.

284. Recently, he needed to register online for a pension. He asked a friend for help and received it. He described it as a "faff" which tried his friend's patience and he said he would not wish to ask her to regularly make online returns for him.

285. Mr Bishop's nearest public library is only half a mile away. But he does not wish to use a computer in the local library as he does not consider them safe as they are available to anyone to use.

286. Computer literacy: Neither the company nor Mr Bishop has a computer. The company uses fax, phone and post to conduct business. Mr Bishop does not wish to acquire one: he does not wish to use a computer and he does not want the expense. He considers the internet as inherently insecure.

287. Mr Bishop has very little computer experience. He was obliged to use a computer in the 1970s when working for his HND (which involved the now entirely obsolete punched computer cards). His only experience with a computer since then was three years ago when he spent an hour on a computer as he was required to complete a City and Guilds examination online. I am satisfied that he does not know how to file a VAT return online and could be fairly described as computer illiterate.

288. Telefiling: Like Mr Tay, Mr Bishop has had a poor experience when trying to contact HMRC by telephone. He has tried to ring HMRC on a number of occasions – sometimes letting it ring more than 24 times, but normally without getting an answer. Once he got through after trying on and off for a fortnight.

289. He has been offered (via solicitors) the updated telephone filing by HMRC and refused the offer.

Mr Sheldon

290. Mr Sheldon trades in the Midlands as Aztec Distributors. At the time of giving evidence he was 72 years old.

291. He had worked all his life as an employed person and by 1996 had been promoted to be a director of a company for which he had worked for some time. But in 1996, aged 56, he was seriously assaulted and as result suffered a loss of self confidence, a nervous breakdown and resigned his directorship. Shortly afterwards, he decided to start up a small business of his own to rebuild his confidence. This business is wholesaling electrical equipment to factories, schools and electrical contractors. He works from home, and takes orders over the telephone. He could retire if he wished but he does not. He lives to work.

292. He believes that his method of trading (which involves knowing the industry thoroughly through years of experience, talking through the job with the client and ensuring all necessary equipment is delivered in one go) means that he has created a niche for himself in a market dominated by much larger traders. His business had a turnover of about £137,000 in the year ended 2010 with pre-tax profits of £32,000.

293. Disability: Mr Sheldon has had severe destructive rheumatoid arthritis since 1970. He has a great deal of medication to cope with his condition including, not surprisingly, analgesics. All his joints are affected. He walks with difficulty. It was apparent to me, as he said, that his hands are rigid and deformed. His fingers have all curled around towards his palm and he has little movement in them and little control over them. He can't easily grip with them. He had great difficulty in handling the bundles at the hearing and turning pages.

294. He has many aids to help him: a walking stick, special shoes, special eating utensils, arm braces, hand supports, a long handled gripper, an electrically operated bed and special battery operated bath chair to help him get in and out of a bath.

295. He also has very poor eyesight. In 2009 he suddenly entirely lost the vision in his left eye because of a condition diagnosed as central retinal artery occlusion. Although he has good distance vision in his right eye, he has poor vision of things within one metre. As he has monocular vision, he has difficulty gauging distances. The effect is that images on paper and screen appear to him to jump around. He can read a letter from beginning to end, but, as was apparent in cross examination, it was difficult for him to scan a letter to spot a particular paragraph.

296. He produced letters from various doctors about his condition, three of whom specifically mention that he would have difficulty in using a computer accurately because of his health problems.

297. He did not mention deafness as a problem although the hearing loop had to be turned on before he could give evidence and it was apparent to me that he was rather hard of hearing too.

298. He employs his wife to help him do many personal things which he would otherwise find very difficult because of his arthritis, such as to get out of bed and get dressed. She does not help him with his business. He pays her and has to deduct PAYE. HMRC have put him on a 'simplified' system for PAYE returns as a "care and support employer" and have indicated that he will be able to continue making paper PAYE returns after the simplified scheme ceases in April 2013.

299. Computer literacy Mr Sheldon, despite his health problems, is computer literate and does own a computer. He learnt to use computers during his time in employment as part of his management role.

300. He bought the computer before his eye problems started, and still continues to use it for searching for items on the internet such as electrical products to use in his business. At one stage he used the computer for online banking and occasionally making online payments. However, the bank introduced some sort of encryption key gadget for security reasons, and this was too small for his arthritic fingers to use, so he gave up internet banking.

301. Now he can no longer read a computer screen without distortion. He can't see "boxes" on a computer screen and can't be sure of accurately "clicking" inside a box with a mouse.

302. He cannot use a computer keyboard (even his large key one) quickly, easily or accurately because of the limited movement he has in his hands and arms. He demonstrated this to me. The curl of his hand and rigidity of his fingers means that if he hits the keyboard with his forefinger there is a considerable risk that his little finger will hit another key at the same time. He misspells words when carrying out internet searches. When he has a "flare up" of his arthritis he cannot use a computer at all. He is concerned that he would unable to complete a VAT return electronically accurately (because of his arthritis) nor (with his eye problems) be able to check its accuracy on screen.

303. HMRC accept that Mr Sheldon would have difficulty filing online but consider it may be no more difficult for him than filing by paper.

304. I do not agree. The curve of his hand is, as he also demonstrated, such that he can hold a pen. The gist of his evidence was that he finds it easier and more accurate to write than to type, and he can compensate for his eye problems by moving the paper around. While he does not find it particularly easy to complete his VAT return by paper, I accept he would find it much harder to compete it accurately online. I find it would be impossible or at least exceptionally difficult for Mr Sheldon to personally file accurately online.

305. use of professionals and friends & family: He keeps all his books and does all his tax returns himself, including his self assessment return and VAT returns. He is proud of his clean record on tax returns and the good state of his bookkeeping. He normally files his self assessment about 10 days after the end of the tax year and thinks (no doubt rightly) that he is one of the first self employed persons in the country to file every year. This customary efficiency no doubt explains why he actually applied for exemption from online filing before receiving the notification that he must file online (see §12 above). Mr Sheldon does not wish to employ an agent.

306. Nor does he wish to ask friends and family for help. His wife does not know how to use a computer, and, although he does know how to use one, he does not wish to stand over her telling her how to operate the computer and what entries to make.

307. Helpline/telephone filing: He phoned HMRC's helpline. The adviser told him to inform HMRC of his problems. He phoned on another 3 occasions. Despite letting the phone ring for up to 6 minutes, no one answered the phone.

308. After contacting his MP in January 2011, his MP, Mr Uppal, contacted HMRC. HMRC wrote to Mr Uppal, again suggesting that Mr Sheldon speak to HMRC's VAT helpline. This time the phone was (eventually) answered and Mr Sheldon was promised a call back. He was called back and he was advised to use HMRC's telephone filing system which was being trialled for 12 months. He rejected this because it was only a short term solution.

309. When the reformulated telephone filing system was offered to him, he rejected that as well as he considers it too inconvenient. I look at this in more detail below.

Mr Williamson

310. Mr Williamson was the Technical Director of the Low Incomes Tax Reform Group ("LITRG") of the Chartered Institute of Tax. The purpose of the LITRG as expressed by Mr Williamson is to make representations to Government (and especially to HMRC) about the impact of tax and tax credits law and administration on unrepresented individuals and households on low incomes.

311. He was a witness of fact and not opinion and therefore his evidence was in the most part no more than to refer to LITRG's responses to various consultations.

312. In 2008 the LITRG responded to HMRC's EQIA on the mandatory online filing of VAT returns. It raised a number of concerns with HMRC including the difficulties that older persons and disabled persons might face with online filing.

313. Mr Williamson also noted that concerns were raised with HMRC by other bodies. For example, following the consultation on draft regulations in November 2009, the Chartered Institute of Tax pointed out the difficulties for persons without broadband access. The Institute of Chartered Accountants in England and Wales ("ICAEW") in their response raised the issue of computer illiteracy and the cost of computers to small businesses in an economic recession

314. The ICAEW also drew HMRC's attention to a 2008 government paper "consultation on delivering digital inclusion: an action plan for consultation" which contained a statement:

> 'some have made an informed choice not to engage directly in using the internet, and no part of this action plan suggests that they should be compelled to engage without a reason or need."

315. And the ICAEW also draw to HMRC's attention a statement by a Minister on 23 November 2010 that

> "every single government service must be available to everyone- no matter if they are online or not".

Mr Hallam

316. Mr Hallam is the director and sole shareholder of the fourth appellant, which runs the business of a narrowboat marina.

317. Computer literacy. Mr Hallam is not old or disabled and he does not claim to be computer illiterate. On the contrary, his company promotes itself on its website. The company objects to the requirement to file online and pay electronically due to concerns about online security and legal risk.

318. Legal risk: Under the Bills of Exchange Act 1882 the bank was at risk if it accepted a forged cheque. Mr Hallam's (unchallenged) submission on the law was that if an online transaction was made with his password, he was at risk even if the transaction was unauthorised.

319. He points out that there was no reference to legal risk in Lord Carter's report.

320. Online security: Mr Hallam objected to both filing and paying electronically, although his evidence and case centred on the latter.

321. Mr Hallam's personal opinion is that online banking and making electronic payments are too risky and he does not use online banking nor make electronic payments nor does he permit the company to do so either.

322. His evidence of the risk was to point to a number of published articles where the risk of hacking and so on have been considered. It included BBC and The Independent news articles. HMRC criticise this evidence as unreliable hearsay. Unlike HMRC, I do not disregard this evidence as without weight. It is only hearsay but it reflects what is common knowledge and what the Government has itself recognised. For instance, Mr Hallam drew the tribunal's attention to the speech of the Government's Crime & Security Minister in December 2012:

> "The internet is vital for the UK's economic prosperity, national security and for our way of life. It brings many opportunities for businesses and people, but also threats from crime, espionage, terrorism and warfare which must be addressed.
>
> …
>
> Cyber attacks threaten our economy and our national security. This threat is real and increasingly important.
>
> However, it is very difficult to give an accurate figure to the cost of cyber crime to the UK economy. What we do know is that the costs are high, and they are increasing.
>
> To take the latest Action Fraud figures, over the past 12 months the centre has taken over 46,000 reports from the public of cyber enabled crime. This amounted to attempted levels of fraud of £292million. And we know that is only a fraction of all crimes committed.
>
> The most serious threats are real and present and highly organised…."

323. There is an evolutionary arms race between banks and computer programmers on one side and hackers or 'cyber criminals' on the other. It would be foolish for any bank to assume that their computer systems were safe from attack and in any event, even if the banks' systems themselves were safe from attack, that does not protect an online bank customer from (a) a hacker gaining personal information such as passwords from the user's own machine or (b) a bank employee misusing information to which he has access.

324. For instance, one of the reports to which Mr Hallam referred the tribunal was a 2012 Independent article reporting that some civil servants in the Department of Work and Pensions were said to be selling real identities to criminals who would use them to commit identity theft, and another report in the same year in the same paper was of HMRC being tricked by cyber criminals into making £600million of tax repayments to false identities. The Guardian in 2012 reported that even top secret MOD systems had been breached.

325. Mr Hallam referred to KPMG's *The e-Crime Report 2011 – managing risk in a changing business an technology environment.* This was a general report about risks of electronic communications and is, as evidence goes, of the weakest kind being hearsay opinion evidence. Nevertheless, I note that it takes cyber crime as a given and makes what seems an obvious conclusion that 'organised crime syndicates are motivated to develop commoditised mass-market attacks that are repeatable, automated and deliver a regular financial return on investment with low risk of capture'.

326. HMRC criticises the evidence as vague and hearsay and puts against it Miss Pattison's hearsay evidence that in 11 years there have been no breaches of security at HMRC's end in the VAT online filing system.

327. I find that HMRC's stance in the hearing was not matched by what HMRC had said publically on their website. For instance, while there may have been no breaches of security at HMRC's end of the online filing system in 11 years, HMRC admit that there have been security breaches caused by agents' confidential logins being breached:

> **Security information for agents**
>
> **Why online security is important to HMRC, tax agents and their clients.**
>
> [introduction]
>
> …If your confidential login details fall into the wrong hands, fraudsters may have the ability to generate false repayments and direct them to third parties without the knowledge of HMRC, the tax agent or their client.
>
> …
>
> Unauthorised use of your login details can lead to financial losses fro tax agents, their clients, HMRC, as well as affecting the client/agent relationship. There is also the potential to undermine your clients' confidence in the ability to communicate or transact business with HMRC or their agent by email or online.
>
> ….
>
> **Online security for agents**
>
> Each year, a very small number of tax agents' credentials are compromised, potentially leading to fraudulent activity and significant financial loss to the Exchequer….

328. In another section of the website, because of fears of 'phishing' (use of emails by criminals pretending to be an official person), HMRC rejects email communications for financial matters:

> "HMRC will **never** send notifications of a tax rebate by email, or ask you to disclose personal or payment information by email…."

Emails are, of course, not the same as online filing systems as the latter have built-in security such as encryption. But nevertheless it is clear that even HMRC, outside this hearing, recognise that there are risks inherent with electronic communications.

329. I accept that making online payments does involve risk of the payment being diverted, or other funds in the appellant's account being unlawfully accessed. However, while it is clearly Mr Hallam's opinion that online banking is more risky than postal banking, the vague state of the evidence in front of this tribunal does not leave me in a position to say whether the risk is greater or less than the risk of a

cheque sent by post being intercepted and fraudulently diverted or the payer's bank details being used unlawfully.

Linda Allen

330. Ms Allen is an HMRC officer and at the relevant time held the position of Director of HMRC's Business Tax Programme. That Programme was responsible for the implementation of mandatory filing of VAT and other tax returns.

331. She gave evidence on HMRC's policy. She said HMRC wished to maximise taxpayer's use of online filing in order:

(a) To provide a better and cost effective service for taxpayers;

(b) Encourage taxpayers to use new technology

(c) Capture clean easily processed data to reduce HMRC and taxpayer costs.

332. From her oral evidence, it was clear that, although she was part of project team to implement Carter Report, she was not involved in creating the report, carrying out the EQIA or RIA or drafting the legislation. Her responsibility was on the communications and marketing side. She did not look at the responses to the consultation nor was she responsible for the team which did. She said she was put forward as witness as the other 3 senior civil servants involved in the project, who could have given more immediately relevant evidence, had moved on to other roles within HMRC, whereas Ms Allen is still involved on digital side of things.

333. She agreed that the EQIA said that there would be power to exempt specific groups and this was intended to cover more than just religious exemption. She accepted that at least around the time of implementation HMRC had recognised that some kind of exemption was needed for disabled persons. She gave evidence that she thought she had heard that the reason a decision was taken not to include an exemption in the regulations was that it would be "difficult to articulate" and it would be better to deal with it a different way. This evidence was rightly criticised. Ms Allen was not herself one of the decision makers on this issue and she did not actually know the answer. I conclude that this tribunal does not know why HMRC chose not to give exemption to disabled persons, to old persons, to computer illiterate persons or to persons without easy broadband availability.

Judith Pattison

334. Miss Pattison is an HMRC officer in the role of "VAT Communications Partner" with responsibility since May 2009 for the introduction of mandatory online filing of VAT returns. Even before May 2009, in her previous role as Customer Champion for micro businesses and individuals, she was involved in the planning for VAT online mandation. She was not as senior as Ms Allen and was not one of the 4 civil servants with overall responsibility for the project.

335. Research: As Customer Champion she carried out research into whether VAT registered taxpayers used computers and had access to the internet. The result of the

research was that most VAT registered taxpayers had access to a computer and used the internet, although a minority of VAT registered taxpayers did not.

336. She gave evidence about the various methods used to communicate to VAT registered taxpayers what HMRC saw as the benefits of online filing of VAT returns and the fact that it would be compulsory to do so from specified dates.

337. Miss Pattison from her witness statement and her oral evidence is a staunch supporter of VAT online filing, giving evidence that filing online is easy and that by making filing online of VAT returns compulsory has greatly increased the take up of online filing.

338. She drafted the EQIA and part of the Tranche II consultation, but none of the other documents in evidence. It was her name to whom responses were to be sent but in fact she did not read or deal with the responses as she had moved on to a customer liaison role. The job of reading the replies to the EQIA was given to a colleague who has since moved on.

339. It was Miss Pattison who commissioned the research which led to the report in Jan 2009 which divided up the VAT registered population five groups. Two of the groups covered persons who were able to use a computer competently ("supercapables" and "simplicity seekers"), the other three groups were called "traditonalists" "insecure sceptics" and "nervous enthusiasts". Putting aside the rather patronising nature of these groupings, the research failed to consider as a separate group VAT registered persons who might have difficulties in filing online due to old age, computer illiteracy, disability or lack of reliable internet access.

340. Miss Pattison gave the rather surprising opinion that she considered Mr Sheldon fell into the 'traditionalist' category and said "paper is [his] security blanket" and said at the back of his desire to keep using paper were "emotional" issues. I find this extraordinary as Mr Sheldon is computer literate, owns a computer and was even prepared to use internet banking. His problems stem from his severe disabilities.

341. It seems it was her view that these five groups adequately described all VAT registered people. I find that they do not. They fail to take account of persons who might have difficulties in filing online due to old age, computer illiteracy, disability or lack of reliable internet access.

342. Miss Pattison accepted that disability "as an issue hardly surfaced" in her segmentation research. But from her evidence it seems she did not ask the researchers to look at the impact of online filing on disabled or older persons.

343. The flavour of her evidence is that HMRC believed it could quickly and easily educate computer illiterate persons to file online. HMRC held a number of roadshows where taxpayers who wished would be shown how to file online. An officer at one of these presentations reported to her that someone could be taught in half an hour to use a computer sufficiently well to file a VAT return. It was "just pointing and clicking".

344. In evidence she said HMRC recognised that some taxpayers would need support to register for, and then actually file their returns online. She accepts that a small number of taxpayers may genuinely find it very difficult to file online.

345. Help offered to taxpayers with online filing: A great deal of online help was offered to taxpayers, including, for instance, an online demonstrator. There was also telephone helpdesk specifically dedicated to help with online filing. For those who did not own a computer and/or could not use one, HMRC's published suggestions were:

(1) They should ask friends and family to loan their computer or ask them or a professional person to file on their behalf; or

(2) They should use the free computer facilities in public libraries.

346. Only if neither of these options was "suitable" Miss Pattison considered that a person otherwise unable to file online would have the following options:

(1) Attending a HMRC enquiry centre where the taxpayer could be assisted by a HMRC officer in using a standalone PC provided for the purpose of registering for online filing and actually filing VAT returns.

(2) Opting for telephone filing.

347. Miss Pattison's witness statement recorded that there were 75 HMRC enquiry centres available to be visited. At the hearing, she said this number had reduced to 67. (I take judicial notice of the fact that on March 14 this year HMRC publically announced an intention to close all enquiry centres in 2014 and replace them with telephone and visits to taxpayers).

348. Miss Pattison stated that HMRC had chosen not to advertise the availability of these last two options to taxpayers. She explained in her witness statement that HMRC wanted to restrict their availability to those who truly had no alternative. Taxpayers would only be told about the availability of these options if they contacted the Online Service desk for help and the HMRC officer taking the call, using a spreadsheet determined that the taxpayer should be offered assistance.

349. I find that there was no public reference to the last two options. There were only two ways of finding out about the availability of telephone filing. One was to do as the joint appellants did and appeal. This generated a number of written offers to the appellants of telephone filing.

350. The other way in which an offer of telephone filing might be generated was if someone read a document published by HMRC January 2012 and then made a call to the VAT Online Services helpdesk. This document was headed "Support available to help you move from paper to online VAT returns". It is rather long (3 A4 pages) and goes into detail on the many sources of *online* help, which are clearly useless to a person who is unable to use a computer for whatever reason. So far as telephone help is concerned it mentions only the VAT helpline and the "VAT online services helpdesk" whose role it is to give help with signing up for online VAT returns and submitting them when signed up.

351. It also mentions "national events" where taxpayers could meet HMRC officers and be assisted to register for online VAT returns there and then.

352. It mentions in some detail availability of professional help from accountants and bookkeepers (helpfully or otherwise including the website address of the various professional bodies but rarely a telephone number) and the possibility of free "help" in the ability to use computers situated in public libraries or those belonging to friends and family.

353. It does not mention the availability of telephone filing. What it does say is this, in a small sub-paragraph in the middle of the document:

> "Help available to you if you feel you will have real difficulty in going online (for example, because you live in an area without reliable internet access, or have a disability which makes it very difficult or impossible for you to use a computer). If you are in this position, you should call [telephone number given] (open 8am to 6pm, Mondays to Fridays, except bank holidays) and explain your circumstances. The helpline staff will explain what support options HMRC can provide."

354. However, I find that although the telephone number was publically available, and advertised as a place to get on the phone assistance with online filing, it was not obvious that making this call might result in the offer of right to file VAT returns by telephone. I find it would be far from obvious to a reader that making such a call would lead to an offer of help other than the help that was outlined in the rest of the document, which was all concerned with ***online*** filing. It certainly makes no mention of a telephone filing option or the option of visiting an enquiry centre. And in any event it does not offer any help to persons who are computer illiterate due to their age.

355. Telephone filing: When this was originally introduced it was introduced as a 12 month trial. HMRC now intend it to be a permanent option although this is not made clear even in the welcome pack provided to those who sign up to it.

356. Miss Pattison seemed to think it was introduced in April 2011 and never required the taxpayer to ring HMRC. Mr Cameron's evidence and the evidence of the joint appellants, however, was that originally taxpayers were required to ring HMRC under this concession. And Mr Cameron's evidence was that it was introduced in April 2010. I think Miss Pattison's memory is at fault here and I prefer Mr Cameron's evidence as he was the person who introduced it and his evidence is consistent with what the joint appellants said.

357. A new system of telephone filing was introduced in April 2012. Under this system HMRC would ring the taxpayer, rather than the other way around.

358. Miss Pattison's evidence on telephone filing was largely consistent with what Mr Cameron said and I summarise it, together with his evidence in §§ 422-433 below.

359. Miss Pattison said HMRC chose not to advertise the availability of telephone filing as if it was more widely known, more people would apply, even those who were not entitled to it, and it was difficult for HMRC to assess any applicant's claim to

need the concession. It was put to her that the failure to advertise it was because HMRC wished to give the impression there was no alternative to online filing: in oral evidence she said the question was difficult to answer but I note her witness statement had stated it was because HMRC wished to restrict it to persons who had no other option (see § 438) which amounts to virtually the same thing.

360. cheque payments: Miss Pattison also gave evidence on problems HMRC had had with cheque receipts. Some customers omitted to write their VAT numbers on back of cheques making it difficult to attribute the payment to the right account. Others did not specify to which VAT period the payment related. Sometimes cheques were stolen while in the postal system.

361. Using agents to file online: she spoke to two bookkeeping bodies and this was source of her evidence on costs summarised at §382 below.

362. Contacting HMRC by phone: statistics published by HMRC and made available to the Tribunal were that some 40% of callers to HMRC would have to wait more than 10 minutes for the phone to be answered. Miss Pattison's evidence was that she thought that the current statistics were that no more than 25% have to wait more than 10 minutes to have their call answered. Either way this corroborates the personal experience of the appellants that ringing HMRC can be very frustrating and actually making contact with an HMRC officer by phone is very difficult.

363. Dedicated computer at an enquiry office: A person who called the online helpdesk and to whom HMRC chose to mention the concession, would be able to attend at an enquiry centre and file their return on a dedicated computer with help from an HMRC officer. The HMRC officer would assist the taxpayer with making the online return and would then ensure the information entered on the computer by the taxpayer could not accessed later by another taxpayer. The HMRC officer would also attempt to train the taxpayer to file online without assistance and to undertake this security operation himself.

364. Reason for insovlency exemption: Miss Pattison said she thought that the insolvency exemption was given because the company's logins for the online return system would not be known to the liquidators or other insolvency practitioner taking over the running of the company.

365. I find this fails to explain why the liquidator could not simply be issued with new login details. He would not need to access previous VAT returns in order to make the current VAT return.

Mr Michael Cameron

366. Mr Cameron is an HMRC officer and was the officer responsible for the introduction of the telephone filing system. Miss Pattison was his direct line manager. Mr Cameron designed the telephone filing system but once it was implemented he has moved on to other projects within HMRC.

367. He did not submit a witness statement as HMRC had not intended to call him as a witness, but they asked for permission at the hearing to call him as telephone filing had become more of an issue in the hearing than HMRC anticipated. The appellants did not object and I gave permission. The particularly contentious issue between the parties was whether telephone filing was an exemption from the obligation to file online or merely a form of assistance with online filing.

368. The findings of fact made below (such as in §§ 423-433) about HMRC's computer systems depend largely on the evidence which Mr Cameron gave and to a lesser extent on the evidence given by Miss Pattison.

Relying on the evidence given I make the following findings in answer to the questions posed at § 254:

Why don't the appellants use a computer?

369. It is clear that Mr Sheldon is more than prepared to use a computer. I find that he cannot, by reason of his disabilities, use a computer easily or sufficiently reliably to file online.

370. Mr Tay and Mr Bishop do not want to use a computer. Further, neither of them know enough about computers to file online. They do not know how to use a modern computer to file online as they are too old to have learnt at school and it has not been required of them in their respective jobs.

371. To file online would require them to learn how to use a computer. I consider how long this would take below.

372. Further, because using a computer would first require Mr Bishop to spend significant time learning to use a computer, I am satisfied that this, by reason of his disability would be difficult and painful for him (see § 282).

How much money does online filing save HMRC?

373. From Mr Cameron's evidence, I find that HMRC administers each taxpayer's VAT account with its 'backend' computer system. When a taxpayer files on online return, the information is automatically transferred once a day from the online system to the backend system, automatically populating the backend system with the information contained in the return. Unless there is a malfunction, it does not require action on the part of any HMRC officer.

374. A paper return, on the other hand, has to be entered into the backend system. This is done by using a scanner, which automatically reads the information on the paper VAT return, and transfers it into the backend system. Human intervention is required to place the VAT return on the scanner and more intervention is required (such as putting the information into readable form) if the scanner cannot read the VAT return.

375. I was given no direct evidence of how much money online filing actually saves HMRC. The nearest to quantification was contained in Lord Carter's report where he said online filing saved HMRC £8 per *self assessment* return. I consider it might well be less for VAT returns which comprise only one page. While £8 is a very small of money, multiplied by the very large number of taxpayers, it is rather more significant.

How much money does a computer cost?

376. Mr Bishop has investigated the purchase of a computer. He estimates that a computer (with a special screen for his eyes) with all the necessary software would cost about £1,000 and in addition he would need to pay on going subscription fees for internet access.

377. The ICAEW in its response to HMRC' consultation mentioned at § 313 above a computer would cost £330 every 3 years plus £10 per month for an internet link.

378. I find that an online computer would involve a taxpayer in significant financial expenditure of perhaps between £300-£1000 every three or so years, together with perhaps probably over £100 a year on subscription fees for internet access. In total this equates to about £200 to £400 per annum expenditure.

How much money does using a profession agent cost?

379. Mr Tay was quoted £100 plus VAT per quarter for an accountant to file (but not prepare) VAT returns online.

380. Mr Bishop was quoted £150 per year by his accountant to file (but not prepare) quarterly VAT returns.

381. He was also given a list of local bookkeepers by HMRC. One of these bookkeepers quoted a £15 fee for taking him on as a client followed by £5-£15 per return filed thereafter. Mr Bishop does not wish to use a bookkeeper in addition to his accountant: it is yet one more person with access to his confidential information.

382. Miss Pattison also obtained quotes from bookkeepers. She was told their charges were £15-£25 per hour. Her view is that therefore the charge for online filing would be very low as each return would not take an hour, although she agrees she did not ask what the client acceptance procedure would cost.

383. I find that the cost quoted is very variable, ranging from about £5 to £100 per return. Taking into account the need for client acceptance, the need to instruct someone who, if not an accountant, is a member of a professional body with a code of ethics and confidentiality, I find it is unlikely that the charge for filing 4 returns per year would be much less than £60 and it might well be more.

Is a disabled person less likely to use a computer?

384. As recognised by the various reports referred to, computers might help many persons with disabilities. Nevertheless, the ONS report on internet access noted that disability is cited as the reason for no internet access for 1-3% of the population. And as the EQIA recognised, some disabilities make it hard to use a computer.

385. So if a person has a disability that makes it difficult or painful to use a computer, I find, not surprisingly, that such a person is less likely to use, own, or know how to use, a computer.

Is an older person less likely to be able to use a computer?

386. HMRC seemed to see this question as relating to an older person's ability to learn to use a computer and they said there was absolutely no evidence an older person would find learning to use a computer any more difficult than a younger person.

387. In my view this overlooked the obvious. Irrespective of the relative abilities of older and young people to learn new skills, it is the case that persons under a particular age are very likely already to know how to use a computer because they will have been taught at school, while persons over a certain age cannot have been taught how to use one at school because home computers simply didn't exist when they were at school. Indeed, HMRCs own reports recognised this.

388. So, in order to make their VAT return online, an older person is more likely than a young person to need to be taught how to use a computer and to use the internet. As years pass, and the computer literate generation becomes old, this will cease to be the case. But it is not the case yet.

389. I was presented with surveys and reports by the joint appellants. They all seemed consistent in saying there was less computer and internet useage by older persons. The Office of National Statistics ("ONS") 2012 survey showed that showed that 82% adults below 65 years use a computer every day while only 29% of adults about 65 years did so. It showed that only 36% of households of persons over 65 years of age had internet access. The ONS 2010 survey showed that internet usage increases with education and with managerial/professional jobs and income. The most marked difference in users was however determined by age. The ONS report also showed (as one would expect) that lack of internet access was associated with lack of computer skills.

390. Mr Williamson's evidence refers to the ONS reports. Mr Macnab says the reports are of little weight as:

(a) They do not consider business people and therefore it is not possible to draw the conclusion that old persons in business are less likely to use internet than young persons in business;

(b) It looks at use of the internet rather than computer illiteracy. The fact a person does not use the internet does not mean they can't use the internet.

(c) Mr Sheldon is the oldest of the four appellants but is computer literate, and Mr Tay is not old (as he is only 61) yet he is computer illiterate and so (implies Mr Macnab) the conclusion of the report is suspect.

391. I do not dismiss the reports as of no weight. They state what is obvious which is that older people, who were born and grew up in a world without home computers and the internet, are less likely to use, and to know how to use, computers and the internet than younger people.

392. And so far as Mr Macnab's comments at (c) are concerned, the criticism is groundless. While it is clear from the ONS surveys that its findings are that age is the biggest determinative of whether someone is a computer user, it is not the only determinative. As the report recognised (§ 389 above), the nature of a person's employment has an impact too. Mr Sheldon learned to use a computer in a managerial role when he was employed in his 50s (approximately 20 years ago). Whereas, although Mr Tay and Mr Bishop are younger, they are not and have not been in managerial/professional work.

393. Mr Tay's age at 62 is also irrelevant: for the purpose of computer literacy he is too old to have learnt at school. The same is true of Mr Bishop, as although he is young enough to have had some college training on computers, what he learnt is now hopelessly out of date and his job has not caused him to renew and update his knowledge of computers.

394. Mr Macnab does criticise the appellants for saying exemption should be given to persons over 60 because the age 60 or 65 is arbitrary. And I agree as far as it goes. From the point of computer literacy it is not a person's absolute age that is significant but their year of birth and in particular whether they were born more than, say, twenty years before home computer use became widespread so that they were unlikely to have learnt about computers at school. As at 2013, that would apply to people aged over about 45. So all of the joint appellants in this sense are old.

Is an older person less likely to own a computer?

395. There was no direct evidence on this but there was statistical evidence that older people were less likely to know how to use a computer and less likely to have internet access: I find that therefore older persons are less likely to own a computer than members of the population at large.

Is it harder for an older person to learn to use a computer?

396. Mr Macnab's position was that age does not prevent a person aquiring the skills to use a computer. While I agree there is no evidence that older persons cannot acquire the skills necessary to use a computer, there is statistical evidence that it is harder for them to do so than younger persons. The appellants relied on a report by Kelley and Charness who were psychologists at American universities. They were not expert witnesses in this case.

397. HMRC did not object to this report coming in as evidence but their position was that the Tribunal should not put any weight on it.

398. Its conclusions were that older persons take longer to learn to use a computer and make more mistakes.

> (page 108)The overwhelming conclusion that emerges from this body of research is that older adults experience significantly more difficulty learning to use a computer than do younger adults, with ten out of the twelve studies finding that older adults have more trouble than do younger adults. 'Difficulty' is defined here as taking a longer time to learn to use the system, making more errors on a performance evaluation after training is completed, and requiring more help while learning to use the system.
>
> …
>
> (page 118) The research summarised in this paper has suggested that older adults experience greater difficulty than younger adults when learning to use a computer. This difficulty is probably not due to increased computer anxiety on the part of older adult users, nor is it likely due to negative attitudes towards computers. Some research has suggested that reductions in cognitive abilities (especially spatial ability) may play a role in older adults' difficulty with computers

399. The fact that the writers were not called as expert witnesses denied HMRC the chance to put to them their position which is, as I understand it, that filling in an online VAT return form is so easy an older person who is computer illiterate could easily acquire the skills to do it.

400. However, the writers of the report would be unable to comment on the VAT return form. It was not the subject of the report.

401. HMRC also criticises the report because it is 17 years old and, say HMRC, before Windows and the ability to use a mouse to point and click, which HMRC, it appears, consider makes using a computer *easier*. But this is an assumption on their part: HMRC failed to demonstrate either that the report did pre-date all Windows programs or that using a mouse makes a computer easier to learn how to use. On the contrary it seems to me that using a mouse is just yet one more skill a novice computer user would have to acquire. It *increases* what must be learnt.

402. HMRC's other criticism is that the writers did not carry out their own research but merely collated about 10 other studies. Again, I tend to agree with the appellants that this makes the report of more rather than less weight.

403. Overall, the report seemed to state what is obvious, that an older person will take longer to learn to use a computer than a younger person. To that extent I accept it. It does not tell me how long it would take an older, computer illiterate person to learn to use a computer sufficiently well to file their VAT return online accurately and reliably.

How long would it take to learn to use a computer in order to file online?

404. HMRC's view, based on Miss Pattison's hearsay evidence of what an officer had said to her, was that it would only take a person half an hour to learn to use a computer in order to file online. There was of course no evidence on whether the persons taught to file online in half an hour were taught the basics of how to use a computer nor any information on whether they remembered their training when it came to filing a live VAT return. It did not tell me how old they were. I put little weight on this evidence.

405. Mr Tay's evidence was also hearsay. This was that he had a friend who have been on computer training course to learn to use a computer and this had required him to attend college one afternoon a week for two years. HMRC criticise Mr Tay for being reluctant to learn to use a computer. Mr Macnab described it as 'palpable nonsense' for Mr Tay to suggest that he would need to attend a two-afternoons-a-week course for two years. They consider Mr Tay's inability to use a computer not to be related to his age but a reluctance to learn. I found Mr Macnab's view unfair: younger people have the benefit over Mr Tay of learning to use a computer at school or in their jobs. Who can say how reluctant most people would be to learn to use a computer if they had no idea how to use one and were only being required to learn to use one in their 60's in order to complete a simple form consisting of ten boxes four times a year which they had previously always done on paper?

406. In any event, as I had no information on exactly what this course covered, it was quite possible that it was more extensive than would be needed by someone wishing merely to file online. Again, I can put little weight on this evidence, though not for the reasons given by HMRC.

407. I note Mr Tay's evidence at § 269 was that an HMRC officer had advised him to attend a computer training course offered free at libraries.

408. I do not have the evidence to decide exactly how long it would take a person who had never before used a computer to learn to file online, and this would obviously vary from person to person in any event. It seems to me that, even if HMRC are correct to say that the online form itself may be very simple to complete, a complete novice would have to learn how to turn on the computer and the programs, use a mouse, navigate the internet and what to do when the computer crashed, how to save the receipt from HMRC to show the return had been received, and how to protect their information from other users if it was not their computer, and how to install and operate a firewall if it was their computer. On the evidence which I had I consider that while this would take considerably longer than Miss Pattison's suggested half an hour, it was unlikely to take even an older person quite as long as suggested by Mr Tay.

What are Bank Giro payments?

409. To the extent I had evidence, as it was not really in dispute, a bank giro appears to be a means by which money is moved from one account to another. A taxpayer would be given a booklet of pre-printed slips, each of which would contain the

taxpayer's name, VAT number and HMRC's name and bank account number. Each slip would apply to a different VAT period in respect of which the taxpayer was due to make a payment. Each bank giro slip had to be accompanied by a cheque for the amount written on the bank giro by the taxpayer.

410. A bank giro with its accompanying cheque needs to be presented to the taxpayer's bank: it can't be posted to HMRC. Using a bank giro does not involve any kind of electronic action on the part of the appellant.

411. Miss Pattison's evidence was that payment by bank giro avoided all the problems with HMRC accepting payment by cheque (set out at § 360).

412. The fourth appellant's complaint was that it was inconvenient to for Mr Hallam to attend at a branch of its bank in order to hand in the bank giro over the counter, as it banks remotely by post and its particular bank has no branches anywhere near its location. At the moment Mr Hallam pays its VAT by posting a cheque to HMRC; and he pays in cheques it receives by posting them to its bank.

413. However, Mr Hallam had not enquired if he could post the bank giro together with its accompanying cheque to its bank. It is certainly not obvious to me why the bank would insist he present the giro in person at the counter rather than putting it in the post. In conclusion, I find Mr Hallam has not proved that paying VAT by bank giro would be any more inconvenient to him than paying by cheque by post.

414. On the question of legal risk, Mr Hallam did not make out a positive case that as a matter of law payment by bank giro involved more legal risk than payment by cheque and it is certainly not obvious to me that it would. To do so he would have needed the terms and conditions from bank giro and he had not investigated these. Therefore, I find that the appellant has not made out a case that the terms of bank giro payments are any different to those that would pertain to payment by cheque.

415. On the question of security, Mr Hallam's opinion was that it was more risky than a cheque payment. However, I had no evidence to that effect and it is certainly not obvious to me that that would be so. As both methods involve cheques, it seems more likely than not that the security risks are the same. Indeed, it seems likely that paying a cheque in over the counter should involve fewer security risks than posting a cheque.

416. It was also Mr Hallam's case that to even use bank giro to pay the fourth appellant's VAT, he has to sign up to HMRC's electronic gateway, with a password and attendant security risks, and further that he would have to accept a disclaimer under which the taxpayer accepts that the risk of the electronic payment going astray. This was disputed by HMRC's witnesses: they said HMRC would post out a booklet of bank giro slips in response to a telephone request and Brinklow would not be required to sign up to the electronic payments disclaimer in order to pay by bank giro.

417. I was presented with no evidence in the form of screen prints from HMRC's electronic gateway or any other means of assessing the contradictory witness evidence: I find that Mr Hallam has not made out his case on this.

418. There was some dispute over whether bank giro was properly a use of "electronic communications" for the making of a payment to HMRC within s 132 FA 99 (the primary legislation) (see §§15) or Reg 40(2A) VAT Regulations 1995 (the secondary legislation) (see §§ 22).

419. However, while bank giro did not require the taxpayer to do anything involving electronic communications, nevertheless, to the extent I had evidence, the transfer by bank giro from the taxpayer's bank to HMRC's bank would be by electronic means. It is obvious that the purpose of the regulations was to prevent HMRC being obliged to accept payment of tax by cash or cheque but instead to have an electronic receipt of the money directly into its account. I find that bank giro was therefore a payment using electronic communications, because it was electronic when received by HMRC as it was received directly into its bank account without HMRC needing to take any action, and that met the objective of the legislation on electronic payments.

How safe is it to use the internet or make online payments?

420. Although I was presented with the many reports I have summarised above, from which I accept what is general knowledge in any event that there are risks to using the internet and particularly with making payments over the internet. Those risks are not only that the payment itself might go astray but that it might enable the payer's bank account to be illegally accessed.

421. Nevertheless I was not given sufficiently precise information from which I could assess the degree of risk. Indeed the degree of risk must vary depending on the level of encryption used and the banks' security levels in general.

Telephone filing

422. Telephone filing was a significant issue in the hearing as the appellants had not accepted it as an alternative to online filing whereas HMRC's approach was that the offer of this concession meant that there was simply no question of HMRC having failed to take sufficient account of the interests of elderly or disabled persons. I set out here my findings on the facts and law related to telephone filing.

What is the telephone filing service?

423. Mr Cameron was asked to design a telephone filing system in April 2010. The first offer of telephone filing was made by HMRC in May 2010 and the first return was 'captured' on it in October 2010.

424. As already mentioned there is no information in the public domain about the telephone filing service offered by HMRC to some taxpayers. As already mentioned, it is HMRC's policy not to publish information about it as a means of restricting the number of persons who apply to use it (see §348 and §359)

425. To someone who rang the online helpdesk for assistance and mentioned disability, HMRC would offer telephone filing even if the claimed disability did not

appear to be relevant to online filing. HMRC would not check if the claim to disability was genuine.

426. Since 2011 and after discussions with LITRG HMRC would offer telephone filing to a person who rang the helpdesk for assistance and mentioned their age, if that age was over 60.

427. Telephone filing might be offered to a person who claimed to have difficulties connecting to the internet because of their location: but this claim would be checked before the offer was made.

428. At the time of the hearing some 122 people had signed up to telephone filing and 56 of these were on the grounds of disability.

How does telephone filing work?

429. If the taxpayer is offered telephone filing, HMRC will send out a welcome pack. If the taxpayer agrees to the terms offered, he then agrees with HMRC a time at which HMRC will call him in order for him to make his VAT return.

430. The protocol for the officers in the telephone filing team is to ring the taxpayer at this pre-agreed time and day. If they receive no answer, the rule is that they must ring back twice on that day. If no answer is received, then they write a letter in order to agree a new date and time.

431. Mr Cameron's evidence was that in practice the team ring back every ten minutes if they don't get through and, so far as Mr C knows, have never failed to contact a trader on the pre-agreed date.

432. When making a successful call to a taxpayer, the HMRC officer would take a figure from taxpayer to be entered into one of the boxes on the VAT return, repeat it back to the taxpayer, and if the figure was confirmed as correct, the HMRC officer would enter it into the online return. He would then move onto the next box and repeat the process until the return was completed.

433. The HMRC officer would normally make no comment on the figures he was asked to enter. But if the online system flagged up an error (normally that the boxes did not add up) this would be related to taxpayer.

How inconvenient is it to use HMRC's telephone filing service?

434. The original offer of a telephone filing system was made on the basis of a twelve month pilot scheme and involved the taxpayer ringing HMRC to report the figures in his VAT return. No doubt because this involved the taxpayer in the expense of a phonecall and the frustration of unanswered calls by HMRC, the scheme was modified.

435. The current version of telephone filing, as offered to the joint appellants, requires the taxpayer to agree three months in advance with HMRC a day and time

(in HMRC's business hours) when HMRC will ring the taxpayer in order for the taxpayer orally to state the figures on the VAT return.

436. Mr Tay considers the service would be very inconvenient to him as he runs his business single handed and for very long days, every day of the week (7am to 9pm). It is not a self service filling station so it is impossible for him to predict three months in advance the time in any particular day when he would be free to take a call from HMRC.

437. HMRC did not accept this. My conclusion, following a very lengthy cross examination by Mr Macnab of Mr Tay on this issue, is that telephone filing would inconvenience Mr Tay in the running of his business. While it is true that it is not a profitable business and he will not always be engaged with customers, the nature of his business (an attended petrol station selling diesel) is such that serving individual customers can take some time and he would be unable to predict three months in advance whether he would be engaged with a customer at the time HMRC called him. The only way he could ensure he was free to take the call would be by temporarily closing the station for business.

438. Mr Bishop also considers that telephone filing would involve him in a great deal of inconvenience. He too would find it difficult to commit to being available on a particular day at a particular time as he won't know three months in advance what appointments he will have through his business, nor whether he will need to attend a medical appointment for either himself or (very likely) his mother (who is disabled and for whom he cares).

439. While Mr Bishop is more able to schedule appointments with HMRC's telephone filing service than Mr Tay, for telephone filing to work for him he would need to be able to re-book his telephone call with HMRC should it prove to have been arranged at an inconvenient day or time. The same is true of Mr Sheldon.

440. HMRC does not accept that telephone filing is inconvenient. They point out that the HMRC agent would ring back if the taxpayer was engaged. But the protocol established by HMRC for telephone filing is that the agent will only ring back twice, and will then write a letter to the taxpayer in an attempt to re-arrange the phone call.

441. I find reliance on the postal service to re-arrange a phone call is unrealistic: VAT returns are due on set days. Unless the taxpayer arranges the first call to be on a date long before the due date, he would run the risk that if the call has to be re-arranged, the new date will be after the due date.

442. HMRC do not suggest that the arrangements for the re-arranged call can be made over the phone. It is not part of the protocol, and as evidence above has shown it is very difficult to contact HMRC by phone.

443. I find telephone filing is not a very convenient option for submitting a time sensitive document, the late submission of which will incur penalties.

444. I accept that telephone filing would be very inconvenient to all three taxpayers and I reject Mr Macnab's submission that their refusal to accept it shows that they are unreasonable. I have already mentioned this at § 257.

Is telephone filing an exemption from the obligation to file online or merely a form of assistance with online filing?

445. HMRC's online system is the program available (once registered and with used with proper passwords) to VAT registered taxpayers in order to enter their VAT returns. The online system accepts the information and checks that the appropriate boxes add up but otherwise all it does is to "batch" up the information each day and send it electronically to HMRC's backend system, to which only HMRC officers have access.

446. HMRC's telephone filing team consists of 5 HMRC helpline officers. Their normal role is as helpline advisers; in addition they accept telephone returns from the 100 or so taxpayers registered for telephone filing.

447. These five officers have created a profile for themselves in HMRC's online system as if they were agents. They log on to the online service as agents. When, during the course of the phone conversation, a taxpayer gives the figures on his VAT return to an officer in the telephone filing team, the officer enters the figures into the online system via their "agent" login. They do not enter the figures directly into the backend system.

448. These were the undisputed facts of telephone filing system.

449. HMRC's case is that the HMRC officer acted as an agent for the taxpayer when submitting their figures into the online filing system. The taxpayer was therefore filing online but with concessionary assistance from HMRC.

450. The joint appellants' position is that it was a concession from the obligation to file online: by law they were obliged to file online but instead by concession they allowed to file verbally over the phone by orally stating their VAT return figures to an HMRC officer.

451. HMRC (as I have said) called Mr Cameron to give evidence to help resolve the dispute: Mr Cameron made it clear that the HMRC "telephone filing" officers receiving the phone call enter the figures into the same online interface that any taxpayer or agent acting on behalf of a taxpayer would use. They do not enter the figures directly into the backend system.

452. The crux of the dispute was the legal position of this HMRC 'telephone filing' officer. If he was an agent of the taxpayer at the time the figures were read out to him and entered into the online system, then HMRC would be right that a taxpayer using telephone filing would actually be making an online return.

453. But if the HMRC 'telephone filing' officer was not the taxpayer's agent, but HMRC's agent, then the return would be made simply by the figures be given orally

to that HMRC officer. If the officer then failed to enter the figures onto the computer (an unlikely but possible scenario) the return nevertheless would have been made and the taxpayer would not be in default.

454. HMRC point out that they require the taxpayer to appoint HMRC as its agent in order to take up the telephone filing offer. But that is no answer to the appellants' case that as a matter of law it was impossible for the officer to be an agent of the taxpayer.

455. This led to a dispute about the law of agency. This is actually a question of law but it seems appropriate to deal with it here as it will resolve the question whether persons filing by telephone are filing online or filing by telephone:

Return must be to controller

456. Reg 25 requires the VAT return to be to the "Controller". The Controller is a specific office within HMRC and the helpline officers operating the telephone filing system are not the Controller.

457. Therefore, says HMRC, it follows logically that the act of giving the figures orally over the telephone does not amount to making a return.

458. But this is of course to ignore the status of telephone filing in law. The appellants' case is that it is a concession to the requirement to file online; a concession by its very nature permits the taxpayer not to operate by the strict letter of the law. Therefore, the fact that the return *ought* to be made to the Controller does not tell the Tribunal whether telephone filing is concessionary assistance with online filing or concessionary filing by telephone.

459. In any event, the HMRC officers operating the telephone helpdesk and accepting the return could properly be seen as agents for the Controller. They are, like the Controller, all officers of the same public body and acting in the course of their duties as such officers.

460. Therefore, the fact that returns must be made to the "Controller" adds nothing to the argument on whether the HMRC telephone filing officers were agents for HMRC or agents of the taxpayers when accepting the VAT return figures over the telephone.

What is an agent?

461. Rather bizarrely HMRC relied on Miss Pattison's evidence that the telephone filing officers acted as agents for the taxpayers. But whether or not the taxpayers using the system sign a piece of paper appointing unspecified HMRC officers as their agent, it does not make any difference to the *legal* question of whether it is possible for a taxpayer to appoint as his agent for a tax matter an HMRC officer acting in the course of their duties as an HMRC officer. If it is not possible as a matter of law, any number of signed appointments purporting to say otherwise would make no difference.

462. Ms Redston referred me to *Bowstead & Reynolds on Agency*. This stated the well understood concept that an agent in law is a person who is able to bring about changes in his principal's legal relationships with a third party. Halsbury's Laws Part 1 Chapter 1 paragraph 1 of Vol 1 is to similar effect:

> "the essence of the agent's position is that he is only an intermediary between two other parties, and it is therefore essential to an agency in this sense that a third party should be in existence or contemplated."

463. HMRC's definition of agency was rather different. Mr Macnab said an agency existed wherever an 'agent had authority to act on behalf of another'. He said the taxpayer gave the telephone filing officers authority to file on his behalf and this made the telephone filing officers the agent of the taxpayer.

464. He did not necessarily accept that there had to be a third party where an agency exists, but considered that the taxpayer was the principle and the HMRC officer the agent. HMRC would be (in Mr Macnab's view) the third party if one was necessary.

465. I reject Mr Macnab's view. And agent is someone with authority to change the principal's legal position vis-à-vis another person (the third party). There can be no agency without a principal and a third party.

466. The HMRC officer is clearly an agent as the legal position between the taxpayer and HMRC changes when the tax return is filed: the taxpayer goes from having not filed a return to having complied with his obligation to file a return. The question is whose agent is he? Does the officer act on behalf of HMRC or on behalf of the taxpayer?

467. Mr Macnab said not. Yet the legal position is clear that while not everything an HMRC officer did would be as agent of HMRC, nevertheless when acting in the course of their employment to alter HMRC's legal position vis-à-vis a taxpayer, such as accepting a return, the HMRC officer *is* an agent of HMRC.

468. In the case of telephone filing, the officer is clearly acting in the course of his employment when he agrees to accept tax returns by telephone and enter them on the online return system: if this was not in the course of his employment he would be liable to be sacked. Mr Cameron's evidence made it clear that HMRC has required these officers to do this in the course of their employment. Such officers are therefore acting as HMRC's agent in accepting the taxpayers' returns by telephone and entering the figures on the online return system.

469. Can the officer be the taxpayer's agent at the same time as he is HMRC's agent? No. It is impossible for an agent to be agent for principle and third party. He is agent for the principal: that he is not agent for the third party is made plain in the description 'third party'. "Third party" means a party who is not a party to the agency contract. Any other conclusion would give rise to impossible conflicts of interest. An agent cannot represent the interests of both parties to a contract.

470. Mr Macnab went on to make the quite extraordinary submission that, while HMRC officers were required by their employment to act as telephone filing officers, they ceased to be acting for HMRC when actually accepting the return from the taxpayers and entering it on to the online filing system. This amounts to a submission that, temporarily, the officers' duties to and employment by HMRC ceased while accepting a return from a taxpayer. This is obviously wrong and I reject it.

471. Lastly Mr Macnab's submission is that the tribunal would have to conclude that the HMRC officer acted as the taxpayer's agent because otherwise the taxpayer would be in breach of his obligation to file online. But I do not have to go against centuries of the understanding of the meaning of "agent": whether or not HMRC ought to have granted this concession, it is clear that HMRC have care and management powers and the right to grant concessions on statutory obligations.

472. The fact that HMRC obliged taxpayers to sign a piece of paper appointing HMRC officers as their agent as a condition of using the telephone filing service is neither here nor there: the officers remained officers and agents of HMRC and could not act on the taxpayer's behalf. In the course of their duties as HMRC officers, officers could offer assistance to taxpayers in fulfilling their obligations to HMRC, but the taxpayers were not and could not be their principal.

473. The position would be quite different if the taxpayer was able to make a return at an online enquiry centre with an HMRC officer standing by to offer assistance with the operation of the computer: in such a case the taxpayer would be making an online return with HMRC's assistance. But this is not the case with telephone filing. The HMRC officer is not the taxpayer's agent making the entry on his behalf. Therefore, by allowing the taxpayer to make a return to such an officer by telephone, the taxpayer's obligation goes no further than to make the correct return *orally*.

474. If the HMRC officer made a mistake in keying in the entries given, it seems to me that the responsibility for that lies with HMRC and not the taxpayer and it is not a question of 'reasonable excuse' but simply of there being no default.

475. In conclusion, telephone filing is not assistance with online filing. It is filing by a different method which has been permitted by concession.

476. In so far as the appellants' case is that it is a method of filing specified under Reg 25A(10) I reject this for the same reasons that I reject that paper filing pending the outcome of this appeal is a type of Reg 25A(10) filing.

Public law and the telephone filing concession

477. HMRC's telephone filing concession was a highly contentious issue between the parties (except the fourth appellant to whom it was not offered). HMRC's case could be stated in brief as being that the regulations on compulsory online filing was not a breach of any of the appellants' human rights, but even it they were, the position was remedied because HMRC made available to the joint appellants the option of filing by telephone.

478. The joint appellants' position was that HMRC could not rely on the telephone filing concession in this Tribunal. This was for a number of reasons.

Timing

479. The decision the subject of this appeal was issued *before* telephone filing was offered to the joint appellants. It was not offered until January 2012 but it is clear that the even in its first incarnation, telephone filing did not exist until after the decision letters the subject of this appeal.

480. HMRC said that this did not matter. This was because the appellants had benefitted, since the decision in dispute, from a different concession. HMRC had agreed that anyone who appealed a decision requiring them to file online could continue to file by paper until the appeal was resolved (see §§ 165-167).

481. The effect of this was that the date on which HMRC's decision that the appellants should file online would not in practice be in force until a date after they had received the offer of telephone filing.

482. I would like to agree with HMRC on this. Their view, at least at first glance, appears practical – at least if I assume that telephone filing is a lawful concession. If I were to find, ignoring telephone filing, that the regulations were a breach of the appellants' human rights and allow the appeal against the decisions, HMRC would have to re-issue the decisions and the Tribunal would have to hear a second appeal, but this time one in which telephone filing was a live issue.

483. However, stated like that, it is clear that even practically, HMRC's view is wrong. Since the decisions at issue in this appeal were made, the law has changed. All taxpayers (subject to the religious and insolvency exemptions) are required to file online irrespective of whether they receive a decision from HMRC. The rules are now the rules that apply to tranche II.

484. In any event, I am concerned with the law and not practicalities. The decisions under appeal are those outlined in §§ 9-12 above. As at those dates the three joint appellants had not been offered telephone filing, and then, as now, there was no publically available information about it. In fact, telephone filing did not even exist: Mr Cameron was not asked to create the system until April 2010 whereas the decisions at issue in this appeal are dated February 2010.

485. As a matter of law, the legality of the decisions must be considered as at the date that they were issued. As at the date of the decisions, the telephone filing concession neither existed nor had been offered to the appellants. It cannot affect the legality of HMRC's decision.

486. While for practical reasons as explained I would consider that decision to which I am driven unfortunate, in practice it has no effect because for other reasons I do not consider that HMRC could rely on the telephone filing concession as a defence to the joint appellants' claimed breach of human rights. This is for a number of reasons.

Are concessions justiciable in this Tribunal?

487. I have already addressed this issue at great length and concluded that I consider that Parliament intended the tax tribunal to have jurisdiction to determine whether the terms of a concession in the tax sphere had been met by the appellant and grant or refuse an appeal accordingly: see § 131-137 above.

488. However, not only was it HMRC's position that this Tribunal had no jurisdiction to allow an appeal where a taxpayer met the terms of an ESC, Ms Redston agreed. Therefore, it was the appellants' position that the telephone filing ESC was irrelevant to this hearing and could not be relied on by HMRC.

489. As I have said, HMRC adopted the rather unedifying "have your cake and eat it" position that, in their view, while ESCs are not enforceable in this Tribunal, HMRC could rely on an ESC to defeat a claim that HMRC had acted in breach of a taxpayer's human rights.

490. HMRC's point appears to be that, while unenforceable in Tribunal, ESCs are not without legal consequences. Firstly, if the appellant can obtain permission and takes action within the necessary time limit, it can seek to enforce an ESC by judicial review action. Secondly, a concession would be relevant to "reasonable excuse" or even "special circumstances" in order to challenge the imposition of a penalty for non-compliance.

491. The former consideration, judicial review, is unlikely to be a practical or effective remedy in this case bearing in mind the appellants' financial position and the amounts of money at stake in this appeal. But the same cannot be said of the latter consideration.

492. The defence of reasonable excuse would be irrelevant if this hearing was about a decision on an assessment for tax. But it is not: the subject of the hearing is an obligation the breach of which gives rise to a penalty, not an assessment for tax. Reasonable excuse can be a defence to a penalty for non-compliance with the decision notices at issue in this appeal, and therefore, even putting aside the question of judicial review, it seems that the concession would be justiciable at least to some extent in this Tribunal.

493. The joint appellants also complain of the uncertain nature of the concession. It can be changed or withdrawn on a moment's notice. Ms Redston points out the view of the European Court of Justice to concessions in the case of *EC Commission v Grand Duchy Luxembourg* [995] STC 1047:

> "Mere administrative practices, which by their nature were alterable at will by the authorities, could not be regarded as constituting proper fulfilment of a member state's obligations under the Treaty, since they maintained a state of uncertainty as regards the extent of the rights of the persons concerned as guaranteed by the Treaty."

494. My view of the law is that entitlement to concessions is justiciable in this Tribunal. While concessions can be changed at short notice, statutory law is not written in stone either and is regularly changed.

495. In my view, putting aside the issue on timing, HMRC could rely on telephone filing despite its concessionary nature. However, there are other problems with it which preclude reliance, as follows.

Is it lawful as a matter of public law and does it matter?

496. Its concessionary status was not the only controversy over telephone filing. There are (at least) three reasons why it might be unlawful:

- It may ignore s 25(4) Value Added Tax Regulations 1994;
- It is an unpublished and largely secret concession;
- It may be "Wednesbury unreasonable" in that HMRC do not appear to have considered all relevant matters

497. S 25(4) VAT Regulations. I have set Regulation 25A out in full at § 21 above. Sub-section (4) relevantly provides:

> "(4) In any case where an electronic return system is not used, a return must be made using a paper return system."

498. HMRC's case is that the telephone filing concession is concessionary help with online filing. The return is still an online return. I have considered this in very great detail above and concluded that as a matter of law this is impossible. It is not concessionary help with online filing: it is a concessionary verbal method of filing. It is not online filing at all.

499. Yet Regulation 25(4) states that a taxpayer who does not make an online return must make a paper return. Therefore, it seems to me that while HMRC have general care and management powers, and these extend to power to, by concession, exempt a person from the obligation to file online, it does not extend to allowing HMRC to offer a filing system that is neither online nor paper.

500. It was therefore beyond HMRC's care and management powers to offer telephone filing.

501. Unpublished and largely secret concession. HMRC accept that it is an unpublished concession about which there is no publically available information. This is intentional and not accidental.

502. At § 349 I record that there is no publically available published information about the concession. The joint appellants only know about it because the offer of it was made to them by HMRC in the course of preparing for these proceedings. An eligible taxpayer would have no means of being alerted to its existence: it could only

be discovered by phoning the online helpline but the encouragement to do so was buried in a document about help with online filing and failed to mention that extra options were on offer: see § 350-354. Old age was not even mentioned.

503. At § 348 I record Miss Pattison's evidence that HMRC chose not to advertise the availability of telephone filing (or help at HMRC enquiry centres) because HMRC wanted to restrict the use of the concessions to those who had no other options.

504. As a matter of public law, this cannot be a satisfactory justification for failing to publish to all taxpayers the availability of a concession. If it is right to offer a concession, then it should be offered to all persons who would be entitled to benefit from it. It should not be limited to those who litigate or who ring the online helpdesk. Less assertive but equally elderly or disabled taxpayers are left without the benefit of the concession available to some of their contemporaries. In any event, in practice HMRC offered the concession to anyone who rang the helpline and claimed disability or old age: they did not check that they had no other options.

505. This is particularly the case where at least some of the other options to which Miss Pattison concerned would (if compulsory) involve a breach of the taxpayer's human rights, such as reliance on friends or family (see §677)

506. Another justification for its secrecy given by HMRC (see § 359) is that they have no means of measuring whether a person qualified. They say this is necessary because (in so far as the person is disabled) they do not and (they say) cannot check whether the disability is genuine and genuinely makes it difficult for a person to file online.

507. Firstly, this fails to explain why the concession, in so far as it relates to old age and lack of broadband, both of which matters are easily checked and were checked, was not published.

508. In so far as disability is concerned, again I consider that HMRC have acted as no reasonable taxing authority could have acted. While it is legitimate to restrict a concession to only those meeting its terms (in this case the disabled), this legitimate objective cannot be achieved by *not publishing the concession and then, for those few taxpayers who do find out about it anyway, granting the concession without checking that they are entitled to it.* Operating a concession in this way will undoubtedly restrict the number of persons seeking to benefit from it, but it fails to ensure either that those persons who are entitled to it get the benefit of it, and secondly, those that do receive the benefit of it are actually entitled to it.

509. In any event I do not accept that HMRC cannot check whether a person is disabled such that filing online would be difficult or painful. There are measures of disability. They could require a doctor's letter. Mr Sheldon had doctors letters – see § 296.

510. What I am clear is that as a matter of *Wednesbury* unreasonable, it is unlawful to act as HMRC have done and give a concession but fail to publish it. It is a fundamental principle that HMRC should treat taxpayers equally. They cannot do

this if the concession is unpublished and in effect only communicated to those who happened to be the lead appellants in the litigation or those who phoned a helpline. In this HMRC have acted as no reasonable taxing authority could have acted.

511. Failure to consider all relevant matters. HMRC, it is apparent, were under the mistaken view of the law that telephone filing was concessionary assistance with online filing: it is not. It is a concession which permits a different form of filing, it permits filing by telephone. HMRC did not consider this.

512. If HMRC had properly understood the law, they ought to have considered whether it was appropriate to offer telephone filing rather than paper filing. It seems they did not do this because they were under the mistaken impression that it was a form of online filing.

513. If they had addressed their minds to this, they ought to have considered the relative costs to HMRC of paper and telephone filing. Mr Cameron's evidence strongly suggests that telephone filing costs HMRC (in HMRC officer time) more than paper filing and it is only viable because so few people are offered it.

514. conclusion on legality: For all three reasons, I find that the telephone filing concession in the form in which it was given was not a concession which HMRC had as a matter of public law power to give. If HMRC relied on it in this Tribunal, they would be relying on an unlawful act.

515. As a matter of law, my opinion is that they cannot do this. This follows from *Winder* and as explained in detail at § 139 above. HMRC cannot rely in this Tribunal on an unlawful act. This is also consistent with the decision in *Noor* where HMRC could not be held to an unlawful use of their discretion to give advice.

516. In overall conclusion on this issue, the telephone filing concession cannot be relied on by HMRC in this hearing as justification (if needed) for the failure of Reg 25A to exempt the old, disabled, or those living remotely because (a) it post-dates the decisions at issue and (b) it was unlawful in any event. However, it is not irrelevant to this hearing, as I explain below (§§770-789).

Public law and the enquiry office concession

517. The enquiry office concession does not suffer from many of the defects from which telephone filing suffers. As described to me, it really is a form of assistance with online filing. The taxpayer completes the return with at an HMRC office and with the assistance of an HMRC officer. There is no question of the officer purporting to act as the taxpayer's agent.

518. But does the existence of this concession impact on the decision of this Tribunal?

519. The same criticism of its secrecy can be made of the enquiry office concession, and for the same reason as with telephone filing I consider HMRC cannot rely on it in this tribunal.

520. Also, from the point of view of timing, the offer was never made to the appellants and cannot affect the legality of the decisions made in 2010.

521. In any event, I note in passing, although it is strictly irrelevant, that it appears that as an option it has ceased to exist. While Miss Pattison's evidence was that the number of enquiry offices had decreased in between her witness statement and giving live evidence, Mr Williamson's evidence was that HMRC had a policy to close all its enquiry centres. I take judicial notice of the fact that since the hearing HMRC has announced the closure of all enquiry offices.

522. Having established the Tribunal's jurisdiction and the facts in this case, I move on to consider whether Regulation 25A or 40(2A) involved a breach of the appellants' human rights or was unlawful under the EU Treaty.

Are the regulations a breach of the appellants' human rights?

523. There is nothing in the Convention about whether it is lawful to require persons to communicate with the state by online means only. This is scarcely surprising: it is a very general document dealing with overarching general principles quite apart from the fact that it predates the electronic communications revolution.

524. Nevertheless, that is not to say that the Convention is irrelevant.

525. The fourth appellant's complaint is at least superficially straightforward. It objects to the obligation to both pay and file online. It objects because it requires it to commit financial data to the internet, and in the case of the obligation to pay online, in addition it complains that this would require it to commit banking details to the internet and actually make the payment over the internet. It considers this to be a breach of its right to privacy. It also complains that the regulations are a breach of the Charter but that aspect of its claim I deal with when I look at the law of the European Union at §§ 812 onwards.

526. The joint appellants' complaints are rather different. Like the fourth appellant they consider that they should have been given exemption from the rules but the basis of their claim is not that filing online requires them to put private information on to the internet but because a failure to give them exemption is a breach of their human right to property, to non-discrimination or to a private life because using any of the possible methods of filing online leads to a breach of one or more of these rights.

527. The only way that the joint appellants' case can be approached is to consider the multiplicity of methods by which the appellants could comply with the regulations and make their VAT returns online. The state does not dictate how the appellants made their online VAT return: the choice is the appellants'. For instance, a taxpayer could engage an agent to make the online return on his behalf or he could use a friend's computer and do it himself. The state does not dictate the option chosen by the taxpayer.

528. The methods of compliance with the obligation to file online are not compulsory. To that extent it is therefore irrelevant if one of the methods, would, if compulsory, involve a breach of the taxpayer's human rights. The taxpayer could comply by using a different method which did not involve a breach of his human rights.

529. But if ALL of the various methods that are open to the taxpayer to use to comply with the obligation to file online would, if compulsory, involve a breach of the taxpayer's human rights, then the regulations themselves must involve a breach of human rights because the requirement to file online is compulsory.

530. However, if only <u>one</u> of the methods would not involve a breach of human rights if compulsory then the taxpayer has a method by which he can comply with the regulations without suffering a breach of human rights and, in my opinion, the state can lawfully impose the regulations (so far as the Convention is concerned).

531. So to determine whether there is a breach of human rights in the compulsory online filing regulations, I have to determine all the possible methods of compliance which the appellants could adopt and determine if at least one of them does *not* involve a breach of human rights. If at least one of them does not, then the regulations are lawful so far as the Convention is concerned.

532. I make the proviso that a method would need to be a practical method for the taxpayer concerned to be relevant: for instance, using his own computer would not be practical for a taxpayer too disabled to use a computer.

533. The possible methods of compliance discussed at the hearing were as follows:

(a) The taxpayer could use his own computer and internet link. For taxpayers without an online computer this would involve capital expenditure on the purchase of hardware and software and income expenditure on a monthly contract for broadband or dial-up link to the internet;

(b) The taxpayer could use an online computer belonging to a friend or family member assuming that friend or family member gave permission. This would not be expected to involve expenditure on the part of the taxpayer.

(c) The taxpayer could use a public computer free of charge at a public library.

(d) The taxpayer could engage a professional agent to make the online submission on behalf of the taxpayer.

(e) At the request of the taxpayer, a friend or family member could make the online return submission on behalf of the taxpayer.

(f) The taxpayer could use HMRC's "phone filing" facility. I mention this option but I have already determined that HMRC cannot rely on it in these proceedings, so it is irrelevant as an option.

(g) The taxpayer could use free of charge a dedicated stand-alone computer at an HMRC enquiry centre but I have already determined that HMRC cannot rely on this option in these proceedings, so it is irrelevant as an option.

534. There was dispute about the extent to which some of these methods of compliance were available to the appellants. It was the evidence of at least one of the appellant's that none of his friends and family had computers. Some of the appellants' evidence was that they did not know how to use a computer and/or their disabilities were such that they could not use a computer so in practice options (a), (b), and (c) were useless to them. I consider these matters in more detail in my conclusion.

535. In the meantime, I move on to consider the potentially relevant articles of the Convention in the context of the various methods by which the appellants could

comply with the obligation to file online, but first a short note about fairness and the relevance of the Convention to the two corporate appellants.

Convention and fairness

536. One thing it is perhaps worth saying is that the convention concerns only the rights contained within it. It is not about *unfairness.* All four appellants clearly felt strongly that they had been treated unfairly by the government when it introduced online filing.

537. It is easy to sympathise with this view: the appellants had been in business for many years paying their taxes on time. There was (in their view) nothing wrong with the old system of paper returns and no need to change it. The joint appellants saw the introduction of compulsory online filing as an unnecessary and undeserved difficulty placed in the way of them continuing in business; the fourth appellant's perception of unfairness related not to the difficulties of online filing but to the perceived risks of using the internet.

538. But I am not here to determine whether the online regulations are fair. That is an impossible determination in any event as people's notions of unfairness differ. I am here only to determine if HMRC's decisions that the appellants must file online were lawful. And that includes whether, as a matter of law, the regulations breached the Convention. It does not include any consideration of some general notion of "fairness".

Do companies have human rights?

539. Two of the appellants (the first and fourth) were companies. The companies are the registered taxpayer and the recipients of the notices to file online. In the hearing HMRC's stated view was that companies have no human rights (as companies are clearly not human) and that therefore the Convention was irrelevant to those two appellants.

540. Mr Macnab's example was a company owned by a physically disabled person. A company, of course, has no physical existence and cannot suffer a physical disability. Therefore, runs the logic of HMRC's argument, even if the law discriminated against physically disabled people, the company could not suffer discrimination on the ground of physical disability, as it was not disabled.

541. What is the status of the fourth appellant's claim to the right to a private life? Companies do not have private lives. They are legal fictions: they have no physical existence and certainly no private life. Yet the fourth appellant is the alter ego of Mr Hallam who both owns and controls it. Mr Hallam has the right to a private life.

542. Surprisingly, despite the long history of the Convention (now over half a century), no one at the hearing was able to draw to my attention any case in which the question of whether the Convention has any application to companies had been squarely addressed.

543. companies have some human rights: The most relevant case drawn to my attention was *Pine Valley Developments Ltd and others* [1991] ECHR 12742/87. There were three appellants in this case, the eponymous company, another company called Healy Holdings Ltd and a Mr Healy. Both companies were owned and controlled by Mr Healy and were companies specifically established by him to carry out the development of a piece of land. The case concerned the state's withdrawal of planning permission over the land which caused significant financial loss to the company which owned the land and therefore to Mr Healy who owned the company.

544. The reasons for the Court's decision in that case are not really relevant: what is relevant is that the court found that there was a breach of A1P1 (the right to property) combined with A14 (the right not to be discriminated against) against both Healy Holdings Ltd and Mr Healy. It found no breach so far as Pine Valley was concerned simply because Pine Valley did not own the land at the time planning permission was withdrawn. Therefore, says the appellant, it is clear that companies do have rights under the Convention.

545. HMRC's reply to this is that the Court was not asked to consider whether the companies' claims to human rights should be dismissed because of their corporate status. However, while it is true that the defendant (the Irish Government) did not take the point, the Court did appear to consider it in passing. It said at §42:

> "As to the merits of the pleas, the Court would make at the outset the general observation that Pine Valley and Healy Holdings were no more than vehicles through which Mr Healy proposed to implement the development for which outline planning permission had been granted. On this ground alone it would be artificial to draw distinctions between the three appellants as regards their entitlement to claim to be 'victims' of a violation."

546. This is a clear statement by the Court that a company could be a victim of a breach of human rights. This means that the Court ruled (albeit without hearing argument) that a company can have human rights: and as I have said the Court went on to find that the company was a victim of a breach of its human rights.

547. This is not to say that all companies have all human rights: the basis of the Court's decision in this case was clearly that the companies concerned were the alter egos of Mr Healy. I do not need to consider whether other types of company could have human rights: in this case it is clear that the second appellant and fourth appellant were the alter egos (respectively) of Mr Sheldon and Mr Hallam. They were the vehicles through which they conducted their business.

548. Can companies be discriminated against on the basis of a characteristic possessed by their owners? HMRC's second argument was to say that even accepting that some companies could have human rights, their human rights were limited as companies clearly could not in practice be the victim of discrimination on the grounds of (say) disability.

549. In *Pine Valley* the Court did find that the company had been discriminated against: so a company can be a victim of discrimination. The basis of the discrimination was that the company had been singled out and treated differently from all other holders of similar planning permissions when the government legislated to re-validate the planning permissions. The reason for this was because the company alone of all the affected persons had earlier (unsuccessfully) challenged the withdrawal of planning permission in the Irish courts and the Government did not consider it constitutional to legislate to (in effect) quash a judicial decision.

550. In that case, therefore, the discrimination was on the basis of a characteristic possessed by the company. That characteristic was the fact that the company had litigated whereas all other affected persons had not. But, say HMRC, a company can't be physically disabled. It is not discrimination within A14 where the difference in treatment is on the basis of a characteristic possessed by someone else, such as the company's director and owner.

551. That leads me to the case of *Tinnelly & Sons Ltd and others v UK* [1998] 4 BHRC 393. The applicant was a company based in Northern Ireland which alleged that it was the victim of unlawful religious discrimination. Its allegation was that the local government did not award it a contract as the company was controlled by persons who were Roman Catholic. The Court decided the case in the appellant company's favour under Article 6 (the right to a fair hearing). As it was not necessary in the particular circumstances it did not go on and decide the discrimination point. The UK Government had in that case specifically questioned whether a company could have a private or family life: but no answer was given.

552. The joint appellants' position is that if it was simply the case that a company could not be a victim in the particular circumstances of this case, the Court would have said so.

553. I am not able to agree: the UK government specifically raised the point in the context of A8 (right to private life) and the Court refused to answer it on the grounds it had already disposed of the case under A6. This is neutral. It does not tell me what the Court would have decided had it actually addressed the case on A8.

554. Nevertheless, I am able to reach a concluded view on this without the assistance of the ECHR. HMRC's case amounts to saying that a company cannot claim to be the victim of discrimination where the discrimination against it is based on a characteristic possessed by its owner/director, such as where the owner has a particular religious belief or a physical disability.

555. Stated like this it is easy to see that on the basis of A14 alone this proposition by HMRC cannot be right: "other status" in A14 is, as I explain below, very wide. A company would clearly have an "other status" where it is discriminated against because of a characteristic possessed by its owner/director.

556. Does a company have a right to a private life? But in any event, I think the principle is even wider than this. A company has human rights if and to the extent it

is the alter ego of a person (or, potentially, a group of people). Therefore, it must be seen as being in the shoes of that person and must possess the same human rights because any other decision would deny that person his human rights.

557. Therefore, while it is ludicrous to suggest a company has a private life or family, nevertheless a company which is the alter ego of a person can be a victim of a breach of A8 (the right to private life) if, were it not so protected, that person's human rights would be breached.

558. HMRC say that this is not right: the remedy is for that person to take an action in their own name claiming that the treatment of his company is a breach of his personal human rights. But it would also be HMRC's position that the owner of the company would not have the right ('locus standi') to bring an action in the Tribunal against the notice to file online served on the company. In HMRC's view, all the owner could do would be to make a complaint direct to the European Court of Human Rights.

559. HMRC's position is unappealing: the Convention itself provides that in the determination of his civil rights a person is entitled to a fair and public hearing within a reasonable time. HMRC's position would deny him any national remedy at all for this alleged breach of his human rights. Further, if HMRC were right it would means the Convention itself discriminates between a person who trades in their own name and a person who trades via a company. It is clear from *Pine Valley* that the Court cannot see a good reason to make such a distinction.

560. While it is clear that at least in common law a company is an entirely separate legal entity from the individuals who own and control it (see for a reaffirmantion of this view *Prest v Petrodel),* nevertheless it appears that civil law has a less rigid demarcation between the company and its owners, and as the European Court of Human Rights is largely comprised of civil law judges, their views would be expected to prevail. It is obvious that a company owned and controlled by a single person is in practice the alter ego of that person and to ensure full protection of such a person's human rights it may be necessary to treat those human rights as also pertaining to the company.

561. The Court has indeed considered this and said in *Societe Colas Est v France* (2004) 39 EHRR 17:

> "[41] The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions. As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company's right under Art 41 to compensation for non-pecuniary damage sustained as a result of violation of Art 6(1) of the Convention. Building on its dynamic interpretation of the convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Art 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises."

562. I therefore consider that the Convention properly interpreted applies to give human rights to companies where those companies are the alter egos of their owners. Companies have a right to a private life where that private life is the private life of the alter ego of the company.

563. In conclusion, I consider that it is irrelevant to the first and fourth appellant's case that they are incorporated companies: they have the same human rights as their owners would have had had they chosen to conduct their business without incorporation.

The right to peaceful possession of property

564. The Convention includes the protocols to it. The very well known first article of the first protocol, which I will in accordance with common practice refer to as "A1P1", states as follows:

> "**First article of the first protocol ("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."

565. A1P1 is only suggested to be relevant to some of the methods of compliance with the regulations, in particular:

> (a) Use own computer and internet link. For taxpayers without an online computer this would involve capital expenditure on the purchase of hardware and software and income expenditure on a monthly contract for broadband or dial-up link to the internet;
>
> and
>
> (d) Engaging a professional agent to make the online submission on behalf of the taxpayer.

And I consider A1P1 in the context of these two types of expenditure. So far as (a) is concerned I consider this on the assumption that the appellant does not have a computer. To state the obvious, if the appellant already has an internet linked computer, then this method of compliance could not involve a breach of A1P1. (Mr Sheldon's evidence was that he has a computer and this is also the tenor of Brinklow's submissions. Mr Tay and Mr Bishop do not have computers.)

566. To determine whether A1P1 has any application in this appeal, I have to consider a number of questions. The first is to consider whether the appellants come within the first paragraph which establishes the bare human right not to be deprived of possessions. Second I have to consider the second paragraph which sets out

exceptions to the right not to be deprived of possessions. And as part of the consideration of exceptions, it is well established in cases dealing with human rights that I have to look at public interest and proportionality: the rights of all persons impinge on those of others to a greater or lesser extent and the right balance must be struck. See the recent ECHR decision in *NKM v Hungary* (66529/11):

> "[42]…an interference, including one resulting from a measure to secure payment of taxes, must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights…there must be a reasonable relationship of proportionality between the means employed and the aims pursued…."

567. So I will consider these issues as a series of questions:

(a) Do the appellants have a possession within the meaning of A1P1?

(b) If they do, do the regulations (which HMRC's decisions the subject to this appeal give effect to) interfere with it?

(c) Is the interference lawful because (in accordance with the second paragraph of A1P1) it is to secure the payment of taxes?

(d) Is the interference lawful because (in accordance with the second paragraph of A1P1) it is in the public interest?

(e) Is the interference in the public interest but nevertheless unlawful because it is not within the State's margin of appreciation?

Is there a possession?

568. Both (a) purchasing a computer and internet contract and (d) engaging a professional agent would involve expenditure by any of the appellants. Nevertheless it was HMRC's position that such expenditure was not within the Convention.

569. This was on a number of grounds.

570. Firstly they relied on the decision of the House of Lords in *Countryside Alliance* [2007] UKHL 52 for an argument that *future* expenditure was a *future* reduction in the business' profits and therefore outside the scope of the Convention which was only concerned with current expenditure.

571. I do not accept this argument. The regulations are in force, the appellants are obliged to comply with them now. It is not a question of future but current expenditure out of current assets. *Countryside Alliance* was a decision that in effect no one possesses the guarantee that a current business activity will be lawful and profitable in the future and therefore making it unlawful does not deprive the person of a possession: that is quite different to requiring a person to undertake expenditure. That of necessity depletes existing or future resources: the fact that expenditure is required brings it within Convention.

572. Although not on all fours, I consider my views consistent with the view of the ECHR in *Marckx v Belgium* (1979-80) 2 EHRR 330 and *Draon v France* (2005) 20 BHRC 456. In *Marckx* the ECHR held that A1P1 applies to the laws of inheritance because the right to dispose of property was a fundamental aspect of the right of property. In *Draon* an existing right of action was held to be property even though the value of it had not been realised as cash.

573. The appellant relied on *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46 where Lord Reed said:

> "[114] The concept of 'possessions' has been interpreted by that court as including a wide range of economic interests and assets, but one paradigm example of a possession is a person's financial resources…In the case of an insurance company the fund out of which it meets claims must therefore constitute a possession within the meaning of the article. Legislation which has the object and effect of establishing a new category of claims, and which in consequence diminishes the fund, can accordingly be regarded as an interference with that possession."

574. So in my view a requirement that current or future expenditure must be made is within A1P1. In conclusion, so far as compliance by methods (a) and (d) are concerned, the appellants have a possession (their current and future cash resources) which is within A1P1.

575. That conclusion makes it strictly unnecessary to consider the question of penalties but as it was argued (as I raised the question in the hearing) I will mention the parties' views on this. I pointed out that failure to file online by a mandated person would lead to liability for a penalty. I asked whether this factor alone meant that A1P1 was engaged?

576. HMRC accepted the imposition of a penalty would involve the loss of possessions by a taxpayer. But only when the penalty was actually imposed. HMRC considered the potential imposition of a penalty was irrelevant to these proceedings as no penalty had yet been imposed.

577. The joint appellants rely on the case of *Burden v UK* [2008] STC 1305 in which it was held that the future imposition of tax was enough to bring the case within A1P1. In that case the appellants complained that UK inheritance tax was unlawful on the particular facts of their case. The ECHR decided that there was a current possession within Convention even though the event (the death) which would trigger both the inheritance and the tax liability on that inheritance had not yet occurred.

578. I think the answer is that the potential liability to a penalty is irrelevant, but not because it has not yet been imposed. *Burden* in that sense is irrelevant. If a penalty was imposed the question under the Convention would be whether that interference with possessions was a breach of human rights. That would require the ECHR to consider *why* the penalty was imposed. The fact that a deprivation of possessions (a penalty) was imposed for a breach of an obligation, would not of itself make the imposition of the obligation a possession within A1P1. The question would be

whether the obligation (and not the penalty) involved an unlawful interference with a human right.

Is there interference by the regulations with the appellants' possessions?

579. Largely the question of whether there is interference is inseparable form the question of whether there is a possession. If a person is required to expend money, their possession, the money, has been interfered with.

580. HMRC pointed out that any expenditure required by the requirement to file online did not require payments to be made to the state: the appellants' possessions were not being confiscated by the state. But I find it is clear that A1P1 applies to many more situations that confiscation. For instance, the case of *M v Sec for State for Work and Pensions* [2006] UKHL 11 was about the legality of the laws on child support payments made to the custodial parent. It did not involve payments to the state.

581. Another point made by HMRC is that, as least in so far as (a) purchase of own computer is concerned, this would merely require the appellants to exchange one possession (cash) for a different possession (a computer). Their resources are not depleted says HMRC. However, again I consider this irrelevant. The appellants are clearly deprived of their cash, even if they have acquired something else in exchange. And in any event, the A1P1 is also a guarantee against *interference* with possessions, and there is clearly interference if a person is obliged to swop one kind of asset for another kind of asset.

Does the interference secure the payment of taxes?

582. The second paragraph of A1P1 contains to exceptions to the prohibition on the interference with possessions:

> "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."

There was a dispute about what "secure the payment of taxes" meant in the context of the Convention.

583. The joint appellants' view was that, in so far as they were concerned, as they all have unblemished records for payment of their taxes on time, the measure could not be within the exemption for securing the payment of taxes as it was clearly unnecessary to secure the payment of the appellants' taxes. Looking beyond just the appellants, Ms Redston's view was that Lord Carter's report made it clear that the requirement to file online was to save HMRC money and not to improve compliance. Indeed there is no suggestion anywhere that taxpayers are more likely to comply or more likely to comply timeously if compelled to do online returns rather than merely permitted the choice between online and paper filings. Therefore, says Ms Redston, the purpose of the new regulations was not to secure the payment of taxes.

584. Mr Macnab's view was that the system of VAT returns was part of the overall system of tax collection and was therefore self evidently a method by which the payment of taxes is secured.

585. I think that the measure of whether the regulations were to secure the payment of taxes must be considered by its overall effect and not just as it affected the appellants. But was it, considered as it affected all taxpayers, a law to secure the payment of taxes? Requiring tax returns to be made is clearly a measure to secure the payment of taxes as without tax returns HMRC cannot know how much tax to collect. However, the purpose of this particular measure was simply to make compulsory the method of submission of a return which was the cheapest for HMRC to administer.

586. Referring back to the second part of A1P1, in §564 above, a regulation could lawfully interfere with possessions if *either* it was to secure the payment of taxes *or* it was in the general interest. Indeed, requiring people to pay taxes is simply one aspect of regulations that would be in the overall general interest.

587. Lord Carter's report shows that the purpose of making online filing compulsory was to save HMRC costs in collecting taxes. Whether or not this comes under the hearing "secur[ing] the payment of taxes", it would clearly come under the over-arching head of "general interest" and, so, does it matter which head is applicable?

588. One view might be that it matters because, firstly, a wider margin of appreciation may be given to states if the measure is a tax measure rather than any other measure in the public interest, and, secondly, does the requirement a measure be proportional apply to taxes?

589. The recent decision of the European Court in *NKM v Hungary* (not cited to me as it post dates the hearing) supports the view that in tax national governments have an especially wide margin of appreciation:

> "[49]…In matters of general social and economic policy, on which opinions within a democratic society may reasonably differ widely, the domestic policy-maker should be afforded a particularly broad margin of appreciation….
>
> [50] In so far as the tax sphere is concerned, the Court's well-established position is that States may be afforded some degree of additional deference and latitude in the exercise of their fiscal functions under the lawfulness test….

590. Nevertheless it is clear that, however wide it is, national governments still have to ensure that their tax measures are not outside that margin of appreciation. It is also clear from the same case that tax measures, the same as other measures in the general interest, have to satisfy a test of proportionality. For this see §§591-610 below.

Margin of appreciation/proportionality

591. The ECHR has said that States have a particularly wide margin of appreciation in tax matters. In *Gasus-Dosier* (1995) 20 EHHR 403 at §59 the ECHR said:

> "the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation"

592. To the extent it matters my decision is that the regulations at issue in this appeal were to secure the payment of taxes because requiring VAT returns is a necessary part of securing the payment of VAT and the regulations were intended to ensure the efficient collection of VAT returns which, in some small way, is all part of the overall securing the payment of taxes. Nevertheless, it is on the margin between being part of the sub-set of taxation and simply being part of a non-taxation measure in the "general interest". And for that reason I do not consider (to the extent it matters) that the UK's margin of appreciation would be much wider than it would be in a normal, non-tax case.

593. The decision in *NKM v Hungary* was that there was nothing to suggest that the Government's reason in introducing the tax at issue in that case was "manifestly devoid of reasonable basis":

> "[59] 'sense of social justice of the population' in combination with the interest to protect the public purse and to distribute the public burden satisfies the Convention requirement of a legitimate aim.…no convincing evidence on which to conclude that the reasons referred to by the Government were manifestly devoid of any reasonable basis…."

594. Even applying a slightly narrower margin of appreciation as explained in §592 above, I do not consider that the measure complained of in this case could be said to be devoid of reasonable basis. It is entirely reasonable for HMRC to wish to reduce the costs associated with tax collection and it seems the expectation was that the majority of taxpayers already owned computers and would be able to comply with compulsory online filing without any additional costs.

595. The answer might have been different if the new regulations required all taxpayers to purchase expensive equipment in order to make their returns in a particular form. But that is not the case.

596. But contrary to what HMRC said, a tax measure can be a breach of a person's A1P1 rights even if it is not manifestly devoid of reasonable foundation. The measure must be proportional. The ECHR held in *Gasus Dosier und Fördertechnik v The Netherlands* [1995] 20 EHHR 403 at [62] that a fair balance between interests of community and individual's fundamental rights must be struck. In *Sporrong and Lönnroth v Sweden* [1982] ECHR 7151 the ECHR said

> "[69] … For the purposes of the latter provision, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. …"

597. They also said at [69] that member states should not make a person bear

> "an individual and excessive burden".

598. And it is clear that this applies as much to measures to secure the payment of taxes as to other measures in the "general interest". In *NKM v Hungary* the European Court said:

> "[60] In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the impugned measure….
>
> [61]…the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest….
>
> [66] ..such measures must be implemented in a non-discriminatory manner and comply with the requirements of proportionality…

599. The case concerned a civil servant made redundant whose contract entitled her to 8 months' severance pay. Due to the economic recession, the Hungarian Government regarded this amount of severance pay as excessive and clawed it back through a 98% tax rate to the extent it exceeded a threshold. NKM's case was a test case: all other civil servants made redundant at this time were similarly taxed.

600. The conclusion of the court was that the tax was an interference with the right to property. However, it is clear that it would have found the interference to be lawful and justified, bearing in mind the state's wide margin of appreciation, were it not for a few discriminatory features. These were that severance pay in the private sector not taxed at punitive rate (§67); that no other payments to civil servants were taxed at punitive rate (§68); that the tax resulted in substantial personal hardship to applicant (§70) and that there was no transitional period (§71). The court concluded:

> "…the measure complained of entailed an excessive and individual burden on the applicant's side. This is all the more evident when considering the fact that the measure targeted only a certain group of individuals, who were apparently singled out by the public administration in its capacity as employer……[75] Therefore the measure cannot be held reasonably proportionate to the aim sought to be realised."

601. In summary, a member state has a wide margin of appreciation particularly in tax matters; to be outside this margin, the measure has to be manifestly devoid of reasonable foundation or fail the test for proportionality and non-discrimination. Deciding whether a measure is proportional will involve consideration of:

> (a)The *benefit* of the measure to the state bears a "reasonable relationship of proportionality" to the costs of it to the affected persons;
>
> (b)whether the measure unfairly singles out a few people. This is the question of whether it imposes an *individual* burden But proportionality also looks at the degree of hardship. This is the question of whether it imposes an *excessive* burden?

602. <u>Reasonable relationship of proportionality:</u> the joint appellants did not suggest that the measure was manifestly devoid of reasonable foundation in relation to the

general VAT registered section of the population: they merely claimed it imposed and individual and excessive burden on some taxpayers and I consider this below.

603. Excessive burden: On the question of whether it imposes an excessive burden, I have made findings of fact on the savings to HMRC (see § 375) and the costs to the appellants (§ 378). In summary the cost saving to HMRC appears to be less than £8 per return (ie less than £32 per year). The cost to the appellants who don't have a computer of buying an online computer is many multiples higher than this (£200-£400 per year). I am satisfied that this would be an excessive burden on those individuals.

604. However, they could comply by employing an agent and I am satisfied that the annual cost of this (about £60 or more per annum – see §383) is significantly less, although still greater than the savings to HMRC. Nevertheless, a state has a wide margin of appreciation and it is unreasonable to expect that compliance with a cost saving measure would impact on all taxpayers equally or that there might not be a few for whom it might cost more to comply than the government would save. Not only that, the cost is not particularly great in real terms, and (see paragraph § 283) considerably less than it costs to pay a professional to carry out other tax compliance obligations, such as compiling tax returns. I am not satisfied that measured by money alone the measure is disproportionate. The burden is not *excessive.*

605. Individual burden/discrimination: HMRC's case is that there is no discrimination because it applies the new regulations to all VAT registered individuals. A universal measure cannot be discriminatory, says HMRC. A universal measure, they say, cannot impose an individual or excessive burden on individual taxpayers.

606. I do not agree. Firstly, as a matter of fact this measure was not universal. It allowed two exemptions, one for persons with certain religious beliefs and one for certain insolvency practitioners. Indeed, at the time of the decisions the subject of this appeal, which is therefore relevant, it allowed an exemption for persons with a turnover below £100,000. Further, so far as PAYE returns "care & support" employers would remain entitled to make paper returns. These are disabled persons who receive a state allowance to employ a carer and are therefore obliged to deduct and account for PAYE on their carer's wages. I have already noted that Mr Sheldon received this exemption as a care and support employer of his wife (see § 298).

607. Secondly, as a matter of the law applicable to the Convention, a universal measure can be discriminatory if it fails to make allowance for persons in materially different positions. This is known as 'indirect discrimination' and I deal with it in more detail below at paragraphs §§ 701-705. I will return to whether the measure is discriminatory, as it is difficult to divorce this question in the context of 'proportionality' from the same question in the context of an alleged breach of Article 14 of the Convention. I will also deal with the question of justification at the same time, as discrimination under A1P1 or A14 can be justified.

Conclusion

608. If the regulation required taxpayers who did not possess one to purchase an online computer then I would conclude that the measure was outside the state's margin of appreciation as it imposed on those taxpayers an individual and excessive burden. Unless it can be justified, it would be a breach of A1P1 and a breach of their rights. The question of justification would have to be addressed and I do this below

609. However, the taxpayers affected could employ an agent. While this does engage A1P1, and imposes an individual burden on those without a computer or unable to use a computer, I do not think it is an excessive burden. Nevertheless, that does not necessarily mean that the measure is within the state's margin of appreciation. The measure also must not discriminate – or at least it must not discriminate without justification. There is therefore symmetry. If there is unlawful discrimination under A14 (addressed below) there will be a breach of A1P1. Otherwise there is not.

610. So my conclusion under A1P1 on the question of employing an agent is necessarily the same conclusion as I reach under consideration of A14 combined with A1P1. It comes down to a question of whether there is discrimination and if there is whether that discrimination can be justified and I consider this at §§ 706-726 (discrimination) and §§760-789 (justification) below.

The right to respect for private and family life and correspondence

611. The joint appellants also based their case on A8 of the Convention of the right to respect for private and family life. The fourth appellant also relied on this.

612. Art 8 Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

613. As with A1P1, whether there is a breach of A8 can be addressed as a series of questions. The Court of Appeal in *AG (Eritrea) v Sec of State for the Home Department* [2007] EWCA Civ 810 at §19 in paraphrase said there were five questions:

> (1) Will there be an interference with right to respect for private or family life?
>
> (2) If so, is the interference of such gravity to engage Art 8?
>
> (3) If so, is such an interference in accordance with the law?

(4) If so, is it necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to legitimate public end sought?

What is private and family life, home and correspondence?

614. What is private and family life and correspondence? Does it extend to the tax filing obligations of persons in business, or even of a company?

615. The easiest way to address this is to consider the complaints of the appellants. The joint appellants complain that the obligation to file online breaches their human rights: the only way I can consider this (as I have said) is to consider whether, if compulsory, there is at least one method of complying with this obligation which would not breach their human rights. To do this I have to consider each method of compliance separately and they are as set out at § 533 above.

616. The only methods of compliance to which A8 could be relevant are:

(b)The taxpayer could use an online computer belonging to a friend or family member assuming that friend or family member gave permission. This would not be expected to involve expenditure on the part of the taxpayer;

(d)The taxpayer could engage a professional agent to make the online submission on behalf of the taxpayer.

(e) At the request of the taxpayer, a friend or family member could make the online return submission on behalf of the taxpayer.

617. In addition, the joint appellants' case is that the obligation to file online by itself is a breach because it may force them to cease trading.

618. None of the appellants suggest that the obligation to file a VAT return could be a breach of their human rights: implicitly they accepted that it is entirely lawful for the Government to require this information.

619. Nor did any of the joint appellants specifically argue that they considered the obligation to file their VAT return online was a breach of human rights because it required their financial information to be transmitted over the internet, although I note that all of them voiced concerns about data security on the internet.

620. But this is a part of the fourth appellant's case. Brinklow complains that (a) it is a breach of its human rights to be obliged to pay electronically and (b) it is a breach of its human rights to be obliged to file online– and at least a part of this latter complaint is that it is a breach of his human rights as it leads inexorably to the obligation to pay electronically. In all cases the grounds of its complaint is that it requires it to commit

financial data to the internet. It considers this a breach of its right to a private life and/or respect for its correspondence.

621. What does the Convention mean by private life? In *Niemietz v Germany* (1992) 16 EHRR 97 the court said:

> "[29] The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.
>
> There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment in time.
>
> To deny the protection of Art 8 on the ground that the measure complained of related only to professional activities – as the Government suggested should be done in the present case – could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them. In fact, the Court has not heretofore drawn such distinctions: it concluded that there had been an interference with private life even where telephone tapping covered both business and private calls (see the *Huvig v France ….);* and, where a search was directed solely against business activities, it did not rely on that fact as a ground for excluding the applicability of Article 8 under the head of 'private life' (see the *Chappell v the UK* …)"

622. The decision in that case was that the search of a lawyer's business premises was a breach of A8 as private life should be interpreted widely in order to protect individuals. 'Private life' therefore would cover some professional and business activities and did cover the applicant's professional business premises in that case.

623. In *Pretty v UK* (2002) 12 BHRC 149 the ECHR said at [61] that 'private life' was a 'broad term' as personal autonomy was important.

624. Mr De Mello cited *S and Marper v UK* 30562/04 [2008] Convention 1581 §§66-67 where the ECHR said:

> "[private life] can therefore embrace multiple aspects of the person's physical and social identity…Beyond a person's name, his or her private life may include other means of personal identification and of linking to a family….[67] The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Art 8…The subsequent use of the stored information has no bearing on that finding...However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained….."

625. There is an irony, probably not lost on the appellants, in HMRC's position. HMRC maintain that the appellants' businesses are not part of the appellants' private life, nevertheless HMRC suggest that the appellants take advantage of their friends and family, probably the most significant part of their private life, and ask for their help in filing the businesses' VAT returns.

626. It is not always possible to divorce business from private life. I consider that where a sole trader is concerned, or one-man band company, they are likely to be inextricably linked.

627. Are the financial figures contained in a person's VAT return a part of their private life? It is true that someone could gain from the figures in a VAT return the amount of the VAT trader's turnover and his VAT bearing expenses and therefore to make a rough estimate of the amount of his profit. Where the business is the VAT trader's only or main source of income that gives the person possessed of the VAT return a rough estimate of the trader's income.

628. The fourth appellant's case is that the amount of their income is something that a person has a right to keep private from the general public, if not from the government.

629. This country clearly does recognise this information as private: there is no requirement for any legal entity to publish VAT returns and a positive duty on HMRC to keep them confidential (s 18(1) Commissioners for Revenue and Customs Act 2005 "CRCA")). Similarly individual self assessment returns are kept strictly confidential by HMRC. On the other hand, larger companies are obliged to file their accounts at Companies House and there are lesser filing obligations in respect of small companies.

630. Nevertheless in *M v Sec of State for Work and Pensions* [2006] 2 AC 91 at [3-5] Lord Bingham said that a person's finances are not part of private life. Lord Walker's view appeared to be that because A8 required private life to be respected, an interference with a person's employment rights (or, by implication) their ability to conduct business could only be a failure to respect private life where that interference was very serious (see §83).

631. Overall, and taking *M* into account, I am not satisfied that, despite the broad scope of "private life" recognised by the ECHR in the above cases, that the figures on

a VAT return are a part of person's private life. Making them public would not fail to respect a person's private life. However, largely this is irrelevant because the regulations do not make the figures on a VAT return public: all they require is that they be communicated to HMRC online. The fourth appellant relies on the right to respect for correspondence.

632. Is there interference with correspondence if required to transmit VAT returns online? The fourth appellant's case is that there is an interference with his correspondence if the regulations require it to transmit its VAT returns online because it lays it open to the risk of unlawful interception by third parties. Is there interference by the Government because it requires the appellant to do use a method of communication which lays his correspondence open to a risk of unlawful interception by other persons?

633. Mr De Mello points out that the Convention can apply to prospective breaches of human rights: *R (oao Quila)* which itself relies on *Razgar*:

> "…the engagement of article 8 depended upon an affirmative answer to two questions, namely whether there had been or would be an interference by a public authority with the exercise of a person's right to respect for his private or family life and, if so, whether it had had, or would have, consequences of such gravity as potentially to engage the operation of the article…."

634. Mr De Mello also referred to *Open Door and Dublin Well Woman v Ireland* (1992) 15 EHRR 44 where it was held that all women of child bearing age potentially were affected by the Irish Supreme Court decision banning publication of information on abortion. He also referred to the case of *Burden and Burden v UK* (2006) where the two applicants who were sisters had victim status as it was virtually certain one would pay IHT on death of other, although both were alive at the date of the hearing.

635. While I agree that the tribunal has jurisdiction to determine prospective breaches of human rights, I think that the question of "interference" is a matter of degree.

636. What the appellant is claiming is that the Government may only require communications to be made by the means least susceptible to interference by third parties: in its view that is the postal service. Where a third party intercepts the VAT return they will be interfering with the sender's correspondence. But the defendant to this action is HMRC: they are not interfering with the sender's correspondence.

637. So it is not a question of whether this tribunal has jurisdiction to consider prospective breaches: the question is whether by requiring online returns HMRC have interfered with the taxpayer's private life because of the possibility of a future interception with the online VAT return by a third party.

638. It was Mr De Mello's case that it was not for the appellant to show that there was risk of interference with his returns or his VAT payment, but for HMRC to show that their systems were secure. He takes this from *R (oao Wood) v Commissioner of*

Police of the Metropolis [2010] 1 WLR 123. In that case the police took and retained a photograph of a person in the vicinity of a meeting between arms manufacturers. The person had no convictions and was not accused of any crime or misconduct. On the question of justification under A8(2), Dyson LJ said:

> "[86] the retention by the police of photographs of a person must be justified….[90] It is for the police to justify as proportionate the interference with the claimant's Art 8 rights…."

639. Therefore says Mr De Mello, it is for HMRC to show that their online system is secure. This is wrong. It confuses the question of *interference* with the question of *justification.* The complainant must prove the interference; if proved the state must justify it. In this case the fourth appellant must prove the interference.

640. Mr Macnab saw the question of interference as a question of remoteness. The interception was too unlikely to amount to interference.

641. Mr De Mello's view was that it was not too remote. He referred to *AG (Eritrea) v Sec of State for the Home Department* [2007] EWCA Civ 810 at §28 where the Court said

> "an interference with private or family life must be real if it is to engage art 8(1), the threshold of engagement (the 'minimum level') is not a specially high one."

642. HMRC rely on In *R (oao Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307 at §28 where Lord Bingham said

> "…intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level."

643. This reliance by HMRC was misplaced as the case reached the ECHR (4158/05 [2010] ECHR 28) where the court rejected Lord Bingham's airport search analogy at §64 saying that the reason such a search might not be a breach of a passenger's human rights was not because it did not reach a minimum level of seriousness but because it was justified in the interests of passenger safety and secondly the passenger consented to it as a condition of being able to fly.

644. In conclusion I agree with Mr De Mello that the level of seriousness does not have to be particularly high.

645. Assessing the level of seriousness requires consideration of how likely such an interference by a third party would be. Mr Hallam's view was that electronic communications were inherently unsafe and a less safe method of communication than the postal system: nevertheless on the evidence with which I was provided I can go no further than to find that there is a risk of interference with it from third parties, but that the appellant has failed to prove that that risk is more than remote.

646. In particular the risk of interference would depend on the level of security & encryption of the VAT return service and on this the only evidence I had, which as hearsay was weak, was that in 11 years there had been no breaches of HMRC's online return system security other than those caused by an agent's failure to protect its password. Therefore, on what evidence I had I can only find that the risk of interception at the moment is remote (as long as the fourth appellant guards its password).

647. Therefore I conclude that a relatively remote possibility of future interception of an online return *by a third party* in my view clearly fails to cross the boundary into being an actual (or future) interference with correspondence *by HMRC*.

648. In any event, I prefer to analyse it as a question of causation. By laying the taxpayer open to the risk of interception, has HMRC actually breached the appellants' right to respect for its correspondence? Has HMRC's action actually caused the interference?

649. Mr De Mello did not dissent from HMRC's proposition that any interception by a third party with an electronic communication would be unlawful. It is also clear from *Wieser and Bicos v Austria* (2008) 46 EHRR 52 and *Narinen v Finland* [2004] ECHR 45027/98 that it is a breach of human rights for states to interfere with electronic communications without justification: but an interception by a third party is not interception by the state. In my view, an interception by a third party breaks the chain of causation at least where it is remote: the requirement to file online would not legally have caused the interception.

650. My view on this might be different if third party interception was a very likely or even an inevitable consequence of filing online. but as I have said the evidence I had did not support such a finding.

651. The same point can be made in consideration of the question of "victim" status. In order to make a complaint relying on the Convention, the appellant must be a 'victim' of the alleged breach. Similarly I consider that unless the risk is shown to be of a sufficiently serious degree, the fourth appellant would not be a "victim" so far as the regulations are concerned.

652. It may also raise the question of justification: if the risk of interception was high, the measure may not be justified within the state's margin of appreciation.

653. But this is speculation: the fourth appellant has shown that there is risk. It has not proved the degree of risk. It has not proved a serious degree of risk so it could not make out a case that the online filing regulation, in requiring it to file online, is a breach of A8.

654. The same answer can be given in so far as it is its case that it would be a breach of its right to respect for its correspondence and/or private life because it is required to pay online, although I accept that the risk of interception of an online payment must be higher (even considerably higher) that the risk of interception of an online return. But nevertheless the degree of that risk has not been proved. But in any event this

claim in addition fails on the facts: it is not required to pay online. This is because it can pay by any of the means set out in §23 which includes bank giro. While I have found payment by bank giro is an electronic means of payment (see §418) nevertheless it does not require the taxpayer to commit any financial details to the internet (§410). The fourth appellant's appeal on this basis must be dismissed.

655. (c) Is there interference with private life if a public library must be used to file online? Much the same could be said of filing at a public library as I have said of filing online. It clearly puts at risk the privacy of correspondence. It might not be possible for the taxpayer to work at a computer without a stranger watching what he did and effectively reading the taxpayer's correspondence with HMRC, or a stranger might use the same computer afterwards and be able to access the information which the taxpayer had entered.

656. Nevertheless, the degree of risk is not apparent. HMRC do not actually *cause* interception with correspondence in requiring a public computer to be used; they merely create the possibility of third party interception of the correspondence. But I am unable to assess the probabilities of such interception so I would not be satisfied, if relevant, that there is interference *by HMRC* with correspondence.

I note in passing, as the point was not argued, that in so far as the appellants cannot use a computer so in order to use one in a public library they would be required to learn to use one, then being required to learn to use a computer in order to file a simple tax return might be an interference with private life. I don't need to decide this on the facts of this case as the only person it is relevant to is Mr Tay and the matter falls under A1P1 anyway as explained in §759.

657. (d) engaging a professional agent: Engaging a professional agent costs money and to that extent it might be a breach of A1P1, if at all, for the same reason as given in *M*. It also requires the taxpayer to share with that agent the figures in his VAT return. While there is no right to keep figures in a VAT return private, this does in effect require the taxpayer to share his correspondence with a third party.

658. Is there failure to respect family or private life if compelled to (b) use friend or family member's computer or (e) request a friend or family member to make the return on behalf of the taxpayer: This is in a very different category. While there may be no right to keep a VAT return private, it is a very different thing to require a taxpayer to use his friends and family in order to file online.

659. It is stating the obvious that a person's friends and family are very much a part of his private life. In *R (oao Razgar) v Sec of State for the Home Dept* [2004] UKHL at [9] Lord Bingham said 'private life' extended:

> "to those features which are integral to a person's identity or ability to function socially as a person."

660. In *Gillan* it was noted that any physical search of a person interferes with their private life as it might cause embarrassment in front of friends. In *R (Countryside*

Alliance) at [10] Lord Bingham said Art 8's purpose was to prevent the state intruding into

> "the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they chose".

661. HMRC's point is that conducting a business is clearly not an aspect of a person's life where they can expect no interference from state. It is obvious they will have to make a tax return. But equally so, a person would not expect the state to compel them to involve their friends and family in their private business affairs.

662. If the law obliged the appellants to use a computer belonging to a friend or family member in order to file returns, would that interfere with his private life? If the law obliged the taxpayer to ask a friend or family member to make the return on their behalf would that interfere with his private life?

663. It seems to me that the answer must be yes. It forces the taxpayer to ask a friend or family member for a favour (to use that persons computer or for that person to make the online return on his behalf). That impinges immediately on his family and social life. Indeed what little evidence I had (see § 284) is, as one would expect, asking favours of friends and family can *adversely* affect that relationship, although to be a breach of A8 it would not have to be shown that the interference was adverse.

664. It would also be an interference with correspondence to the extent a taxpayer was forced to use a friend or family member to make the entries on the computer on behalf of the taxpayer.

665. Such an obligation would therefore interfere with the taxpayer's private and family life. Whether it is unlawful I consider below.

666. <u>obligation to file online will lead to appellants ceasing to trade?</u> It was suggested that the obligation to file online would cause the appellants to cease trading and that would interfere with their private life as their business was very much a part of their private life as can be seen from my findings of fact.

667. HMRC's case is that there is no right to carry on a business, citing *R (Countryside Alliance).* Even if the imposition of the obligation did cause the appellants to cease trading, this could not therefore be a breach of A8.

668. In so far as Mr Sheldon and the first appellant were concerned, to the extent it is even part of their case, it is not shown on the facts that filing online would cause them to cease trading. The position is a little different for Mr Tay. His business really cannot afford to pay a third party to file online. However, his business is so marginal financially that I could not be satisfied that a decision to stop trading would be the result of the obligation to file online.

669. As this is not made out on the facts, I do not need to consider it further.

Sufficient gravity?

670. The only methods of compliance which I have found involve an interference with the right to respect for private and family life or correspondence are (b)/(e) which both require the taxpayer to ask repeated favours of his friends and family, either to borrow their computer or to have them file on his behalf, or (d) instruct a professional agent.

671. I find that such interference is of sufficient gravity. I find it quite extraordinary that the law should require a business person to involve their friends and family in their compliance obligations and I am not aware of any other law that would require a person to do this. While no other cases concern comparable facts, it certainly seems in the question of the degree to which it engages private life, no less serious than a search of business premises or a search in front of friends.

The position on (d) is different. This is an interference with correspondence but is it of sufficient gravity to engage A8? I am not satisfied that the interference to the right to respect for correspondence is of sufficient gravity where all that is required is that a person instruct a professional agent to file their "correspondence" online, if that agent belongs to a professional body with a code of ethics and a duty of confidentiality.

Justification

672. Again, I need only consider the last three questions, which relate to legality and justification (see § 613 above), in so far as the obligation to file online forces a taxpayer to use friends and family, or to use an agent. I have not been able to dismiss A8 as relevant (by itself) to an obligation to use friends and family as that is an interference with private life; I have not been able to dismiss A8 as relevant to an obligation to use an agent as this necessarily involves a third party dealing with the taxpayer's correspondence.

673. I have dismissed the fourth appellant's case that the obligation to file online or pay electronically involves an interference with correspondence because of the risk of interception. I say the same of an obligation to use the public library.

674. HMRC's justification for online filing is that it saves them costs. So far as the obligation to file online forces a taxpayer to use the services or possessions of their friends and family, is this justified by HMRC's cost saving motivation?

675. I find it very difficult to see how this could be justified. It seems an extraordinary proposition that HMRC could compel a taxpayer to take advantage of his friends and family in order to comply with his tax filing obligations and I note that while there are costs saving, the cost saving per taxpayer is very low. Further, HMRC agreed that it would be a breach of HMRC's obligations to the taxpayer of confidentiality for an HMRC officer to discuss a taxpayer's tax affairs with his friends and family. HMRC are therefore requiring the taxpayer to do something that HMRC could not do themselves. Therefore I find that *if* the obligation to file online was

effectively an obligation to use friends and family to do so then this would be an unjustified breach of A8.

676. Further, looking at the justifications within A8 itself, it cannot be said that obliging a person to impose on their friends and family is something that is it necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

677. Methods of compliance (b) and (e) therefore are a breach of A8 of the Convention without considering whether they could be a breach of A14 in combination with A8.

678. Although I have in any event said that the breach is not of sufficient gravity for A8 so far as (d) using a professional agent is concerned, I am also not satisfied that if I am wrong on this, it would be an unjustified breach of the right to *respect* for correspondence to the extent that the person is required to instruct a professional who belongs to a professional body with a code of ethics and owes a duty of confidentiality. That of course does not prevent it being a breach of A1P1, which I discuss elsewhere.

Discrimination - Article 14 Convention

679. Article 14 of the Convention provides:

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

680. An interpretation of this was set out in the case of *Kjeldsen v Denmark* [1976] Convention 5095/71 at [56]:

> … within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic (status) by which persons or groups of persons are distinguishable from each other.

681. The first thing to note is that, contrary to popular belief, the Convention does not confer on anyone the right not to be discriminated against. The right is (merely) not to be discriminated against when exercising the other rights contained in the Convention.

682. And this is why, even if there is no breach of A1P1 by itself, I must consider whether, in the alternative there is a breach of A14 because in the exercise of A1P1 or A8 the appellants may have been unlawfully discriminated against.

683. Again it is helpful to consider the application of A14 as a series of questions. I understood the parties to be agreed that the relevant questions for A14 are:

(a) Do the appellants have a characteristic protected by A14?

(b) Have the appellants been discriminated against because of this protected characteristic?

(c) Was the discrimination is within the ambit of a convention right (in other words, did the discrimination occur during the exercise of a right protected by the Convention?)

(d) Is the discrimination nevertheless justified?

Protected characteristics and "other status"

684. A14 contains a list of protected characteristics. They are:

> sex, race, colour, language, religion, political or other opinion, natural or social origin, association with a national minority, property, birth or other status

685. None of the specific statuses mentioned in the list are at issue in this appeal. The joint appellants claim discrimination on the grounds of disability, age, location, and (at least by implication) computer illiteracy. The fourth appellant's claim is not based on discrimination.

686. The list is clearly not meant to be exhaustive. It is prefaced by the words "such as" and concludes with the words "other status". The joint appellant's claim is that disability, age, location and (by implication) computer illiteracy are within "other status" and are protected characteristics.

687. I also understood the parties to be agreed that nevertheless the list specifically mentioned the "core" characteristics, discrimination on the basis of which would require 'very weighty reasons' to justify. Discrimination on the basis of characteristics with only "other status" would not require such strong justification and is allowed unless 'manifestly without reasonable foundation": see *Burnip v Birmingham CC* [2012] EWCA Civ 629 at [27-28] and *Stec v UK* [2006] EHRR 47 at [51-52].

Protected characteristic – disability

688. I understood HMRC to accept that disability was within "other status." They do not accept that the regulations discriminated against the appellants on the basis of disability.

689. I find that disability is a protected characteristic under A14 of the Convention.

Protected characteristic – age

690. Originally HMRC disputed whether age was within "other status" and therefore a protected characteristic. Ms Redston draw their attention to the case of *R (British Gurkha Welfare Society & others) v Ministry of Defence* [2010] EWCA Civ 1098 [11] in the face of which Mr Macnab accepted that age was an "other status". In that case Kay LJ said

> "We are concerned here with discrimination on the grounds of national origin and age which is a relevant 'other status'"

691. There was a dispute about what particular age mattered? The age of 60 or 65? Ms Redston thought the cut off was 60 and Mr Macnab challenged this. I think the argument sterile: the other status is "age". A measure which discriminated against a person because of his age (young, old or in the middle) is potentially unlawful under A14.

Protected characteristic – computer illiteracy?

692. Mr Macnab's view was that to the extent that the joint appellants were discriminated against it was not because of age or disability but because they were computer illiterate and, he implied, computer illiteracy is not an "other status".

693. As a matter of fact, of course, so far as Mr Sheldon at least is concerned, Mr Macnab is not correct. Mr Sheldon is not computer illiterate.

694. As a matter of law, although it was not put specifically as the appellants' case that computer illiteracy was an 'other status', I could not as easily as HMRC make the assumption that computer illiteracy was not a protected status. I was not convinced that under the Convention it would be lawful in all cases to discriminate against a person on the grounds, say, that they were illiterate (ie unable to read and write). And if illiteracy was a protected status, then I could see no reason why computer illiteracy would not be a protected status. The question in all these cases would come down to whether the discrimination was justified and, I accept, that the further the particular protected status is from the core statuses such as sex and race, the easier it would be to justify the discrimination.

695. HMRC see 'other status' as being limited to something inherent in the person such as their race or sex. This is clearly too limited. A person is born with a particular race, national identity and sex, but it is accepted that disability and age are 'other status' and these can or will change after birth. Old age is certainly not a status that anyone is born with! Even with the core characteristics, national identity, sex and, very easily, political opinions can be changed. So 'other status' is not limited to something inherent in the person. A status obviously includes a state of mind at any particular time in a person's life as well as a state of health at any particular time in a person's life. It includes their legal position (eg such as their ownership of property). It includes their class (their "social origin"). And although I am unaware of a case to this effect, it seems to me that it would include the extent of a person's education. So I find that illiteracy, and in particular computer illiteracy, is a protected status.

696. Mr De Mello drew to my attention the case of *Hode and Abdi* Application no. 22341/09 where the ECHR said:

> [46] In the present case, the treatment of which the applicant complains does not fall within one of the specific grounds listed in Article 14. In order for the applicant's complaint to be successful, he must therefore demonstrate that he enjoyed some "other status" for the purpose of Article 14. In this regard, the Court recalls that the words "other status" (and a fortiori the French "toute autre situation") have generally been given a wide meaning (see *Carson*, cited above, § 70, and *Clift v. the United Kingdom*, no. 7205/07, § 63, 13 July 2010). Although the Court has consistently referred to the need for a distinction based on a "personal" characteristic in order to engage Article 14, it is clear that the protection conferred by that Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, cited above, § 59). On the contrary, the Court has found "other status" where the distinction was based on military rank (*Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22); the type of outline planning permission held by the applicant (*Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A no. 222); whether the applicant's landlord was the State or a private owner (*Larkos v. Cyprus* [GC], no. 29515/95, Convention 1999-I; the kind of paternity the applicant enjoyed (*Paulík v. Slovakia*, no. 10699/05, Convention 2006-XI (extracts); the type of sentence imposed on a prisoner (*Clift v. the United Kingdom*, cited above); and the nationality or immigration status of the applicant's son (*Bah v. the United Kingdom*, no. 56328/07, Convention 2011).
>
> …..

697. Mr Macnab's comment on this case was to the effect that if every difference of one person from another is an 'other status' then soon no one would have to obey the law. But that is not the case. All it means is that while it is easy to show an 'other status' there must still be discrimination on the basis of that status and that that discrimination must not be justified.

698. In conclusion, I consider that inability to use a computer by reason of lack of education or training would be an 'other status' but that, as an 'other status' far removed from the core protected statuses, it would be easier to justify discrimination on the basis of it.

699. Having decided that age, disability and computer illiteracy are all 'other status' the next question to consider is whether the appellants have been discriminated against on the basis of their possession of any one of these protected characteristics.

700. It is obvious that the regulations do not directly discriminate against them: the regulations (with the three exceptions – religion, insolvency and low turnover - I have already mentioned) are universal. All VAT registered businesses are required to file their VAT returns online.

Indirect discrimination

701. The joint appellants' case is that the regulations indirectly discriminate against them by not giving them an exemption from the requirement to do what (nearly) every other VAT registered business is required to do and in particular to exempt them from online filing.

702. The Convention recognises the possibility of indirect discrimination: the court said in *DH v Czech Republic* (2008) EHRR 3:

> "…a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group."

703. In the case of *Thlimmenos* (34369/97) the ECHR said:

> "[44] … The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

704. The concept of indirect discrimination was refined in *Thlimmenos* which recognised that there were two kinds of indirect discrimination. This was explained in the *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634 per Kay LJ as follows:

> "Different treatment of persons in analogous situations and same treatment of persons in significantly different situations are both *prima facie* discriminatory under Art 14 where it is disability that is the reason for the different treatment or the feature that makes the situations significantly different."

Elias J said:

> "The traditional concept of indirect discrimination is not the same concept as treating different cases differently. In the latter, the core of the applicant's complaint is not that a rule is imposing a barrier and cannot be justified: rather, the complaint is that even accepting that the rule can be justified in its application to others, it ought not to be applied to the applicant because his or her situation is materially different, and that difference ought to be recognised by the adoption of a different rule, which may take the form of an exception from the general rule. The complaint is not that the single rule adopted is inappropriate because discriminatory and unjustified: it is that the circumstances require that there should be more than one rule."

705. The point about the different types of indirect discrimination is that affects justification – as explained by Kay LJ in *Somalia:* in traditional indirect discrimination the complaint is that the indiscriminate rule is unfair and cannot be justified; in non-traditional indirect discrimination the complaint is that the failure to make an exception to the indiscriminate rule is unfair and cannot be justified. Therefore, when considering justification of the indiscriminate rule traditional indirect

discrimination the court looks at the rule itself; in the non traditional sort it looks at the whether the refusal to draw a distinction or grant an exemption can be justified.

Discrimination?

706. Before considering whether the law is justified, the appellants have first to show that they have been discriminated against on the basis of a protected characteristic.

707. As a matter of law it may not be difficult to establish discrimination. The ECHR has said in *DH v Czech Republic* (2007) 23 BHRC 526*:*

> "As applicants might have difficulty in proving discriminatory treatment, in order to guarantee those concerned the effective protection of their rights, less strict evidential rules would apply in cases of alleged indirect discrimination. Thus where an applicant alleging indirect discrimination established a rebuttable presumption that the effect of a measure or practice was discriminatory, the burden then shifted to the respondent state, which had to show that the difference in treatment was not discriminatory."

708. HMRC accept this shift in the burden of proof but consider that either the appellants have failed to raise a rebuttable presumption of discrimination or that HMRC have successfully rebutted the presumption.

709. Mr Macnab says that the appellants have failed to show that the law affects them differently because they are old or disabled. I understand that he takes this view because he considers (as I have already reported) that the appellants' problems stem from computer illiteracy rather than disability or old age.

710. I reject this argument. Firstly, I consider that computer illiteracy is as much a protected characteristic as disability or old age. Secondly, it fails to deal with the scenario of a person too disabled to use a computer. Lastly, it ignores that the appellants' computer illiteracy is inextricably linked to their age, in that they are too old to have learnt to use computers at school.

711. The appellants relied on their own oral evidence and also on some statistical evidence. HMRC criticised the use of statistical evidence on the basis (as I understand it) it is hearsay and cannot be properly tested. Ms Redston pointed out, however, that the courts seem to allow, almost expect, statistical evidence. Kay LJ in *Burnip* said:

> "[13] … I would reject the attempt on behalf of the Secretary of State to criticise the appellant's case for not being founded on statistical evidence. Whilst such evidence can be important in an art 14 case …it is not a prerequisite. Where, as in the present case, a group recognised as being in need of protection against discrimination – the severely disabled – is significantly disadvantaged by the application of ostensibly neutral criteria, discrimination is established, subject to justification"

712. He also said:

> "[18] Whilst it is true that there has been a conspicuous lack of cases post- *Thlimmenos* in which a positive obligation to allocate resources has been established, I am not persuaded that this is a legal no-go area. I accept that it is incumbent upon a court to approach such an issue with caution and to consider with case any explanation which is proffered by the public authority for the discrimination. However, this arises more at the stage of justification than at the earlier stage of considering whether discrimination has been established….

713. I have accepted the statistical evidence as explained above. I have found that the evidence shows that there is less internet usage amongst elderly. I have found that the elderly are less likely to know how to the use a computer (§§386, 394). I have found that it would require some significant investment in time to learn how to use a computer (§§404-408) and they will find it harder to learn than younger persons (§396-403). And they are less likely to own a computer (§395). I have found that disabled persons may be unable to use a computer (see § 384-385).

714. Whether there is discrimination on the basis of age, disability, computer illiteracy or remote location has to be addressed by looking at each of the methods of compliance.

715. <u>(a) use of own computer.</u> If this were a requirement, I find it would discriminate against those who are computer illiterate due to their age as it they are unlikely to own a computer and this would require them to incur an expense which would be unlikely to be required by a computer literate person who are more likely to own a computer;

716. So far as a person who is too disabled to use a computer without difficulty or pain, it would discriminate against them because they are unable to comply, unlike an able bodied person. This is the same as a person living remotely: they are discriminated against compared to all other persons as they are unable to use their own computer due to lack of internet access.

717. <u>(b) use of computer belonging to friend or family member:</u> The question of discrimination does not arise as I have said that it is a breach of A8 even without considering discrimination.

718. <u>(c) use of computer in public library:</u> an elderly person is more likely to be computer illiterate and less likely to own a computer than a younger person. Being compelled to use a computer in a public library because they do not own their own discriminates against them as a younger person is much more likely to be computer literate and therefore to own their own computer.

719. So far as a person who is too disabled to use a computer without difficulty or pain, it would discriminate against them because they are unable to comply, unlike an able bodied person.

720. So far as someone living remotely is concerned, this option requires them to have the expense of travel to a less remote area with broadband access: they are

discriminated against compared to all other persons who do not need to incur such expense and/or can use their own computer.

721. (d) use of professional agent: an elderly person is more likely to be computer illiterate than a younger person and therefore more likely to have to incur the expense of instructing a professional agent than a younger person.

722. A person too disabled to use a computer is put to the expense of instructing an agent that a non-disabled person would not.

723. A person living remotely is put to the expense of instructing an agent that a person not living in an area without broadband access would not be put to.

724. (e) use of friend or family member as an agent: The question of discrimination does not arise as I have said that it is a breach of A8 even without considering discrimination.

725. (f) phone filing and (g) HMRC enquiry centre: these options do not arise for the reasons expressed above at §§479-522.

726. In conclusion the methods of complying with the obligation to file online, to the extent that they are relevant, all involve indirect discrimination against the elderly, disabled and those living remotely. However, that is a long way from saying that they are a breach of the Convention. They must be discriminated against when within the ambit of another Convention right and the discrimination must not be justified. I consider this below.

Within ambit

727. The parties were agreed that A14 is not a free standing right. Discrimination is lawful except when a person is exercising a convention right.

728. The European Court of Human Rights has explained the position in numerous cases. In *Marckx v Belgium (1979-80) 2 EHRR 330* the Court said:

> "[32]…The Court's case law shows that, although Article 14 has no independent existence, it may play an important autonomous role by complementing the other normative provisions of the Convention and the Protocols: article 14 safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions. A measure which, although in itself in conformity with the requirements of the Article of the Convention of the Protocols enshrining a given right or freedom, is of a discriminatory nature incompatible with Article 14, therefore violates those two articles taken in conjunction. It is as though Article 14 formed an integral part of each of the provisions laying down rights and freedoms."

729. In *Thlimmenos* the ECHR , as I have already reported, said:

> "[40] The court recalls that Art 14 has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Art 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols."

730. In *Carson v UK* [2010] ECHR 42184/05 the Court said

> "[63] …It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles….

731. The parties did not agree what "within the ambit" of the Convention actually meant. HMRC's position was that it meant "close to the core" of a convention right.

732. HMRC's view, relying on a statement by Lord Bingham in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, para 13,

> "They denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed."

733. Lord Bingham repeated this in *Countryside Alliance* at §23

> "it is enough there should have been discrimination on a proscribed ground within the ambit of another article of the convention."

734. HMRC also relied on the House of Lords' decision in *M v Sec for State for Work and Pensions* [2006] UKHL 11 to similar effect. The facts of the case concerned a parent who did not live with her child and was by UK law required to pay child support to the custodial parent. The law made allowance for extra expenses where the non-custodial parent lived with a person of a different sex so that child support payments would be lower than if they lived on their own or with a person of the same sex.

735. The non custodial parent complained that the law was in breach of A14 taken with A1P1. In other words, while she accepted that requiring non custodial parents to pay child support payments was not by itself a breach of A1P1 (presumably because it was justified), her claim was that it was unlawful because it discriminated against her on the basis of her sexual preference (in living with a person of her own sex) because it required her to pay more in child support payments than if she had chosen to live with someone of the opposite sex. The claimant was liable for child support payments of £46.97 per week. Had she and her partner been treated in the same way as an unmarried heterosexual couple her liability would have been only £13 per week.

736. The House of Lords had to consider whether the discrimination of the complainant was within the ambit of an exercise of a convention right by her. Lord Bingham said:

> "[4] It is not difficult… to identify the core values which the provision [ie A1P1] is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous those expressions necessarily are. At the outer extremity, it may not… I cannot accept that even a tenuous link is enough…."

737. His conclusion was:

> "[5] …I regard the application of a rule governing a non-resident's parent's liability to contribute to the costs incurred by the parent with care, even if it result in the non-resident parent paying more than she would under a different rule, as altogether remote from the sort of abuse at which A1P1 is directed."

738. Lord Nichols said:

> [13] … The … boundary identified in the Strasbourg jurisprudence is that, for article 14 to be engaged, the impugned conduct must be within the 'ambit' of a substantive Convention right. This term does not greatly assist. In this context 'ambit' is a loose expression, which can itself be interpreted widely or narrowly. It is not a self-defining expression, it is not a legal term of art. Of itself it gives no guidance on how the 'ambit' of a Convention article is to be identified. The same is true of comparable expressions such as 'scope' and the need for the impugned measure to be 'linked' to the exercise of a guaranteed right.
>
> [14] The approach of the Convention is to apply these expressions flexibly. Although each of them is capable of extremely wide application, the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice. Rather, the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa. In other words, the Convention makes in each case what in English law is often called a 'value judgment'.
>
> [17] ……..But, on this, there is an immediate difficulty confronting the claimant: the impugned regulations have no adverse impact on that family life. The adverse impact of which the claimant complains is the adverse impact the regulations have on her as a partner in her family relationship with her new partner. Her complaint is that she is treated differently, and is worse off financially, than she would be if she were living with a man.
>
> …..

739. The case was appealed to the Convention where it was known at *JM v UK* and reported at [2010] BHRC 60 The Court did not agree with the House of Lords' conclusion that the discrimination was not within the ambit of A1P1. It decided the case in favour of the appellant. It said:

> "The application of art 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the convention. It is necessary bit it is also sufficient for the facts of the case to fall 'within the ambit' of one or more of the convention articles (see among many other authorities *Burden v UK …)* The Court has also explained that art 14 comes into play whenever 'the subject matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed.' (see *National Union of Belgian Police v Belgium* …) or the measure complained of is 'linked to the exercise of a right guaranteed' (see *Schmidt v Sweden* …)"

740. In conclusion, while I am not left with a clear definition of "within the ambit" the use of the phrase "close to the core" has not been adopted or approved of by the ECHR. It does, as Lord Bingham says, appear to come down to a value judgment on a case by case basis.

741. What does seem to me to be clear is that where the finding is that another convention right has been engaged and the only remaining issue in respect of that right is whether the potential breach of that right is justified or proportionate, any discrimination within A14 will be "within the ambit" of that convention right. This must be so because a part of the question of justification or proportionality is whether there is discrimination (see §§ above) and to conclude otherwise would be illogical.

742. Looked at in this manner the *JM* case seems straightforward. The requirement to pay child support payments engaged A1P1: it was a potential breach of A1P1 because it involved deprivation of possessions. The only question before the court in reality was whether the deprivation of possessions was justified as in the "general interest". And the answer to that question should have come down to whether the law was justified and in particular whether it was discriminatory, and, if discriminatory, whether the discrimination was justified. But A14 was engaged because there was a deprivation of possessions – irrespective of the question of whether that deprivation was justified and therefore whether there was actually a breach of A1P1.

743. In other words, 'within the ambit' includes anything that would be a breach of a convention right but for an exemption or justification.

744. In my view, any taxation amounts to a deprivation of property and therefore potentially is a breach of A1P1. Nevertheless, in most cases tax would not be considered to be levied in breach of A1P1 because it is within the exemption for "secur[ing] the payment of taxes" and, in addition, is justified within the state's wide margin of appreciate and not disproportionate. But, in my view, simply because tax is a deprivation of property and potentially a breach of A1P1, it will always be open to a taxpayer to challenge a tax on the grounds it is discriminatory under A14. Whether of course such a challenge would succeed is entirely another matter: but it would not be rejected on the grounds that taxation was not within the ambit of A1P1. The case would come down to the question of (a) whether there was discrimination and (b) if there was, whether the discrimination was justified.

745. I do not suggest that such cases are the only ones within the ambit of a convention right. It is clear from cases such as *Petrovic v Austria* (2001) 33 EHRR

307 that 'within the ambit' has an even wider meaning. In that case the state granted a parental leave allowance. The ECHR decided that while the state had no obligation to grant such an allowance, if it chose to do so it must do so in a non-discriminatory fashion because it was within the ambit of the right to respect for family life. A similar decision was reached in *Abdulaziz and others v UK*. (1985) 7 EHRR 471

> "[71] …The Court has found Art 8 to be applicable. Although the United Kingdom was not obliged to accept [names of 3 complainants] for settlement and the Court therefore did not find a violation of Article 8 taken alone, the facts at issue nevertheless fall within the ambit of that Article….
>
> Article 14 is therefore applicable."

746. The facts of that case were, in barest of outline that non-resident wives of men were allowed to enter and reside in UK but non-resident husbands of women were not. The ECHR said there was nothing in the Convention to compel UK to permit non-resident spouses residence in the UK, *but* if they did so, they could not do so in discriminatory fashion.

747. All these show that "within the ambit" has a fairly wide meaning and in particular it would apply where an article of the Convention would be engaged (because there is a right that has been interfered with) but there is no breach because either the interference is justified or because the right itself has an exemption. It is also engaged where eth state has chosen to recognise a right within a core part of the Convention. What does this mean for the joint appellants? (I do not mention the fourth appellant as it does not rely on A14).

748. A1P1: in so far as the obligation to file online causes an appellant to incur financial expenditure the regulations are within the ambit of A1P1 and therefore the regulations must not discriminate unlawfully and without justification;

749. A8: in so far as the obligation to file online forces an appellant to use their friends and family to file online on their behalf, or to use the computer of their friend or family member, I consider that this is a breach of A8 without justification and the question of discrimination does not arise.

750. In so far as the obligation to file online forces an appellant to use an agent, I do not consider that this is a breach of A8 by itself. Similarly, in so far as the obligation to file online forces an appellant to use a public library, I do not consider that this is a breach of A8 by itself. But I have to address the question of whether it is within the ambit of A14.

751. While there may be no human right even for taxpayers whose business is their sole income to keep private their VAT returns, nevertheless I consider that this is within the ambit of the right to private life because the UK government has chosen to give taxpayers the right to confidentiality in their tax affairs (s 18 CRCA 2005 mentioned at § 629 above). My decision relies on *Petrovic v Austria* and *Abdulaziz and others v UK*. In particular, Mr Macnab conceded that it would be a breach of the

law for an HMRC officer to use a computer in a public library in order to deal with a taxpayer's VAT returns.

752. The same cannot be said of compelling a taxpayer to use an agent: HMRC are entitled to discuss a taxpayer's affairs with a properly authorised agent.

753. So far as using the library is concerned, the question therefore arises whether the regulations, in so far as they make it compulsory to use a public library, are discriminatory.

754. So I need to consider discrimination in respect of A1P1 and A8.

Discrimination?

755. Mr Bishop is too old (although not quite 60) to have learnt to use a computer. If he were compelled to instruct an agent to file his returns, this would require him to expend money. The discrimination on the grounds of age is therefore linked to and within the ambit of the right to possessions.

756. Mr Tay similarly is too old (although not yet 65) to have learnt to use a computer. If he were compelled to instruct an agent to file his returns, this would require him to expend money. The discrimination on the grounds of age is therefore linked to and within the ambit of the right to possessions.

757. Mr Tay is also located in an area without reliable broadband access, or at least where broadband is extremely expensive. If he were compelled to instruct an agent to file his returns, this would require him to expend money. The discrimination on the grounds of his physical location is therefore linked to and within the ambit of the right to possessions.

758. Mr Sheldon is too disabled to reliably use a computer to file his return (§ 304). If he were compelled to instruct an agent to file his returns, this would require him to expend money. The discrimination on the grounds of disability is therefore linked to and within the ambit of the right to possessions.

759. What about using a public library? This is irrelevant to Mr Sheldon who owns a computer. For both Mr Sheldon or Mr Bishop it is not an option due to disability. For Mr Tay it would involve expenditure as the library is located some distance away. The fact he does not own a computer is linked to his age. It is also a practical problem in that he does not know how to use a computer. He would incur expenditure on travel to a course to learn how to use a computer. So this too is within the ambit of A1P1. It is discriminatory because his inability to use a computer is connected to his age for the reasons given at § 713.

Justification

760. That is not the end of the question of A14. Interference with rights, or discriminatory interference with rights, under the Convention are not *breaches* of the Convention if the interference can be justified.

761. While it is for the applicant to show a right is engaged under Convention, it is for the state to show that the interference with it is justified. In the case of *R (oao Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123 the police took and retained a photograph of a person in the vicinity of a meeting between arms manufacturers. The person had no convictions and was not accused of any crime or misconduct. On the question of justification under A8(2), Dyson LJ said:

> "[86] the retention by the police of photographs of a person must be justified….[90] It is for the police to justify as proportionate the interference with the claimant's Art 8 rights…."

762. The ECHR has said, in the *Belgian linguistics Case (no 2)* [1968] ECHR 1474/62 at [10], that discrimination is can be justified if has objective and reasonable justification. It must pursue a 'legitimate aim' and must have 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised". And States have a margin of appreciation in deciding whether differences in situation justify different treatment: *Gaygusuz v Austria* [1996] ECHR 17371/90 at [42]

763. The margin of appreciation was discussed by the ECHR in *Stec v UK* 2/55/13 at §52. That case concerned a reduction in pension benefits which impacted more on women than men because at that time women were entitled to a pension at a younger age than men. The Court said:

> "[52] The scope of the margin [of appreciation] will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'.

764. So far as justification is concerned, HMRC are right to say that while discrimination on the grounds of a "core" status such as sex or race must have very weighty reasons to justify it (see § 42 of *Gaygusuz v Austria* [1996] ECHR 1737), the same test would not apply to discrimination on the grounds of "other" status. Indeed, this was said by Herderson J sitting in the Court of Appeal in *Burnip:*

> "weighty reasons may well be needed in a case of positive discrimination, but there is no good reason to impose a similarly high

> standard in cases of indirect discrimination…the proportionality review applicable in the present case must be made by reference to the usual standard…."

In other words, only <u>good</u> reasons are needed to justify indirect discrimination.

765. HMRC rely on *AM (Somalia)*[2009] EWCA Civ 634 where the finding of the Court of Appeal was that there is nothing wrong with having indiscriminate rule even though there may be cases of hardship.

> "[29] It is common ground that there is nothing disproportionate in a general rule or policy which makes self-sufficiency a requirement of entry. The first question is whether it is disproportionate not to exclude the disabled. In my judgment, it is not. Unlike the categories of "suspect" grounds to which I referred in paragraph 15, disability is a relative concept. It may be severe or moderate, permanent or temporary. It affects the affluent as well as the indigent…..
>
> ….There will be disabled sponsors who are far more and far less disabled than the sponsor in this case. All this convinces me that it is reasonable and proportionate to have a criterion of self-sufficiency without a general exemption for the disabled. It will produce cases of hardship but that in itself does not render it disproportionate, particularly where provision is made for exceptional compassionate circumstances."

766. The purpose of the law was to ensure migrants would not need state benefit by requiring their sponsors be able to support them: a disabled person unable to work is not be able to meet this.

767. But it is, as the Supreme Court says, a value judgment in each case:

> The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a 'value judgment' by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force." *Wilson v First County Trust Ltd* [2003] UKHL 40 at [62].

768. I deal with the justifications that HMRC have put forward, bearing in mind that it is for HMRC to justify the discrimination.

769. <u>Universal online mandation is permitted by EU law:</u> I deal with this under the EU law section below at § 840-847. In summary, this justification fails because firstly, the regulations do not introduce universal online mandation – they admit exceptions; and secondly, I find for reasons explained at §§840-847 EU law does not in fact authorise *universal* online mandation.

770. <u>The relevance of the telephone filing/enquiry office concessions:</u> HMRC say that I must not consider justification because different treatment has been offered. If indirect discrimination is a question of failing to make different provision for persons in significant different position then, says HMRC, they have made different provision

by providing the telephone filing concession. Of course, I have said that they are unable to rely on this concession for the reasons set out in §§477-521.

771. While I came to that conclusion as a matter of public law, I consider that similarly the ECHR would not permit reliance on a concession that was kept secret from some of those it was intended to benefit, particularly when the purpose of keeping it secret was to compel the taxpayer to use other options if at all possible (see §501-510). Telephone filing is only relevant if all the other methods of compliance with the online filing obligation would (if obligatory) involve a breach of human rights of the appellants. So, on the assumption that all the other methods do involve a breach, then it would be iniquitous if HMRC could rely on telephone filing as a method of complying with the taxpayer's filing obligations without their Convention rights being breached, where the right to telephone filing is kept secret in order to compel taxpayers to use the other methods that do involve a breach of their human rights! The telephone filing concession can not be used as justification under the Convention.

772. So because the concession was kept largely secret HMRC can no more rely on the concession in this Tribunal as a matter of public law, than it can rely on it as a matter of the law applicable to the Convention. The same applies to the enquiry office concession. But as I explain below, that does not make telephone filing or enquiry office concession irrelevant to proceedings.

773. Justification for universal mandation: HMRC's case is that the VAT system should apply equally to all and that that online mandation was manifestly in the public interest. The appellants do not dispute that: they do not require online mandation to be justified, just the failure to make exemption for the elderly, disabled, and those living remotely, in this non-traditional type of indirect discrimination case (see §§ 701-705).

774. HMRC's case, as I understood it, was that it was easier to justify indirect discrimination because equality is equity. This may well be right: but it is difficult for HMRC to justify the VAT online regulations on this basis because they do not give equality to all. At the time of the decisions complained of, as I have frequently mentioned before, there were three exemptions, the religious, insolvent and small turnover exemptions. The failure to make exemptions for elderly, the disabled and persons living too remotely for broadband access cannot be justified on the grounds that the regulations were universal because they were not universal.

775. In any event, the main reason that the requirement for *mandatory* filing was introduced was because *optional* online filing had not resulted in sufficient numbers of taxpayers submitting online returns to lead to significant cost savings for HMRC. This justifies the mandatory nature of the rule but not necessarily the failure to make exemptions from it.

776. The failure to provide exemptions: can the failure to provide exemptions be justified on any other grounds, bearing in mind that it cannot be justified by the fact that the regulations applied universally (because they did not). And I note that this

alone distinguishes the situation from *AM Somalia*, although that case is also distinguishable on the basis that while the value of the requirement of self-sufficiency for migrants seems obvious, the requirement for universal online filing without exception even for hard cases is less obvious.

777. In so far as the justification for the mandatory rule was that it compelled taxpayers to become familiar with using computers which might have knock-on benefits for them in their business, I do not accept it. The cost to taxpayers without computers of acquiring a computer are considerably higher than the savings to HMRC and there has been no attempt by HMRC to suggest that this cost is justified by whatever knock-on benefits that a taxpayer might have. In any event, since it seems cheaper to pay an agent than buy a computer, the taxpayers can be supposed not to receive any knock-on benefits at all. They won't need to learn to use a computer in order to file on line. I dismiss this as a justification.

778. I have rejected as unreliable the evidence that the failure to make an exemption for disabled persons was because it would be hard to articulate. I would not accept as justification even if it were the reason: it fails to explain why there was no exemption for elderly persons or those living remotely and in any event I do not accept that it is not possible to check on whether a person is too disabled to use a computer. An obvious check is to require a doctor's letter.

779. The appellants' case is that the failure to make exemptions is not justified because it discriminates against the elderly and disabled, and those living remotely, putting them to more cost than HMRC save, particularly when, as they comprise a very small, and diminishing, group within the VAT registered community, exemption from the regulations for them would not impact on HMRC's overall cost saving, and bearing in mind that HMRC has retained the ability to accept paper returns from other taxpayers in any event.

780. I agree with the appellants. It is a value judgment. While "age" and "disability" may be an "other" status, the failure to grant them special treatment requires in my value judgment requires rather more justification than HMRC have given.

781. <u>State's margin of appreciation to be respected:</u> HMRC's position is that nevertheless the regulations have not gone beyond the State's margin of appreciation. Compliance will cost disabled and elderly persons more than other persons but this failure to provide an exemption is not outside the State's margin of appreciation.

782. But the problem for HMRC with this is that it seems to me that the ECHR will look at the Government's own exercise of its margin of appreciation. Indeed, it says that it would not normally *interfere* in the State's own assessment. In *Stec* it said that the "Court will generally respect the legislature's policy choice" unless manifestly without reasonable basis. Respecting HMRC's policy choices, requires the Tribunal to recognise that HMRC has *chosen* to make exemptions. It is difficult for the HMRC to say that a universal rule is within its wide margin of appreciation, when what the Government has introduced is not a universal rule, but a rule with exemptions. It is even harder to say indirect discrimination is within its wide margin of appreciation,

when HMRC has chosen, however ineptly, to make an exemption for the particular persons who are claiming that they are the victims of indirect discrimination.

783. In this case the Government has recognised the need for exemptions for some hard cases, such as those with a religious objection to the use of computers.

784. Moreover, the regulations exempt taxpayers in certain insolvency procedures yet HMRC was unable to give me a satisfactory explanation for this exemption (see §§364-5). If the regulations give an exemption which the HMRC officers concerned are unable to justify, this makes it hard to justify a failure to give exemption to a class of persons to whom the regulations will cause hardship.

785. Further, there was an exemption for those with low turnovers and one of the reasons for that was that this was likely to include those less able to file online, such as the disabled. While it turns out that the turnover level for exemption was so low that the taxpayers in this appeal were unable to benefit from it, nevertheless, as old and computer illiterate and/or disabled, they were the sort of taxpayers intended to benefit from this exemption. This makes it hard for HMRC to justify a failure to give them an effective exemption.

786. Therefore, this fails to explain why exemptions did not exist for the old and disabled and those living too remotely.

787. Further, and perhaps conclusively, the HMRC has recognised, however ineptly, the need to exempt those who are old, disabled or living too remotely. It introduced telephone filing. It is difficult for HMRC to justify the failure of the regulations to exempt these three categories of people when even HMRC, by its actions if not its submissions to the Tribunal, considers that these people should be given a concession from the regulations.

788. For these reasons, I find that there was indirect discrimination against old persons, who because of their age were computer illiterate, and against disabled persons, who due to their disability were unable to use a computer or only able to use one with difficulty. There was also discrimination against those who lived in too remote an area for broadband access.

789. While the regulations can be justified, the failure to make exemptions for these three classes of persons cannot be justified for the reasons given above.

Conclusions on the different methods of compliance

790. The possible methods of compliance were:

> (a)The taxpayer could use his own computer and internet link. For taxpayers without an online computer this would involve capital expenditure on the purchase of hardware and software and income expenditure on a monthly contract for broadband or dial-up link to the internet;

(b) The taxpayer could use an online computer belonging to a friend or family member assuming that friend or family member gave permission. This would not be expected to involve expenditure on the part of the taxpayer.

(c) The taxpayer could use a public computer free of charge at a public library.

(d) The taxpayer could engage a professional agent to make the online submission on behalf of the taxpayer.

(e) At the request of the taxpayer, a friend or family member could make the online return submission on behalf of the taxpayer.

(f) The taxpayer could use HMRC's "phone filing" facility;

(g) The taxpayer could use computer at an online enquiry centre.

791. To what extent would any of these, if compulsory, involve a breach of the appellants' human rights?

(a) Use of own computer

792. If the appellant already owned an online computer, I do not consider that there would be a breach of ECHR in compelling the taxpayer to use it (if he could) in order to file its VAT return.

793. If the appellant did not own an online computer, compelling the taxpayer to buy one in order to file its VAT return would in my view be a breach of A1P1 as it would be an interference with the possessions of the taxpayer beyond the margin of appreciation allowed to governments because it would be out of all proportion to the cost benefit to HMRC and discriminatory against persons who were old as they are less likely to know how to use a computer and therefore to own one; in any event it would also be a breach of A1P1 combined with A14 for the same reason.

794. It would also involve a computer illiterate person learning how to use a computer. Elderly persons are less likely to know this: this is why they are less likely to own a computer in the first place. To this extent it is also not a practical option. To the extent that it is the UK Government's case that such persons should learn how to use a computer, this has cost implications which would bring compliance by learning to be computer literate within A1P1 at least in combination with A14. As elderly persons are computer illiterate by reason of their age, this would be a breach of A1P1 in combination with A14.

(b) use of computer belonging to a friend or family member and (f) have friend of family member as agent

795. I consider that if a taxpayer were compelled by law to use a computer belonging to a friend or family member, or ask such a person to act as their agent, than this would be a breach of A8, irrespective of the question of discrimination. Nevertheless,

it is also a breach of A8 combined with A14. It would be discrimination against disabled or old people or persons who live remotely as these are the persons who will not have their own computer and/or be able to use one.

796. The same comments on becoming computer literate would apply in respect of elderly persons as above at § 794.

(c) use a computer at a public library.

797. I consider that by itself this option would not be a breach of A8 because the risk of third party interception is not shown to be so high that this would amount to interference with the correspondence by HMRC. Nevertheless, because the UK Government has recognised a taxpayer's right to confidentiality in their tax affairs, this brings the VAT online mandation regulations within the ambit of A8 which means that the UK Government must not recognise the taxpayers' right to confidentiality in a discriminatory fashion. HMRC recognise that it would be a breach of their duty of confidentiality to use a public library to transmit a details about a taxpayer's tax affairs: by requiring this of some taxpayers, however, there is discrimination.

798. The discrimination is against elderly persons, and those who live remotely. This is because by reason of old age, an elderly person is less likely to own a computer. They are therefore the persons who would be obliged to use a public library to file. This therefore is discrimination against elderly persons. The regulations fail to accord to elderly persons the same right to confidentiality that younger, computer owning and computer literate persons are given by the Government. This is a breach of A8 combined with A14.

799. The same comments on becoming computer literate would apply in respect of elderly persons as above at § 794.

800. A person who has to use a public library because they live too remotely is also not given by these regulations the same right to confidentiality that persons living in the vast majority of the UK which is served by reliable broadband connections. This is a breach of A8 combined with A14.

801. There is an irony in HMRC's position that taxpayers ought to use a public library as Lord Carter's report stated

> "HMRC have assured us that they take security and taxpayer confidentiality very seriously, and all their online filing services for tax incorporate industry best practices to ensure that transaction online with these systems is both safe and secure"

802. (d) use a professional agent: I have found this to be a breach of A1P1 alone or in conjunction with A14 because of its discriminatory nature in so far as it applies to those who are computer illiterate due to their age, persons who are too disabled to use a computer reliably or without pain, and those who live remotely, and for the reasons given above, such discrimination cannot be justified.

Conclusion

803. These conclusions are sufficient to allow the appeals in favour of the joint appellants.

804. I have found Mr Sheldon is too disabled to use a computer accurately. The only options practically available to him to file online are using friends & family as an agent, or paying a professional agent. For reasons given above, the first of these options does not respect his right to a private life; the second of these options does not respect his right to non interference with his possessions, because they indirectly discriminate against him because of his disability.

805. I have found that Mr Bishop is too disabled to use a computer without pain, and that because he would be required to learn how to use a computer in order to be able to file online, this would cause him more pain than making a paper return. Like Mr Sheldon the only real options available to him are using friends & family, or paying an agent. For reasons given above, the first of these options does not respect his right to a private life; the second of these options does not respect his right to non interference with his possessions, because they indirectly discriminate against him because of his disability.

806. Like Mr Tay he is also computer illiterate due to his age and the same comments apply as to Mr Tay.

807. I have found that Mr Tay is computer illiterate due to his age. By reason of his age he does not know how to use a computer. This is a major (if not the only) factor in the reason why he does not own one. The only practical options available to him are using friends and family or employing an agent. For reasons given above, the first of these options does not respect his right to a private life; the second of these options does not respect his right to non interference with his possessions, because they indirectly discriminate against him because of his disability.

808. In so far as it is HMRC's case that Mr Tay ought to cure his inability to use a computer by learning to use one, I find that this would involve a breach of A1P1 combined with A14. The means options (a) to use his own computer, (b) use friends and family computer or (c) use a public library computer are not available without a breach of the convention.

809. Putting aside his computer illiteracy, as he lives remotely, Mr Tay in practice only has options (b)/(e) friends and family, (c) public library and (d) professional agent. For the reasons already given (b)/(e) is a breach of A8. Option (c) public library is a breach of A14 combined A1P1 as it involves the taxpayer in expense that those living remotely do not have. Option (d) is a breach of A14 with A1P1 as it involves the taxpayer in expense that those living remotely do not have.

810. Putting aside option (b)/(e) which is an interference with the right to a private life, all the other options involve the taxpayers in expense, which while it might not be excessive by itself and disproportionate, nevertheless is an interference with the right to property because it discriminates against the elderly, the disabled, and those

living remotely because it puts them to expense other persons do not need to incur. Interference with A8 or A1P1 can be justified, and the state has a wide margin of appreciation. Nevertheless, in this case, respecting the state's margin of appreciation and its recognition that the elderly disabled and those living remotely should be exempted, I have to conclude that none of the interference is justified for the reasons given.

811. While I have agreed with HMRC that s 3 HRA must be considered before s 6, in this case (unlike *Blackburn)* there is no possibility of interpreting Reg 25A, even on a strained reading, to be consistent with the rights of the old, disabled and those living remotely. Therefore, applying s 6 HRA, Reg 25A must be disapplied in so far as it applies to the joint appellants and their appeals allowed.

Community Law

812. The joint appellants and the fourth appellant also relied on European Community law. The joint appellants have won under the Convention so it is strictly unnecessary to consider European Community Law in their case. It remains relevant to the fourth appellant who has not won its case on the Convention.

813. The European Communities Act 1972 ("ECA") provides for the implementation of EU treaties and the regulations and directives made under them. It provides:

> **2 General implementation of Treaties.**
>
> (1)All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.
>
> (2)….
>
> (3)….
>
> (4)The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council or orders, rules, regulations or schemes.
>
> . . .

814. This requires the Tribunal to recognise any rights that a taxpayer has under the Treaties or the Directives made under it. Any Act of Parliament that post-dates the ECA has to be construed to be consistent with the supremacy of EU law as established by S 2(1) of the ECA.

815. This Tribunal is also bound to interpret EU law in accordance with the principles established by the CJEU (the 'European Court') and this is provided by s 3 ECA as follows:

> **3 Decisions on, and proof of, Treaties and EU instruments etc.**
>
> (1)For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).
>
> (2)Judicial notice shall be taken of the Treaties, of the Official Journal of the European Union and of any decision of, or expression of opinion by, the European Court on any such question as aforesaid; and the Official Journal shall be admissible as evidence of any instrument or other act thereby communicated of the EU or of any EU institution.
>
> (3)…..

The European Court of Justice ("CJEU") said in the early case of *Simmenthal* C-106/77:

> "Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."

816. The House of Lords has confirmed this. In *Factortame* [1990] UKHL 13 Lord Bridge said:

> "Under the terms of the [European Communities Act 1972] it has always been clear that it is the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law"

817. So, as already stated in § 230, the Tribunal's jurisdiction under s 83(1)(zc) must be interpreted as including jurisdiction to consider the lawfulness of the online filing regulations as a matter of EU law.

818. I will consider the lawfulness under EU law of the online filing and electronic payment regulations under the following headings:

(a) Compatibility with the Connvention;

(b) Compatibility with the Charter;

(c) 'Ultra Vires' - whether the regulations are within the scope of the PVD;

(d) Proportionality.

Compatibility with the Convention

The Convention is part of EU law

819. The Treaty of Amsterdam (which currently provides the constitution of the EU) provides:

> "[Art 6 (2)] The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of Community law."

820. In other words the Convention is deemed to be part of European Law and Directives made under the Treaty must be interpreted consistently with the Convention because the Council of the European Union must act consistently with the Convention.

821. Therefore, to the extent that the appellants win (or lose) their appeal under the Convention, the same applies to their case under EU law.

Effect on the appellants' cases

822. Therefore, at first glance consideration of EU law adds nothing to consideration of the Convention. Were it not for the HRA 1998, the ECA 1972 would give the appellants the same result: mandation of persons with disabilities which make it difficult to use a computer or of persons too old to have learnt to use a computer, or of persons living too remotely to be online, is a breach of their human rights in the particular circumstances of this case and by so doing Regulation 25A is in breach of the PVD because the PVD must be interpreted as consistent with, and implemented consistently with, the Convention.

823. But there are other aspects of European Union Law which are potentially relevant to the appellants' claim and as they were argued I consider them.

824. So far as the fourth appellant is concerned I need to consider EU law in so far as it might offer a remedy that the Convention does not, as I have dismissed the fourth appellant's case under the Convention.

Compatibility with the Charter

Is Reg 40(2A) ultra vires the Treaty because of the Charter?

825. The European Union also recognises as part of its laws the rights set out in the Charter of Fundamental Rights of the European Union ("the Charter"). HMRC accept

that the UK must abide by Charter when implementing VAT. For instance, the CJEU said in *McB v E* C-400/10PPU:

> "In that regard, it must be recalled that, in accordance with the first sub-paragraph of article 6(1) EU, the Union recognises the rights, freedoms and principles set out in the Charter, 'which shall have the same legal value as the Treaties'."

If Regulation 40(2A) is not consistent with the Charter, then I must disapply the regulation and allow the fourth appellant's appeal against the decision that he is liable to file online because the automatic consequence of this is that he must abide by regulation 40(2A).

826. HMRC did not suggest that a company could not benefit from the provisions of the Charter and I think that (for the reasons given at §§539-563 above with regards to the Convention) that they must be able to do so.

827. But is Regulation 40(2A) inconsistent with the Charter?

828. Private and family life: The fourth appellant relies on Article 7 of the Charter which is identical to Article 8 of the Convention: the right to respect to private and family life. In fact the "Explanations" to the Charter state that Article 7 of the Charter has the same scope as Art 8 Convention.

829. Therefore, all that I have said in respect of the fourth appellant's case on the Convention (see §§ 632-654 above) applies equally here.

830. Protection of personal data: The Convention has no corresponding provision to Article 8 of the Charter. This provides as follows:

> "**Article 8 Protection of personal data**
>
> 1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority.

831. HMRC's position is that this refers to 'personal data' and therefore cannot be relevant to the obligation to pay electronically. I don't agree. Electronic payments necessitate the use of a person's banking details. Details of a person's bank account (such as its number and sort code) must be personal data of a sort that can be protected by Art 8.

832. But the appellant accepts that the UK's Data Protection Act ("DPA") satisfies Art 8 of the Charter and he does not suggest that the rules on online filing and electronic payment breach the Data Protection Act. In any event, the fourth appellant

has the right to pay by bank giro which does not require him to transmit his banking details over the internet.

833. I do not see that the fourth appellant's case is advanced by reliance on *Narinen v Finland* [2004] ECHR 45027/98 (a case where the ECHR found a breach of A8 where a trustee in bankruptcy opened a private letter addressed to the bankrupt) or *Weiser and Bicos Beteilgungen GmbH v Austria* (2008) 46 EHRR 54 (a case where there was a breach of A8 where a lawyer's offices were searched and material seized). These are cases which involve actual interception. The appellant's complaint is about exposure to risk of interception: not only has it failed to prove the degree of risk to which it is subject, it has not made out a case that the regulations in issue are in breach of the DPA and accepts that the DPA respects A8 of the Charter.

834. And its complaint in so far as electronic payment is concerned fails in any event because he has the option to use bank giro.

835. Freedom to conduct business: As with Art 8, there is no counter part to Article 16 in the Convention. It provides:

> **Article 16 Freedom to conduct a business**
>
> The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

836. The fourth appellant claims a right to conduct his business off-line and without making electronic payments. But I agree with HMRC that the appellant's freedom to conduct its business is not affected by the obligation to file online and pay electronically.

837. The fourth appellant's argument is the same as reported at § 185 which is that there is a fundamental right to pay by cheque. He says that this is because a person is free to conduct a business how he chooses. But I do not agree. There is a right to conduct business: but not a right to conduct it in whatever manner a person chooses. As A16 itself provides, the right to conduct a business is only to conduct it in accordance with national laws. National law requires payment of VAT by electronic means.

838. The case of *Sims* , relied on by the fourth appellant, has no relevance, as there is no fundamental right to pay by cheque.

Conclusion

839. In conclusion I find out that the fourth appellant has not made out its case that Regulation 40(2A) was in breach of the Charter. The Charter formed no part of the joint appellants' case.

Ultra vires – whether the regulations are within the scope of the PVD

Regulations expressly permitted by European Directive?

840. HMRC's position is that not only the regulations lawful, they are expressly permitted by EU law. The appellants do not agree. The disagreement relates to the Principle VAT Directive ("PVD"), which is the instrument which sets out VAT law across the EU and (an earlier version of) which was implemented into UK law by VATA.

841. Art 288 of the current version of the European Treaty provides:

> "… A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods…."

842. In other words, to be lawful under the Treaty, and therefore under the European Communities Act of 1972, the United Kingdom must implement a directive.

843. The Principal VAT Directive ("PVD") 2006/112 provides as follows:

> "**Article 250**
>
> 1. Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and for deductions to be made including, in so far as it necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.
>
> 2. Member States shall allow, and may require, the VAT return referred to in paragraph 1 to be submitted by electronic means, in accordance with conditions which they may lay down.

844. This requires member States to permit a taxpayer to file their VAT return online. It also provides that member States "may require" the VAT return be submitted by electronic means: and it is this provision that HMRC rely on in defence to the joint appellants' claims that Regulation 25A is unlawful under European law.

845. HMRC's case is that this permits Regulation 25A to require universal online mandation and permits HMRC to grant no exceptions to it.

846. I do not agree. As a matter of law, while Art 250 of the PVD says that member States "may require, the VAT return…to be submitted by electronic means" it does not say that member States may require <u>all taxpayers</u> to make electronic returns. The joint appellants, if not the fourth appellant, accept that member States have the right to mandate most taxpayers.

847. If I was in any doubt about the interpretation of Art 250, I would have to refer the matter to the CJEU. Only the CJEU has the jurisdiction to consider the lawfulness of Directives and it seems to me that if HMRC were right to say that Art 250 authorised universal mandation this might well be unlawful under the Treaty, as it

would appear to conflict with the Convention, which as I have said, at the very least in the circumstances of this case would require exemptions for disabled and elderly taxpayers.

848. At the other extreme, the fourth appellant's interpretation is that the Directive is unlawful in permitting any online mandation. I have not accepted that mandation by itself is a breach of the Convention and therefore I do not accept this interpretation and see no need to refer a question to the CJEU.

849. And as a matter of fact, of course, the UK has not implemented universal mandation. It exempts those with certain religious exemptions and those subject to certain insolvency procedures. It also offers telephone filing. Originally it exempted those with a turnover below £100,000. So if HMRC's interpretation of Art 250 were correct (a) I would need to refer this case to the CJEU to consider the lawfulness of this part of Art 250 and (b) in any event HMRC cannot claim to have used any authority under the Directive to implement universal mandation, because they have not implemented universal mandation.

Is Reg 40(2A) ultra vires the PVD?

850. There is nothing in the PVD about how VAT should be paid. Article 206 of the PVD allows member States to require payment of VAT and to require interim payment of VAT but as to methods of payment the PVD is silent. It provides:

> "Any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Art 250. Member States may, however, set a different date for payment of that amount or may require interim payments to be made."

This means that it is within the discretion of individual member states. There is nothing in the PVD which requires a member State to permit payment by cheque.

851. The fourth appellant's case is that, therefore, the UK has purported to exercise a discretion it does not have in requiring the taxpayer to pay its VAT by electronic means. Mr De Mello says that the UK is the only member State which requires compulsory online filing and compulsory electronic payment. Whether or not this is true is not relevant. The methods of payment are something over which the PVD is not prescriptive and therefore something within the discretion of the individual member State. The UK is permitted in this context to impose rules that are not imposed elsewhere in the EU.

852. As the PVD does not state the method or methods by which a taxpayer may pay its VAT liability, therefore, I find that, within the parameters of the PVD itself as interpreted by the CJEU, it is within the discretion of a member State to enact rules on permitted methods of payment.

853. I find that that the fourth appellant has not made out a case that Reg 40(2A) goes further than lawfully permitted by the PVD.

854. As with the joint appellants, the fourth appellant's case was also that the UK has exceeded its discretion because it has enacted a measure that (they say) is disproportionate whereas the exercise of a discretion conferred by the the PVD (or other directives) must be proportionate. I deal with this below.

Proportionality in EU law

855. Irrespective of the question of whether Regulation 25A was a breach of the appellants' human rights, and rights under the Charter, there is a question whether, as a matter of EU law Regulation 25A and 40(2A) had to be, and were, proportional.

856. A classic statement of the requirement for proportionality in EU law was made by the CJEU in the VAT case of *Garage Molenheide BVBA v Belgian State* C-286/94 (note that the CJEU refers to the Sixth Directive which was the forerunner to the PVD and for the purpose of this appeal there is no distinction between them and that the facts of the case were very different to those in these appeals):

> [45] As regards, next, the effects which the principle of proportionality may have in this context, it must be emphasized that whilst the Member States may, in principle, adopt such measures, it is nevertheless the case that those measures are liable to have an impact on the national authorities' obligation to make an immediate refund under Article 18(4) of the Sixth Directive.
>
> [46] Thus, in accordance with the principle of proportionality, the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant Community legislation.
>
> [47] Accordingly, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the Treasury as effectively as possible, they must not go further than is necessary for that purpose. They may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation.
>
> [48] The answer to be given in that regard must therefore be that the principle of proportionality is applicable to national measures which, like those at issue in the main proceedings, are adopted by a Member State in the exercise of its powers relating to VAT, since, if those measures go further than necessary in order to attain their objective, they would undermine the principles of the common system of VAT and in particular the rules governing deductions which constitute an essential component of that system.

857. The court's summary of its conclusion was:

> However, the principle of proportionality is applicable to national measures which, like those at issue in the main proceedings, are adopted by a Member State in the exercise of its powers relating to VAT, in that, if they went further than was necessary in order to attain

> their objective, they would undermine the principles of the common system of VAT…..
>
> It is for the national court to examine whether or not the measures in question and the manner in which they are applied by the competent administrative authority are proportionate. In the context of that examination, if the national provisions or a particular construction of them would constitute a bar to effective judicial review, in particular review of the urgency and necessity of retaining the refundable VAT balance, and would prevent the taxable person from applying to a court for replacement of the retention by another guarantee sufficient to protect the interests of the Treasury but less onerous for the taxable person, or would prevent an order from being made, at any stage of the procedure, for the total or partial lifting of the retention, the national court should disapply those provisions or refrain from placing such a construction on them. Moreover, in the event of the retention being lifted, calculation of the interest payable by the Treasury which did not take as its starting point the date on which the VAT balance in question would have had to be repaid in the normal course of events would be contrary to the principle of proportionality.

858. Counsel for the joint appellants also referred the Tribunal to *R v Minister for Agriculture, Fisheries and Food Ex p Fedesa* (C-331/88) where the CJEU said:

> "[13] The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

859. Lord Hoffman in the House of Lords' decision in *C R Smith (Glaziers) (Dunfermline) Ltd* [2003] STC 419 said:

> "[25] ….But in general European law would require them to satisfy the principle of proportionality in its broad sense, which, following German law, is divided into three sub-principles: first, a measure must be suitable for the purpose for which the power has been conferred; secondly, it must be necessary in the sense that the purpose could not have been achieved by some other means less burdensome to the persons affected, and thirdly, it must be proportionate in the narrower sense, that is, the burdens imposed by the exercise of the power must not be disproportionate to the object to be achieved."

860. The principles which the joint appellants take from these cases is that a measure is only proportionate if

(a) It has a legitimate aim;

(b) It is appropriate to that legitimate aim;

(c) It goes no further than necessary and, where there is a choice, has recourse to the least onerous measure; and

(d) Its disadvantages are not disproportionate to its aim.

861. Ms Redston's view is that the meaning of "proportionality" in EU law is therefore similar to its meaning as applied by the ECHR in cases about the Convention. Some similarity is no doubt to be expected as they are both courts where the judges primarily come from the same civil law jurisdictions but I note that the Upper Tribunal in *Total Technology (Engineering) Ltd* [2011] UKFTT 473 (TC) sounded a warning at § 21 against assuming that 'margin of appreciation' in Convention cases was necessarily the same as 'proportionality' in EU law cases.

862. In any event, there is a difference, in that as a matter of EU law the requirement of proportionality applies to national measures adopted under the PVD: under the Convention, the requirement for a measure to be proportionate only arises where there is an interference with a specified human right. So whether or not "proportionality" under the EU Treaty is the same as under the Convention, the EU Treaty is of much wider application. It requires measures to be proportional even where there is no interference with a specified human right.

Does all VAT legislation have to be proportionate?

863. HMRC do not agree that *all* national implementing measures have to be proportional. Their case (at least originally) was that there is no requirement in EU law for measures adopted by member States when enacting directives, and in particular the PVD, to be proportionate. HMRC say the requirement for proportionality only applies where the member state is interfering with an existing EU law right, in much the same way that proportionality is only relevant under the Convention where the legislation interferes with a human right as listed in the Convention. For instance, in the *Garage Molenheide* case, cited above, the measure complained of by the taxpayer was a limitation on his right under the directive to reclaim input tax.

864. This analysis by HMRC failed, as the Tribunal pointed out, to deal with the line of cases which require penalties imposed by member States for non-compliance with VAT rules and regulations to be proportionate. In *Enersys Holdings UK Ltd* [2010] UKFTT 20 (TC) a VAT default surcharge was struck down as disproportionate; in *Total Technology [2012] UKUT 418* the Upper Tribunal considered that penalty regimes were required to be proportionate, although strictly the point was not in issue as it was conceded by HMRC: §18. On consideration of these cases, Mr Macnab accepted that the requirement for proportionality extended beyond measures which interfered with directly effective EU law rights.

865. HMRC's modified view, relying on *Total Technology* was that proportionality only applies if the national measure "undermines the objective or principles of the common system of VAT" . However, I consider that HMRC cannot rely on *Total Technology* for this proposition. It is clear that *whether* the principle of

proportionality applied was not in issue: HMRC conceded in that case that it was: §18. I can find no support for HMRC's view in logic or in case law.

866. I was referred to a textbook *Wyatt & Dashwood's European Union* where it reads:

> "When Member States are implementing Union Law, eg by enacting legislation pursuant to a Directive, they must exercise whatever discretion they have in compliance with the general principle of Union law, including proportionality….
>
> Furthermore, Member States are also bound by the general principles of Union law, including proportionality, when acting within the field of Union law….
>
> Furthermore, and even though it is for the Member State to decide the penalties imposed for breaches of its rules, the principle of proportionality also applies to criminal and administrative sanctions imposed for breach of rules in any way connected with the exercise of a Union right…"

867. This extract suggests that the principle of proportionality applies to any measure implementing Union law. The PVD requires member States to enact a VAT tax on businesses: it gives members States some discretion in how to do this. When using that discretion the member State must act proportionately.

868. While it is true that a large number of the cases concerning proportionality before the CJEU have concerned a restriction on the directly effective right for taxpayers to deduct input tax, I do not think that there is any authority that the CJEU considers the requirement for proportionality to be limited to such cases. The view expressed in *Wyatt* seems likely to reflect the CJEU's thinking on proportionality: there is every reason to require all exercise of discretion by member States when implementing directives to be proportionate.

869. *Ecotrade SpA* C-95/07 was again a case in which the right to input tax was fettered. In that the Government clawed back the tax – or an amount equal to it – where the taxpayer failed to comply with certain national rules on how returns should be made. But the decision of the Court was expressed in wide terms:

> "[65] the same is true of [what is now Art 273 PVD] pursuant to which the Member States are to take the necessary measures to ensure that taxable persons comply with their obligations relating to declaration and payment or impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion.
>
> [66] Although those provisions allow Member States to take certain measures, they must not however go further than is necessary to attain the objectives mentioned in the preceding paragraph."

870. Here the CJEU specifically state that measures made under Article 273 most be proportionate and they do not limit that statement to measures which interfere with the right to deduct or impose penalties.

871. Further, in the case of *Profaktor and others* C-188/09 the CJEU said:

> [22] Under the common system of VAT, Member States are required to ensure compliance with the obligations to which taxable persons are subject and they enjoy in that respect a certain measure of latitude, inter alia, as to how they use the means at their disposal….
>
> [26] However, the measures which the Member States may thus adopt must not go further than is necessary to attain the objectives of ensuring the correct levying and collection of the tax and the prevention of tax evasion. Such measures may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT….

872. While again this was a case involving a restriction on the right to recover input tax, the CJEU do not limit what they say to such cases. Rather, their decision indicates that the requirement for national implementing measures to be proportionate rule is separate and additional to the requirement that national implementing measures should not undermine fundamental principles (such as the right to deduct input tax).

873. I find that the UK government, as a matter of UK law (ie the ECA) must act proportionately when implementing the PVD and in particular Art 273. Put another way, it seems taxpayers have a directly effective right that measures implementing the Directive should be proportionate. Member States must exercise the discretion given to them by Directives proportionately.

874. I therefore need to consider whether the online filing and electronic payment regulations were proportionate as the UK, in its decision to require some but not all tax payers to file online and pay electronically, is required to act proportionately under the PVD.

Is mandatory online filing proportionate?

875. HMRC's case is that it is proportionate because the PVD permits universal mandatory online filing: adopting an option permitted by the PVD could not be disproportionate.

876. I have already stated that I am unable to agree with this interpretation of Art 250. Article 250(2) permits some tax returns to be mandated: it does not say that mandation could be universal. Precisely which VAT returns could be mandated to be online would depend on the member State's discretion subject to the requirement that that discretion be used proportionately.

877. It does mean that in so far as it was the fourth appellant's case that any online filing mandation was disproportionate it must fail as the Directive clearly permits some mandation. but the fourth appellant's case was really that mandatory electronic *payment* is disproportionate because it obliged taxpayers to commit their banking details to the internet. Art 250 does not say anything about electronic payment.

878. I look first at the joint appellants' case and then at the fourth appellants' case.

879. The case for mandation: HMRC's position is that the regulations are proportionate in any event. The Carter report stated that mandation was a legitimate objective as it saves costs for HMRC and encourages the use of technology by taxpayers which may then save costs for business. While there was a pre-existing optional system for online filing the real benefits were not being realised as the take-up was too slow.

880. So far as the joint appellants are concerned reciting the reasoning in the Carter report is no answer to their case. They do not challenge the need for mandation: all they say is that they should have been an exemption on the grounds of disability and/or age. Lord Carter's report recognised the need for some exemptions.

881. Further, HMRC relied on the CJEU case of *Profaktor*. In that case the member State imposed a temporary restriction on the right to recover 30% of their input tax on VAT registered persons who made sales to members of the public and failed to comply with certain record keeping obligations and in particular to use a cash register. In principle, the CJEU considered that such a rule was not disproportionate (but the final decision on the facts was left to the national courts) as Art 22(8) (now Art 273) provided that Member States:

> "…may impose other obligations which they necessary for the correct levying and collection of the tax and for the prevention of fraud"

882. The challenge to the rule was on the basis it impinged on the taxpayer's fundamental right to recover its input tax. The court found that it did not for reasons which are not significant here.

883. HMRC's case is that the CJEU indicated that a rule which universally mandated the use of cash registers was not per se unlawful. Therefore, says HMRC, it follows that universal online mandation would not be unlawful.

884. What was not at issue in the case was the question whether it was proportionate for *all* persons to be compelled to use cash registers with no exemptions. There is no mention that I can find in the decision for the reason why the appellant in that case did not wish to use a cash register. Therefore, the case cannot be relied on, as HMRC relies on it, for the proposition that a failure to make an exemption from the obligation to use a cash register is lawful even in respect of those, say, who are too disabled to use one.

885. There is really no relevant authority on the point at all so I am driven to basics and to considering the list put forward by Ms Redston at §§ above:

> (a) It has a legitimate aim;
>
> (b) It is appropriate to that legitimate aim;
>
> (c) It goes no further than necessary and, where there is a choice, has recourse to the least onerous measure; and

(d)Its disadvantages are not disproportionate to its aim.

886. As already mentioned in § above, Ms Redston does not dispute that mandation has a legitimate aim. Nor do the joint appellants say that mandation was inappropriate to the legitimate aim of reducing HMRC's costs through having VAT returns made electronically. In so far as the fourth appellant did dispute this, I have rejected the fourth appellant's case. It has failed to prove that the risk of interception outweighed the cost saving benefit to HMRC.

Does it go further than necessary?

887. The joint appellants do say the regulations go further than necessary because they fail to give exemption to the old and disabled and those who are computer illiterate.

888. I find (from the evidence at § 240) that while HMRC did not commission research into the problems faced by elderly or disabled taxpayers, nevertheless their EQIA did recognise that disabled persons would have issues; responses to the EQIA mentioned the issues faced by elderly and disabled persons and those living remotely. The RIA promised an exemption. HMRC must be taken to have been aware of the issue. In failing to make the exemption, do the regulations go further than necessary?

889. Whether something is appropriate is a value judgment, but I consider that it must be relevant to take into account the value judgment that the Government itself has made.

890. Firstly the Government has recognised that it is necessary to give some exemptions. While I consider that the telephone exemption is unlawful due to (amongst other things) the decision not to publicise it, its mere existence shows that HMRC itself considered old and disabled persons and those living too remotely for reliable broadband should be given exemption.

891. Secondly, the reason for the insolvency exemption is hard to understand and the witnesses were unable to satisfactorily explain it to me. This made it hard to understand why disabled persons and old persons were not given exemption when an exemption was given which was not justified (see §§364-5).

892. Thirdly, the Government has given disabled persons an exemption from PAYE online filing. HMRC's point is that the exemption for PAYE is for accidental employers unlike VAT registered persons who are in business. The distinction is that certain disabled persons have to employ persons to assist them *because* of their disabilities. They are only in the PAYE regime because of their disability and not because they have chosen to be in business.

893. In practice, I do not find this a valid distinction. Firstly, it leads to irrationality because a person could be both an accidental employer for PAYE as well as being in business and liable to complete VAT returns. Mr Sheldon is an example of such a person. Secondly, there was statistical evidence that disabled persons as a group are

proportionately more likely to choose self employment than able bodied persons, so Mr Sheldon is unlikely to be the only VAT registered person with a PAYE exemption. And thirdly, HMRC themselves obviously do not think this a valid distinction because they have (ineptly) sought to help out disabled persons with the telephone filing concession.

894. All these indicate that HMRC's view of the regulations is (as they stand) that they are not appropriate to the legitimate aim. And I agree with that assessment. It is clearly possible for HMRC to make exemptions for old and disabled persons and they have done so for PAYE and purported to do so for VAT. The failure of Regulation 25A to include exemption for old and disabled persons and those who have no access to broadband due to their location is not appropriate to its legitimate aim of online mandation.

895. Mr Macnab's position was that the failure to make exemption for those with difficulties in complying with their obligations to file online cannot be disproportionate because the taxpayers can defend any penalty imposed on them by claiming reasonable excuse. HMRC relied on what the Upper Tribunal said in *Total Technology:*

> "[96] In our judgment, the 'reasonable excuse' defence, albeit not the same as mitigation, strikes a fair balance between fairness to the taxpayer and the effective and economical deployment of the State's resources."

896. I do not accept that what the Upper Tribunal said in that context applies here. The context of *Total Technology* was whether a penalty for non-compliance (in that case with the obligation to pay VAT on time) was disproportionate. To be proportionate a penalty regime must include the power for those administering it to mitigate it in appropriate circumstances. All the Upper Tribunal were saying is that the 'reasonable excuse' defence fulfils this requirement. The same would apply to any penalty imposed for non compliance with the obligation to file online: the penalty regime must contain a power to mitigate and it does so because 'reasonable excuse' is a defence.

897. But the question here is not whether the penalty regime for non-compliance is proportionate, but whether the obligation itself is proportionate. There was no suggestion in *Total Technology* that the obligation to pay VAT on time was disproportionate. HMRC's defence in this case amounts to saying that the obligation to file online is proportionate, because, where its operation is not proportionate, the taxpayers can avoid a penalty by relying on the disproportionate nature of the obligation as a reasonable excuse. That is bad law. HMRC's proposition actually recognises that the obligation is disproportionate because it says that merely being within the online filing regime would (so far as disabled or old person is concerned) be a reasonable excuse for not complying with it.

898. In any event, this proposition accepts that it is reasonable for an old or disabled person not to file online, so how could it be proportionate for HMRC to expect them to go to tribunal four times a year to argue against the imposition of a penalty on the

grounds of reasonable excuse? HMRC's reply to this was that it might not be necessary for the taxpayer to go to tribunal: HMRC itself might choose to discharge the penalty on the grounds of reasonable excuse. Even if that was the case, and I have no reason to think that it would be, HMRC it seems would still require the taxpayer to receive a penalty notice four times a year and to appeal it in each case for as long as they remain in business. On the assumption that requiring disabled or old persons to file on line is disproportionate, I am certain that the CJEU would not regard the disproportionality as 'cured' by the reasonable excuse defence to a penalty for non-compliance. The reasonable excuse defence to a penalty for non compliance is no answer to the question of whether the obligation itself is proportionate.

899. Is the requirement to file online for persons whose disability means that they cannot use a computer without difficulty, for persons who are computer illiterate because of their age, and those who live in a location without access to broadband disproportionate? For all the reasons given in respect of the Convention above, while at the end the disadvantage to the disabled, those who are computer illiterate because of their age, or those who live where there is no broadband access, all comes down to money – or using friends and family. They could pay an agent to do their online filing for them – or get friends/family to do it for them. The cost of this is more than the money HMRC saves by receiving online returns but by itself is not so out of proportion to make the measure disproportionate as the law cannot be expected to avoid the fact it may impact on some people more harshly than on others *but* where the persons put to greater expense put to that expense because of their age or disability or even location then the measure is discriminatory. (As I consider any obligation to rely on friends and family as a breach of the Convention and the Charter it can be disregarded – but it too is discriminatory in that it impacts on the elderly, disabled or those living remotely rather than other people.)

900. That discrimination is disproportionate because it would be easy to include these people in the exemption already made for other persons. The option for paper filing already exists for other people and was the norm in any event since 1973 until 2010. The failure to make such exemption is therefore disproportionate.

901. The CJEU might have regarded a properly implemented telephone filing concession as an acceptable alternative to online filing. However, I do not need to consider this, as, as I have said, the telephone filing concession is no defence in this appeal because (a) it is too late and (b) HMRC cannot rely as a defence on an exercise of their discretionary powers which is unlawful under domestic public law. In any event the secret nature of the telephone filing concession which was implemented could not be seen as proportionate (as it means persons entitled to the concession may not benefit from it) and for this reason it would be no defence under EU law in any event. The same applies to the enquiry office concession.

Disadvantages not disproportionate to its aim

902. Having found for the joint appellants under the third heading, the fourth does not need to be considered. But it would seem to fail under this head and for the same reason: the disadvantages of universal mandation to disabled persons, persons who

are computer illiterate because of their age, or persons who cannot access broadband are, for the reasons given above disproportionate to the aim of saving HMRC cost.

903. The conclusion is that three appellants win their case under the European Communities Act as well as and for much the same reasons as their case under the Human Rights Act.

Is the obligation to pay electronically disproportionate?

904. I have said at §§ 873 above why the regulations must be proportionate. That applies as much to the regulations regarding payment of VAT as the regulations regarding how returns of VAT liability are made.

905. The fourth appellant's case is that the Carter report was wrong because it did not properly consider the security risks to taxpayers of online filing and payment. I agree with the fourth appellant that the Carter report's consideration of security appears to be cursory, but that does not necessarily make the regulations disproportionate.

906. The fourth appellant does not consider that mandatory online filing nor the concomitant liability to pay electronically is a legitimate aim because of the security risks. In particular as I have said the fourth appellant objects to payments online as it views the internet as susceptible to interception and in any event the legal risk of loss is on the payer.

907. I have some sympathy with the appellant's view that it would be disproportionate to force a taxpayer to discharge its tax liability by making an online money transfer where the risk of third party interference falls on the taxpayer. I certainly think that if the risks of third party interference were shown to be significant, and significantly more risky than other means of payment, then it might well be disproportionate for a member State to compel payment by that method.

908. But that is not the case here so I do not have to express a concluded view on it. Firstly, while I have had evidence that there are risks associated with online payments, I have not had sufficient evidence to show that the risks are statistically significant and significantly more risky than other means of payment.

909. Secondly, in any event it is not the case that Regulation 40(2A) compels online payments to be made. A taxpayer is given other options. Although, for reasons explained, I consider that all the options offered are *electronic*, not all require the taxpayer to commit their banking details to electronic communications. In particular, payment by bank giro has not been shown to suffer from any of the risks that the appellant associates with online payments.

910. So while it might be possible to make out such a case on the law, the appellant has not made it out on the facts of this case.

911. The appellant's complaint about payment by bank giro is not that it is risky but that it is inconvenient. It considers it disproportionate.

912. I accept that HMRC's refusal to permit payment by cheque has a legitimate aim. As explained (see § 360 above) it is costly for HMRC to receive payment by cheque as an officer has to determine to whose account it should be credited and for which period. It has then to be paid into HMRC's bank. In contrast, a bank giro credit results in an automatic credit for HMRC to the right taxpayer's account for the right period without HMRC taking any action at all.

913. But does Regulation 40(2A) go further than necessary and are the disadvantages to the taxpayer disproportionate to its aim? I find it does not go further than necessary: it would fail in its legitimate aim of saving HMRC costs if payment by cheque were permitted. Are the disadvantages to the taxpayer disproportionate to its aim? The appellant's case here fails on the facts, irrespective of the legal position. Mr Hallam did not know whether he could post a cheque to his bank with his bank giro slip rather than present them over the counter. If he could post them, as a matter of fact this would be no more inconvenient than posting a cheque to HMRC. As a matter of law, in any event, I am not satisfied that the inconvenience (if it could have been proved) to taxpayers of having to present a bank giro slip to their bank four times a year is disproportionate to the costs saving to HMRC of receiving bank giro payments.

914. There is no right to pay by cheque.

915. Mr De Mello suggested that I should refer a question to the CJEU unless I can determine issue with complete confidence. I can determine this issue with complete confidence for the reasons given above.

916. In conclusion in so far as the appellant's concerns on security risks of online payments and inconvenience of payments by bank giro are concerned, I do not consider that Regulation 25A or Regulation 40(2A) (and the rules under it) are unlawful under the PVD or the EU Treaty or the Charter, nor do I consider either of them, in this context, disproportionate.

Conclusion

917. This seems a very unusual case. Not only is it fairly unusual for the Convention to be relevant in a tax case, it is fairly unusual case under the Convention. Counsel for HMRC commented frequently that the appellants were unable to put forward a single Convention case with even remotely comparable facts. This is true but it makes no difference.

918. The case involves an irony for HMRC. At the hearing, HMRC relied heavily on the telephone filing exemption as a sort of "get out of jail free" card. They said this concession would always trump any possibility that the bare regulations unlawfully discriminated against the elderly, the disabled, or those living remotely. Yet I have found that while the existence of the concession did demonstrate that the discrimination was outside the State's own assessment of its margin of appreciation, nevertheless the State could not rely on it as a defence because the concession was unlawfully implemented, largely because there was an unjustified policy to keep it

unpublished. While this might be ironic for HMRC, it seems logical. The existence of the concession indicates the failure to exempt was discriminatory, nevertheless it would be wrong for HMRC to use as a defence a concession which did not exist at the time, was then kept largely secret from the very persons it was intended to benefit, and which, no doubt due to a failure to consider the law of agency, was in conflict with the regulations which permitted only paper returns as an exemption.

919. Another unusual feature of the case is that the appeal is to some extent hypothetical or unreal so far as the joint appellants are concerned. The appeal was against decisions issued by HMRC. Yet by concession HMRC have never implemented the decisions. So far there has been no breach of the appellants' human rights in practice. And in the interim since the issue of the decisions, the law has moved on. While the online filing regulations still exits, a taxpayer's liability to file online no longer depends on a decision by HMRC. It is very unsatisfactory, but the only way a taxpayer now has to challenge the regulations is by judicial review proceedings or by appealing against a penalty imposed for non-compliance (see my decision in *Le Bistingo Ltd).*

920. In summary my decision in respect of the three joint appellants is as follows:

921. S 83(1)(zc) VATA gives this Tribunal jurisdiction to consider the lawfulness of the decision issued by HMRC that the three appellants must file online; consideration of the lawfulness of those decisions extends to whether the regulations themselves were lawful under the Convention or under the Principle VAT Directive; it also extends to a limited extent to consideration of whether they were lawful under national public law.

922. I have found that because of its disproportionate application to persons who are computer illiterate because of their age, or who have a disability which makes using a computer accurately very difficult or painful, or those who live too remotely for a reliable internet connection, that the regulations were an interference with Convention rights under A1P1 and A8 combined with A14 which was not justified.

923. I did not find the decision to be unlawful to the extent that the Tribunal has jurisdiction to consider matters of public law. However, I did find that the tribunal has jurisdiction to consider some matters of public law and in particular while I consider that HMRC could in general rely on a concession in this Tribunal because a concession is properly justiciable in this Tribunal, nevertheless it could not rely on an unlawful concession and for this reason could not rely on the two concessions on which it sought to rely (enquiry offices and telephone filing concessions).

924. So far as EU law was concerned I found the obligations to be disproportionate because they failed to make exemptions for the elderly, disabled persons or persons living too remotely for reliable internet access.

925. For these reasons, HMRC's decision, to apply regulations which were, so far as the joint appellants were concerned, unlawful, was unlawful and for that reason I must allow the joint appellants' appeals.

926. In summary in respect of the fourth appellant my decision is as follows:

927. S 83(1)(zc) only gives me jurisdiction to consider the legality of the decision that it must file online and as that necessarily carries with it the liability to pay electronically, I could also consider whether that obligation was lawful.

928. So far as the obligation to file online was concerned, I did not consider that this by itself was unlawful under the Convention, nor under EU Law nor as a matter of UK public law (in so far as I could consider it). In particular, while the appellant demonstrated that there was a risk of interception by third parties with encrypted internet communications, the degree of the risk was not shown. As I do not accept that the Convention gives a right for persons to be guaranteed risk-free communications, this meant that the appellant had failed to demonstrate that there was a breach of A8 and the right to respect for correspondence.

929. So far as the obligation to pay electronically was concerned, the alleged breach by being required to correspond on the internet, this was not made out on the facts as the regulations did not require the taxpayer to commit its private banking details to the internet.

930. I did not find the obligation to file online or to pay electronically to be a breach of UK public law (in so far as I had jurisdiction to consider the matter). In particular, they were not unlawful under the primary enabling legislation.

931. So far as EU law was concerned, I did not find there to be a breach of the Charter, nor were the regulations as they applied to the fourth appellant disproportionate.

932. I dismiss the fourth appellant's appeal.

933. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 30 September 2013