CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 13881/02
by James Murray KING
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 8 April 2003 as a Chamber composed of

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 24 March 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr James Murray King, is a United Kingdom and New Zealand national, who was born in 1930 and lives in London, England. He is represented before the Court by Salim and Patel, lawyers practising in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant was domiciled in New Zealand for the relevant period. He was an airline pilot until he retired in 1991. In about 1984 the Inland Revenue began investigating a number of guesthouse businesses in London which were associated with the applicant and/or his partner Miss Johnson. In December 1985 the General Commissioners of taxes served two notices on the applicant requiring him to provide details of the acquisition of one of the guesthouses and to produce his business records. From February 1987 the applicant was involved in frequent discussions and correspondence with the Revenue about his affairs. In June 1987 the Revenue requested a statement of assets and liabilities from the applicant. When he had not provided it by November 1987, the applicant was interviewed by the Inspector of taxes and in December 1987 the 'Hansard statement' was read to him [although in the application form the date is shown as 1997, it is clear from the context and from other information provided that it should read 1987]. The statement, revised by the Chancellor of the Exchequer from time to time, sets out the practice of the Inland Revenue in cases in which criminal proceedings may be contemplated and outlines the factors taken into account by the Revenue when deciding whether to prosecute.

In April 1988 the General Commissioners served a notice requiring the applicant to give details of all transfers of property and cash and of his bank accounts. The notices included a warning about the financial penalty which could be imposed for non-compliance. In January 1989 the applicant signed a 'Statement of Personal Assets and Liabilities and Business Interests' as at 1 September 1986. The same month, the Revenue issued tax assessments against the applicant for the tax years 1972/3 to 1986/7. The assessments were for income tax on guesthouse profits and bank interest which had not been declared by the applicant in his tax returns. The total claimed was in excess of 620,000 pounds sterling (GBP). For the tax years more than six years prior to the assessments being made, the Revenue could only raise assessments which were to make good a loss of tax due to the neglect or wilful default of the applicant.

1. The 1991 appeal

The applicant appealed to the Special Commissioners of taxes against the assessments. The appeals were heard over eighteen days between May and September 1991. The Commissioners initially indicated that they were not prepared to sit one day a week for the convenience of the applicant, but after the Revenue had opened the case it was decided that, exceptionally, the hearings should be arranged to ensure that the applicant and Miss Johnson were able to attend. The applicant's main submissions were that he had no beneficial interest in three of the guesthouses in respect of which assessments had been made and that certain funds used to purchase property had been a loan from his father.

On 18 November 1991, the Special Commissioners issued their written decision. Some of the assessments were reduced to nil or discharged, but the appeals were dismissed in substance, the Commissioners finding that (for those years for which it was necessary) the purpose of the assessments had been to make good a loss of tax which was due to the applicant's wilful default or neglect. They found that the applicant had traded as a guest house proprietor and had derived profits from the trade. The applicant's evidence was described as "irregular in quality" and his claim that he was in partnership with other members of the family, including his infant children was found to be "a complete sham". The revised assessments amounted to approximately GBP 120,000.

The applicant appealed to the High Court against the 1991 Commissioners' decision by way of case stated, on the basis that they had erred in law, there being no evidence on which they could reach their determinations. The Special Commissioners drafted the case for the High Court in July 1992 and the appeal was heard and dismissed in about November 1993 the exact date is unclear. The Court of Appeal dismissed the applicant's further appeal in October 1995.

Meanwhile, in December 1991 the General Commissioners issued a determination under section 88 of the Taxes Management Act 1970 that interest was payable on the assessments from specified dates on which the tax ought to have been paid, to the date of payment. The applicant appealed against the determination.

In October 1994, the Revenue issued penalty determinations, assessed at 80% of the tax lost (the maximum penalty then being 100% of the lost tax, plus GBP 50). The penalties amounted to over GBP 50,000. The applicant appealed against the penalty determinations.

In April 1995 the General Commissioners agreed that the interest and penalty appeals should be transferred to the Special Commissioners. At about the same time, the Revenue discovered the existence of a further property, Roundwood Lodge, which had been purchased in 1983 and which was in the applicant's name. The Revenue took the view that the property had been purchased with funds from the profits of the applicant's business

and the funds were therefore taxable. In April 1996 further assessments to income tax were therefore issued on guest house profits for the years from 1977/8 to 1985/6. The applicant appealed against the further assessments. In March 1996 the applicant suffered a stroke which affected his memory and his ability to cope with pressure. In August 1996 he wrote to the Revenue to ask that the 'matters in hand' be adjourned to enable him to concentrate on his recovery. He appeared before the General Commissioners in October 1996 when his request for a delay in the hearing of the appeals against the further assessments was granted. In March 1997 the Special Commissioners agreed to accept jurisdiction and in September 1997 the appeals were consolidated.

2. The 2000 appeal

In February 1998 there was a preliminary hearing of the appeals against, (i) the December 1991 determination of interest, (ii) the 1994 penalty determination and (iii) the further assessments raised in 1996. The substantive hearing began in May 1998 and was heard over seventeen days between then and April 1999. The applicant represented himself. He submitted that he had been guilty of neither wilful default nor of neglect. He maintained that, *inter alia*, he did not derive taxable income from the guesthouses, either because he managed them for other 'partners', or because they were nothing to do with him. He believed that income of a non-resident was not liable to UK income tax. He also argued that the capital reconciliation statement he had prepared in 1991 was truthful. During the hearing he applied for a copy of the notes made by the 1991 Commissioners. When the application was refused he sought permission to judicially review the decision, which was also refused.

On 23 March 2000 the Special Commissioners dismissed the appeals. They held, *inter alia*, that they were bound by the factual findings of the 1991 Commissioners on the issue of neglect/wilful default for the years in respect of which such findings had been required. For the later years, in respect of which no determinations had been made by the 1991 Commissioners, they found wilful default and neglect on the part of the applicant (which was necessary to uphold the penalty determination). The Special Commissioners considered that:

> "neglect ... existed where inadequate returns are made by a taxpayer ... unless the taxpayer shows that his inadequate return was due to some reason other than neglect."

Relying on the observations of Wilberforce J in the case of *Wellington v. Reynolds* (1962 40 TC 209), the Commissioners also held that:

> "...wilful default exists where there is a deliberate or intentional failure to do what the taxpayer ought to have done, knowing that to omit to do so was wrong; ... the establishment that undeclared profits have been made will almost automatically mean that failure to declare them in the tax returns must be wilful default."

They did not accept the applicant's account of a family partnership, nor did they accept that he had nothing to do with two of the guesthouses as he had claimed. If he had believed at one time that income of a non-resident was not liable to UK tax, he had not continued to believe that. They also found that the capital statement he had prepared in 1991 was not truthful. As the amount of tax due was correctly determined by the 1991 Commissioners, the interest determination was also correct. The 80% penalties were appropriate. They allowed his appeal against the further (1996) assessments in part, by allowing some reduction in the amount claimed, but found that the applicant had been the owner of Roundwood Lodge and had purchased it with his own funds.

2. Appeal to High Court and Court of Appeal

In May 2001 Mr Justice Jacob dismissed the appeals against the findings of the 2000 Commissioners. He found that the Commissioners had been wrong to hold that they were bound by the findings of the 1991 Commissioners (as to neglect/wilful default), but said:

> "... even though I think the Commissioners were wrong in law as to the effect of s.46(2) I have no doubt that the appeal in respect of the earlier years should be dismissed. At the very least the decision of the 1991 Commissioners was a 'cogent factor' for the 2000 Commissioners. Here it is well worth standing back for an overall view of the position as regards Mr King. The fact is that over the years he acquired a series of properties used for lodging houses. There is no reasonable explanation of how he came by the money to buy those properties, otherwise than from profits of the businesses."

The judge proceeded on the basis that the proceedings were 'criminal' for the purposes of the Convention. He noted that the system was plainly punitive and deterrent, and the potential fine was very substantial and dependent on the culpability of the taxpayer, rather than being an administrative matter. He rejected the applicant's argument that the proceedings reversed the burden of proof and thus breached Article 6 § 2. The applicant submitted that the reliance of the 2000 Commissioners on the facts as found by the Commissioners in 1991 and the limited presumption in section 101 of the Act enabling reliance on such findings for the purpose of penalty determinations meant that the burden of proof had shifted. The judge found that the legal burden remained on the Revenue throughout; the earlier findings amounted to no more than the evidential case against the applicant. In any event, the presumption within section 101 was confined within acceptable limits in terms of Convention case law.

The judge agreed with the applicant that the proceedings began in 1987, when the Hansard warning was given and considered whether the length of the proceedings was unreasonable. Some of the delay had been caused by or contributed to by the applicant, but in conclusion the judge said:

> "The result of all this is that there was delay through no fault of Mr King of, say, five years from the date of the 1991 decision. Is that too much? Marginally, but only just, I think not. He was not thereby prejudiced. He merely had to pay the penalty later. But for the complication of Roundwood Lodge, however, I think the time to determination of the penalty appeals would have been inconsistent with Article 6 (1) ... I see no reason why the 1991 Commissioners could not have dealt with a penalty determination appeal if such a determination had been made at the same time as the 1989 determinations or shortly thereafter."

The judge found in addition that the case was a serious case for penalties and the figure of 80% was not too high. So far as the further assessments were concerned, the reasoning of the Commissioners was detailed and convincing. The applicant had given misleading information to the Revenue and to the 1991 Commissioners and the further assessments had been to make good a loss of tax attributable to the applicant's wilful default or neglect. There was no error of law and no reason to overturn the decision.

The applicant applied for permission to appeal to the Court of Appeal. Permission was refused on paper in July 2001 and at a hearing on 3 October 2001. As a result of the decision of the House of Lords in the case of *R v. Lambert* [2001] 3 WLR 206, concerning the limits on the retrospective application of the Human Rights Act 1998, the arguments which had been put before Jacob J. relying on the Convention were no longer pursued. The applicant submitted that the 2000 Commissioners had effectively reversed the burden of proof when they made findings of wilful default and neglect against the applicant in respect of the appeals against the determination of interest. The court did not accept that the Commissioners had done anything other than recognise that an evidential burden had shifted to the applicant to counter *prima facie* evidence of wilful default or neglect. On the facts of the case there was no prospect of an appeal against the interest determination succeeding.

On the question of delay, the Court of Appeal said:

> "The delays which occurred in relation to the penalty determination must be seen in the context of what has plainly been an extended campaign by the applicant in disputing his liabilities to the Revenue and in deferring the date on which those liabilities have to be satisfied. Moreover, I find...the greatest difficulty in seeing how the applicant could be prejudiced simply by the fact that the penalty might have been imposed earlier."

The court was not persuaded that an appeal on that basis would have any prospect of success. Although by the time of the appeal a medical report had been provided, to the effect that the applicant's memory had been significantly impaired as a result of his stroke, the author was unable to date the onset of the memory loss or its duration. The report did not take the applicant's case as to prejudice any further. Finally, considering the further 1996 assessments, the court found that the applicant's argument that the Commissioners' decision was wrong in law because it was a perverse decision on the evidence was

"... a bold submission which fails completely."

Accordingly, the application was refused in respect of all three matters.

B. Relevant domestic law and practice

Section 36 of the Taxes Management Act 1970 ('the Act') provided:

"... where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to tax, assessments on that person to tax may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be made at any time."

Section 37(1) provided:

"Where, for the purpose of making good to the Crown a loss of tax wholly or partly attributable to the fraud, wilful default or neglect of any person, an assessment for any year ... has been made on him not later than six years after the end of that year, assessments to tax for earlier years may ... be made on him notwithstanding that, but for this section, they would be out of time."

For the years after 1982/83, the position was governed by a new section 36, section 37 having by then been repealed. Section 36 as amended provided:

"An assessment on any person ... for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct ... may be made at any time not later than twenty years after the end of the chargeable period to which the assessment relates."

Section 46(2) of the Act provided, (as relevant) that:

"... the determination of the General Commissioners or the Special Commissioners in any proceedings under the Taxes Acts shall be final and conclusive".

Section 88(1) of the Act provided:

"Where an assessment has been made for the purpose of making good to the Crown a loss of tax wholly or partly attributable to the fraud, wilful default or neglect of any person, the tax charged by the assessment shall carry interest at the prescribed rate from the date on which the tax ought to have been paid until payment."

Section 95 of the Act provided, as relevant:

"(1) Where a person fraudulently or negligently –

(a) delivers any incorrect return of a kind mentioned in section 8 or 9 of the Act ..., or

...

(c) submits to an inspector of the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

he shall be liable to a penalty not exceeding the aggregate of –

(i) £50, and

(ii) the amount or, in the case of fraud, twice the amount of the difference specified in subsection (2) below.

(2) The difference is that between –

(a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person ..., and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct."

Section 101 of the Act provided:

"For the purposes of the preceding provisions of this Part of this Act any assessment which can no longer be varied by any Commissioners on appeal or by order of the court shall be sufficient evidence that the income or chargeable gains in respect of which tax is charged in the assessment arose or were received as stated therein."

Sections 20 and 98 of the Act concern the powers of the Revenue to serve a notice on a taxpayer requiring him to provide information and/or documents and set out the penalties for failure to comply (as at August 1991, the maximum penalty was GBP 300).

COMPLAINTS

1. The applicant complains under Article 6 § 1 of the Convention that his right to trial within a reasonable time was infringed because of the overall length of the proceedings and complains that he was prejudiced by the delay. He also complains that the reliance in the penalty proceedings on information obtained by compulsion infringed the privilege against self-incrimination inherent in Article 6 § 1. He relies on the case of *J.B. v. Switzerland* (no. 31827/96, ECHR 2001-III).

2. Furthermore, he complains that the presumption in section 101 of the Taxes Management Act 1970 offends Article 6 § 2 as it operates to reverse the burden of proof. He also complains under Article 6 § 3(d) that the presumption effectively amounts to evidence which it is not possible to cross-examine.

3. The applicant complains that the definitions of 'wilful default' and 'neglect' applied by the Commissioners were such as to reverse the burden of proof and therefore infringed Article 6 § 2.

4. Finally, he complains that the refusal of the 2000 Commissioners and the High Court to allow him copies of the notes made by the Commissioners

in 1991 infringed his rights under Article 6 § 3(d), as the notes amounted to evidence which it was not possible to cross-examine. The refusal also compounded the unfairness of the reliance in later proceedings on the 1991 Commissioners' findings.

THE LAW

1. The applicant complains that the proceedings were not determined within a reasonable time and invokes Article 6 § 1 of the Convention which provides, as far as is relevant,

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

The Court finds that issues arise meriting communication to the respondent Government. It therefore adjourns this part of the application.

2. The applicant complains that it was unfair to rely in the penalty proceedings on information obtained under compulsion and says he was required to incriminate himself contrary to Article 6 § 1 of the Convention.

The Court recalls its established case-law to the effect that, although not specifically mentioned in Article 6 of the Convention, the right not to incriminate oneself is a generally recognised international standard which lies at the heart of the notion of a fair procedure under Article 6. Its rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (for example, *John Murray v. the United Kingdom,* judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 49-50, §§ 44-47). The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.

However, the right not to incriminate oneself is primarily, though not exclusively, concerned with respecting the will of an accused person to remain silent in the context of criminal proceedings and the use made of compulsorily obtained information in criminal prosecutions. As the applicant acknowledges, the right does not act as a prohibition on the use of compulsory powers to require taxpayers to provide information about their financial affairs. Indeed, the obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is a common feature of the tax systems of member states and it would be difficult to envisage them functioning effectively without it (*Allen v. the United Kingdom* (dec.), no. 76574/01, 10 September 2002).

In the applicant's case, the information obtained was used in the penalty proceedings in the sense that he was penalised for making an inadequate tax return, either by wilful default or neglect. The information was not, however, used against him in the sense that it incriminated him in the commission of an offence due to acts or omissions in which he had been involved prior to that moment. His situation can thus be distinguished from that of the applicant in the case of *Saunders v. the United Kingdom* (judgment of 17 December 1996, *Reports* 1996-VI). Neither was he prosecuted for his failure to provide information which might have incriminated him in anticipated criminal proceedings, as was the case in *J.B. v. Switzerland* (judgment cited above). In the latter case a supplementary tax had been imposed on J.B, but he had in addition been fined for failing to provide documents. In the present case the applicant was penalised for his failure to make an adequate tax return, not in respect of any other offence which the information he was obliged to give had revealed. The privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation by the revenue authorities (see the *Allen* case, cited above).

Furthermore, the applicant faced the risk of, at most, a financial penalty for refusal to declare his assets, in contrast to the position faced by the applicants in the *Saunders* and the *J.B*. cases. Consequently, the Court does not find that the facts of this case disclose any infringement of the right to silence or privilege against self-incrimination or that there has been any unfairness contrary to Article 6 § 1 of the Convention. It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

3. The applicant complains that the effect of section 101 of the Taxes Management Act 1970 was to reverse the burden of proof in respect of the penalty proceedings. He also submits that the effect of it was to prevent him challenging evidence. He complains further that the definitions of wilful default and neglect used by the Commissioners had the effect of reversing the burden of proof by placing the onus on the applicant to show that his tax returns were inadequate for some reason other than wilful default or neglect. He invokes Article 6 §§ 2 and 3(d), which provide, so far as is relevant:

> 2. "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

The Court recalls that presumptions of fact or of law operate in every legal system. The Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law (*Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, § 28). A rebuttable presumption of fact and liability is to be contrasted with an assumption of guilt so as to reverse the burden of proof (the above mentioned *Salabiaku* case, § 26).

As Jacob J. observed in the High Court, the findings of the Commissioners in 1991 giving rise to the presumption under section 101, were reached after a full hearing in which the burden of proving the income of the applicant in respect of which tax was charged lay on the Revenue and in which the applicant had a full opportunity to challenge the Revenue's evidence and to adduce evidence of his own. As further pointed out, the effect of section 101 was to create only a rebuttable presumption that the income in respect of which the tax was charged was that found in the original assessment of the 1991 Commissioners. The Court notes that had the applicant's account of the source of the funds for the purchase of the property been credible it would not have been difficult for him to rebut the presumption. In the event, Jacob J. found that the applicant had conspicuously failed to rebut the presumption, noting that both the 1991 Commissioners and the 2000 Commissioners had seen and heard the applicant and found him to be not reliable and in part untruthful in his account of the source of the funds for the purchase of the property. In these circumstances, the Court finds that the presumption created by section 101 was confined within reasonable limits and that the rights of the defence were fully respected.

The Revenue likewise had the legal burden of proving that the applicant was guilty of "wilful default" or "neglect". As to the applicant's complaint that the 2000 Commissioners applied definitions of "neglect" and "wilful default" which "effectively reversed the burden of proof" by requiring the applicant to show that his inadequate return was due to some reason other than neglect, the Court finds that the evidential burden thereby imposed on the applicant also fell within reasonable limits and sufficiently maintained the rights of the defence. In this regard the Court notes the conclusion of Jacob J. that, on the evidence before the Commissioners and the court, there was no room whatever for any finding other than that the applicant was guilty of wilful default or fraud whatever shades of meaning those words might have.

It follows that these complaints must also be rejected as manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

4. The applicant further complains that the unfairness of allowing reliance to be placed on the findings in the 1991 decision was compounded

by the refusal to allow him copies of the notes kept by the Commissioners during the 1991 appeals. It is contended that the notes may have assisted the applicant in challenging the findings in the 1991 decision and that, insofar those findings may be regarded as evidence, it was evidence which the applicant had no ability to challenge in breach of his rights under Article 6 §3 (d) of the Convention.

The Court finds the complaint to be without substance. The primary facts found by the 1991 Commissioners and their detailed reasons for their findings were set out in their written decision and were open to challenge by the applicant. The Court fails to see how the notes kept by the Commissioners during the proceedings, at which the applicant was himself present, could have assisted the applicant in challenging those findings before the 2000 Commissioners. The Court finds, in any event, that the denial of access to the notes did not disclose any breach of the requirements of Article 6 § 3 (d) or otherwise lead to any unfairness in the proceedings. It follows that this part of the application must also be rejected as manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the length of the proceedings;

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President