INSPECTIONS AT HOME-OFFICES UNDER THE NEW SCHEDULE 36 POWERS: WHAT WOULD THE EUROPEAN COURT OF HUMAN RIGHTS SAY?

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Remember *Rossminster*[1]? The Revenue used what was then the comparatively new power of a section 20C TMA 70 warrant to carry out multiple dawn raids on the homes and business premises of the notorious tax planners Roy Tucker and Ron Plummer.[2] Revenue officers seized thousands of documents. The tax planners immediately challenged the validity of the warrant, claiming the words of s. 20C could not possibly have been intended to permit such drastic action without even alleging a particular offence or perpetrator. However, the literal words of section 20C did not require this.

The House of Lords evidently also felt considerable disquiet at what they saw as a major encroachment on the liberty of the subject. Lord Wilberforce said 'I cannot believe that this does not call for a fresh look by Parliament'.[3] But he regarded it as not for the courts to go behind the 'plain words' of s. 20C. He was led to this conclusion partly by what he saw as the 'substantial safeguards' the Act introduced to minimize the possibility of power being used arbitrarily: the warrant could only be sought by two senior officials and could only be granted by a circuit judge rather than, as was often the case, by a magistrate.

No safeguard of judicial oversight has been included in the inspection and document removal powers granted to HMRC in Schedule 36 of the Finance Act 2008. In fact section 20C TMA70 that caused such concern in 1979 now seems fairly measured

1 *R v Inland Revenue Commissioners, ex parte Rossminster* [1980] AC 952

2 Section 20C had only been added in 1976

3 [1980] AC 952 at 999

when compared with the virtually unfettered powers of entry and seizure HMRC will have when Schedule 36 comes into force. This article discusses how far these new inspection powers are in breach of the Human Rights Act 1998 when they are used for homes also used as a business; how the higher courts are likely to respond to this and what difference this would make to taxpayers in practice.

Scope of the new powers

First a brief summary of the by now notorious inspection powers: where an inspection is 'reasonably required' for the purpose of checking a person's tax position, an officer may enter and inspect that person's business premises, including any business assets or business documents on those premises.[4] The scope of 'premises' is extremely widely defined and extends to those parts of residential premises used for carrying on a business.[5] Taxpayers working from home are therefore vulnerable to inspection, not just in relation to their business but also their personal tax position – including any tax liability they are suspected of having abroad and for which exchange of information agreements exist. HMRC may obtain and record information relating to the premises, assets and documents they have inspected.[6] But where a document is protected from being required under an information notice, for instance because it is privileged, it will also be protected from inspection.[7] Inspections will be governed by codes of practice. A draft code of practice provides that visits would normally be announced and agreed in advance with taxpayers. But these codes will have no binding legal force. Reasons given in the draft code for making unannounced visits include:

- The taxpayer was not been present when the officers attended arranged visits;
- HMRC have been unable to arrange an appointment because contact details provided are no longer correct;
- There was no evidence of trading at the address given as the principal place of business;
- Information provided on official forms (eg VAT 1) does not match other information held by HMRC; or

4 FA 2008, Sch 36 para 10.

5 *Ibid.* para 10(3) For a more detailed exploration of the width of the provisions, see Keith Gordon, *Taxation*, 7th August 2008

6 FA 2008, Sch 36 para 17(b).

7 *Ibid.*, para 28

- HMRC have reason to think that the taxpayer may be deliberately not paying the right amount of tax.[8]

These grounds would give a determined HMRC officer plenty of leeway to make an unannounced inspection at a person's home. And yet there is no right of appeal against an unannounced inspection, nor, crucially, a requirement that it be pre-authorised by the Tribunal. This was rejected by HMRC during the consultation process on the basis that it would 'create significant costs and would risk overloading either the judicial system or the new tribunals.'[9] It sounds like HMRC are anticipating making quite a few unannounced inspections.

While HMRC have a *right* of entry, these powers do not allow officers to force entry or to search the premises[10]. A penalty for obstructing an inspection can only be imposed where the inspection is pre-authorised by the First Tier Tribunal.[11] But taxpayers are unlikely to be immediately aware of their right to turn the officers away. They will simply be handed a copy of the code of practice at the door. But by the time they have read through this, the officers will have gained entry. HMRC's January 2008 consultation paper reinforces this impression. It states that in the VAT context where officers visit without the power to force access, access is nearly always granted.[12]

Schedule 36 thus creates a power to enter premises unannounced to all parts of a person's home or business premises that are not used 'solely as a dwelling'[13] to inspect and copy documents.[14] There is no requirement for judicial oversight and the statute itself contains virtually no safeguards. These will be contained only in codes of practice that have no force of law.

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8 *A New Approach to Compliance Checks – Responses to Consultation and Proposals*, HMRC's consultation published by on 10 January 2008, at Annex C, Draft Code of Practice C

9 *Ibid.* at para 5.33. FA 2008 Sch 36 para 13 merely provides that a Tribunal *may* be asked to approve an inspection.

10 The difference between inspecting and searching is discussed in *R v C & E Commrs (ex p. X Ltd) (aka R v C & E Commrs ex p. McNicholas Construction Co Ltd & Others)* [1997] STC 1197

11 FA 2008 Sch 36., para 39(1)(b);

12 *A New Approach to Compliance Checks*, para 7.18

13 FA 2008 Sch 36 para 10(2)

14 *Ibid,* para 10(2)

What have been the concerns?

Not surprisingly perhaps, there has been a chorus of concern over this change to HMRC's powers. Jonathan Schwartz in a remarkable Hardman lecture about a general drift to authoritarianism despite the enactment of the Human Rights Act wondered what had changed to make this wide power to enter homes also used for business necessary after 200 years of tax collecting.[15] At the ICAEW Tax Faculty Wyman Debate, Keith Gordon asked why HMRC required more powers to enter premises than the police, who can only do so with a warrant or if they have a subject under arrest for a serious offence, and Francesca Lagerberg deplored the imbalance created when hardly any of the promised safeguards had made their way into the legislation.[16]

At a time when HMRC are under increasing pressure to plug the 'tax gap' and officers receive performance-related pay, the temptation for some of them to abuse wide powers is increasing. Tax inspectors are only human. Even in 1979 the Rossminster raid was an understandable reaction by a department frustrated over the many millions the successful tax planners had cost the Department. So what protection does the European Convention on Human Rights offer taxpayers from over-enthusiastic visits to their homes by HMRC?

What Convention rights may apply?

When the Convention was signed in Rome on 4 November 1950, memories of human rights violations during the Second World War were still fresh. The Convention was focused especially on protecting citizens from such abuses of state power. Tax did not really excite the attention of the judges in the same way. The European Court of Human Rights may also have been unwilling to interfere with the tax-raising power because it essentially shapes the policy-making scope and separate political identity of nation states. This is certainly reflected in the Court's extreme reluctance to become involved in challenges to substantive tax policy, which it regards as a political decision to be taken at national level.[17]

However, the Court has been willing to intervene as a guarantor of minimum standards of procedural fairness in the use of tax authorities' investigatory powers. The articles of the Convention relevant to HMRC's new inspection powers are discussed below.

15 A summary of his lecture appears in *Taxation*, 4.12.2008

16 Debate of 10 July 2008 summarised by Mike Truman in *Taxation*, 24 July 2008

17 See *Burden v. United Kingdom (13378/05)* (2008) 47 E.H.R.R 48

Article 8 – Right to respect for family life, home and correspondence

While virtually never interfering in substantive tax policy, the Court has been more assiduous in ensuring that tax investigation and enforcement measures are subject to proper safeguards. All investigative measures interfere with taxpayers' privacy. They therefore represent an interference with taxpayers' rights guaranteed under Article 8(1) that needs to be justified under one of the permissive grounds in Article 8(2):

Article 8

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

such 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.

a) Interference with privacy rights by inspection powers

The Court has confirmed that home-office premises are always included within the definition of home in Article 8(1).[18] Under its 'dynamic interpretation' of the Convention, it has even extended the concept of home to pure business premises where wide executive entry and seizure powers were concerned.[19] Inspections made at any premises of a taxpayer would therefore amount to an interference with his rights under Article 8(1) that needs to be justified under Article 8(2).

b) Justification

'in accordance with the law'

In terms of justification for this interference, a Schedule 36 inspection would certainly satisfy one aspect of being carried out 'in accordance with the law': Schedule 36 provides a basis in domestic law for such inspections. But the Court requires more than this. The law in question must be accessible to the person

18 *Chappell v. United Kingdom,* Application 10461/83, 30 March 1989.

19 *Société Colas Est v. France,* Application 37971/97, 16 April 2002 para 41.

concerned.[20] This test would also be satisfied: Schedule 36 is widely available and the words are comprehensible. However, the wording of the law must also make it foreseeable when the new inspection and document removal powers would apply. Law in this context means the enactment in force as the competent courts have interpreted it.[21] It expressly does not include administrative guidelines, other than where the practice they contain is well established, does not vary from case to case and is known to those affected by it. This was exceptionally regarded to be the case in the almost automatically applied and well-known guidelines on the inspection of UK prisoners' mail[22], but not in the case of the relevant rules for Italian prisons, which failed to make clear the possible length of inspection measures or the reasons that may warrant them.[23] Wherever there is an incursion on privacy that is serious and unexpected, the Court requires the relevant criteria and safeguards to be clearly spelt out in law and not in non-binding guidelines. Hence prior to the passage of the Police Act 1997 and the Regulation of Investigatory Powers Act 2000, the UK's police telephone tapping and bugging operations were held by the Court to be in breach of Article 8 as these activities were largely regulated by Home Office guidelines.[24] The Court recognises that not every law can be framed with absolute certainty and also the risk that the search for certainty may entail rigidity.[25] How much it requires by way of safeguards in enacted or court interpreted law will depend on the nature and extent of the interference in question.[26] Schedule 36 inspections and document seizures certainly represent a serious interference with privacy. The Court would therefore require very specific conditions for their exercise to have been laid down in the statute or in court decisions interpreting it. Merely stating that such interference is permissible where it is 'reasonably required' to check a person's tax position gives taxpayers virtually no indication of when they might expect to receive an unannounced visit to their home. The Court has recently reiterated the need for particular precision in the case of entry and seizure powers. Having stressed that such safeguards must be contained in 'law' as enacted and interpreted by the courts, it said:

> "*The Court would emphasise that search and seizure represent a serious interference with private life, home and correspondence and must*

20 *Sunday Times v. United Kingdom*, Application 6538/74 26 April 1979, para 47, an Article 10 case, but accepted as applying to Article 8 by *Silver v. United Kingdom* 5947/72, 25 March 1983, para 85

21 *Kopp v. Switzerland,* Application 13/1997/797/1000, 25 March 1998, para 55

22 *Silver and others v. United Kingdom*, Application 5947/72, 25 March 1983, para 88

23 *Calogero Diana v. Italy*, Application 15211/89,

24 *P.G. and J.H. v. United Kingdom*, Application 44787/98, 25 September 2001, para 37

25 *Sunday Times v .United Kingdom, ibid,* para 49

26 *P.G. and J.H. v. United Kingdom, ibid.,* para 46

> *accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject*"
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> (*Sallinen and others v. Finland*[27])

Until the UK courts have had an opportunity to assess the criteria and safeguards proposed in HMRC's non-binding codes of practice, any purported exercise of the Schedule 36 inspection and document removal powers would be in breach of Article 8 because the statute contains almost no safeguards or detailed indications on when the new powers may be exercised. So if HMRC knock on the door before the UK courts assess the new powers, a taxpayer could seek an interim injunction pending judicial review. Even where national courts have interpreted an overly wide power to make it compatible with the Convention, the Strasbourg court has also on several occasions struck down interferences with Article 8 rights that occurred before this judicial clarification.[28] So when the inspection powers first come into force, prospectively on 1 April 2009, they will not be 'in accordance with law'. The wider question is what safeguards the Strasbourg Court would insist on to make them comply with the Convention under the other heads of justification of Article 8(2).

Certainly, the Court has long since held that searches of taxpayers' premises pursue a legitimate aim under Article 8(2) of the Convention since they are in the interest of the 'economic well-being of the country'.[29]

However, the Court has also stressed that while Contracting States enjoy a certain 'margin of appreciation' under Article 8, the exceptions in Article 8(2) are to be interpreted narrowly and the need for them in any given case must be convincingly established.[30] The Court recognises the difficulties states face in combating tax evasion but requires legislation granting investigatory powers to afford adequate safeguards against abuse.[31] Both in the tax sphere and elsewhere the Court has fervently insisted on effective safeguards to balance the state's legitimate interest in invading the privacy of its citizens:

> "*One of the fundamental principles of democratic society is the rule of law … [which] implies that an interference by the executive authorities with an*

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27 Application 50882/99, 27 September 2005, para 90

28 *Valenzuela Contreras v. Spain,* Application Number 58/1997/842/1048, 30 July 1998, (telephone tapping) para 58, and most recently in the context of search and seizure powers: *Sorvisto v. Finland* 19348/04 13 January 2009 para 116

29 *Funke v. France,* Application 1028/84, 25 February 1993

30 *Ibid.* para. 55

31 *Ibid.* para. 56, *Société Colas Est v. France,* Application 37971/97, 16 April 2002, para. 47.

> *individual's rights should be subject to an effective control.*"
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> (*Klass and others v. Germany*[32])

Significance of judicial supervision

In cases where entry and seizure powers in the tax sphere have been challenged, the Court has always regarded those powers as acceptable where they were exercised under judicial supervision.[33] Such supervision is regarded as ensuring that an appropriate balance is struck between taxpayers' need for privacy and the state's interest in combating evasion.

But in the absence of judicial supervision the Court has been quick to strike down entry and seizure powers both in the tax sphere and elsewhere where there were no other adequate safeguards or words of limitation in the relevant statute. For example, in *Funke v. France*[34], customs officers of the rank of inspector or above were entitled to enter premises and seize documents 'of any kind relating to operations of interest to their department'. There were no safeguards whatsoever. Not surprisingly, the Court found this to be inadequate. In competition law, similarly wide investigatory powers were also found to be in breach of Article 8.[35] Most recently, in *Sallinen*, cited above, the uncertain extent of legal privilege protecting documents from inspection and seizure was regarded as fatal to a search of a lawyer's office, particularly because there had been no judicial supervision. The warrant had merely needed to be signed by the investigating officer. It was a criminal investigation on suspicion of aggravated debtor's fraud assisted by a tax official. The Court was surprised to find that the relevant law required no judicial authorisation of the entry and seizures:

> "*The Court notes that the search and seizure were rather extensive and is struck by the fact that there was no independent or judicial supervision.*"[36]

In *Sallinen* there was a suspicion of a serious criminal offence and, still, the Court was surprised to find a wide and intrusive entry and seizure being conducted without judicial supervision. Under Schedule 36, it is proposed to allow such entries and seizures in far more innocuous circumstances: for the routine purpose of checking a person's tax position. The question is whether the Court would ever allow

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32 Application 5029/71, 6 September 1978

33 Most of these are included in the detailed breakdown of the cases from 1962 to 2000 in Philip Baker's excellent survey at [2000] BTR 345.

34 Application 10828/84, 25 February 1993

35 *Société Colas Est v. France*, Application 37971/97

36 *Sallinen and others v. Finland* Application 50882/99, 27 September 2005, para 89

administrative authorities to exercise such powers without independent or judicial supervision.

i) Inspection power for homes also used for business is in breach of Article 8

In the case of an inspection right at a private home also used for business, the answer is almost certainly not – the more so where the inspection is unannounced.

The Court would be very likely to find that without judicial supervision, an inspection of a taxpayer's home when there is no suspicion of crime or any wrongdoing cannot be 'reasonably required'. The Court's test of 'necessary in a democratic society' is a strict one and was summarised in *Silver v. United Kingdom.*[37]

> "...the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'…the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, inter alia, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'. "

In assessing whether there is a pressing social need for such an interference, the Court will have regard to the practice prevailing in other member states of the Council of Europe[38]. A survey by the OECD shows that in OECD states excluding the UK for which information was available, access without a warrant or the taxpayer's consent to homes used for business was only permitted in 10 out of 29 countries if no crime was suspected.[39] Of these, only 6 were also Council of Europe states (to which the Court would have particular regard). And out of 26 of 47 Council of Europe states excluding the UK covered by the survey, only 8 allowed some form entry to the home without judicial supervision.[40] Whichever group one looks at – the OECD states or the Council of Europe states – one finds that two-thirds of states insist on judicial supervision of entry to dwellings. This is hardly evidence of a 'pressing social need'.

But when it comes to pure business premises, the trend is reversed: out of 29 OECD countries for which information was available, full and free entry for tax officials is

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37 *Silver and others v. United Kingdom* Application 5947/72, 25 March 1983, para 97

38 *Soering v. United Kingdom*, Application 14038/88 para 102

39 Australia, Canada, Czech Republic, Greece, Hungary, Iceland, Ireland, Japan, Mexico, New Zealand. In Italy, the permission of the public prosecutor is required. ('Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series', OECD 2006, Table 18, page 89)

40 Czech Republic, Greece, Hungary, Iceland, Cyprus, Lithuania, Malta

permitted in 24, subject to varying conditions such as normal working hours or, in the case of Ireland, access merely at pre-specified times. Of the Council of Europe states covered by the survey entry was permitted in 23 out of 26.

Distinct treatment by most OECD countries of search powers for homes used for business as against pure business premises

Most OECD and Council of Europe states' laws therefore recognise a very real difference between the sanctity of the home that happens also to be used for business and the much lesser protection from interference accorded to pure business premises.[41] The overwhelming majority of these countries require a warrant or a suspicion of crime before any part of the home can be entered. In many cases, this protection is enshrined in their constitutions. Germany's Basic Law has been held to prevent entry by tax officials to private homes without a warrant except where there is an imminent risk of evidence being lost.[42] France has a similar rule.[43] So does Spain.[44] The UK may have been overly strict in requiring HMRC to have a warrant to inspect records for direct taxes even where they are located at pure business premises. For VAT a power to inspect without warrant has always existed for all premises. But this can be more easily justified: these taxpayers are handling money on behalf of HMRC and are likely to have more major businesses. However, the fusion of the Inland Revenue with Customs & Excise has brought about an excessive 'levelling up' of powers in the case of taxpayers' homes. Every taxpayer working from home no matter how minor his business operation is now to be subject to unannounced visits without judicial supervision or a suspicion of crime. In fact there is no need for any suspicion of wrongdoing at all. The only required purpose is 'checking that person's tax position'.[45]

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41 The Court also recognises a lesser degree of protection under Article 8 for pure business premises: *Société Colas Est v. France*, Application 37971/97, 16 April 2002 para 41. But Article 8 protection extends as of right to premises of companies that are operated by an individual: *Buck v. Germany*, Application 41604/98, 28 April 2005

42 Article 13(1) Basic Law, Judgment of 3rd Chamber of Federal Constitutional Court (Bundesverfassungsgericht) of 28.09.2006, NJW 2007, 1444. I am grateful to Dr. Stefan Mayer LL.M of Latham & Watkins in Munich for this information

43 Article 66 of the French Constitution, Decision of Constitutional Court (Conseil Constitutionel) No. 83-164 DC, 29 December 1983 : RJF 10/84 No. 1186. I am grateful to Adea Meidani, a French tax lawyer working for EDF Trading in London for this reference.

44 The Spanish constitutional court has held in its judgment of 25 July 1995 (STC 126/1995) that Article 18.2 of the Spanish constitution requires any incursion by administrative authorities on the constitutionally guaranteed inviolability of the home to be authorised by a judge. I am grateful to Toni Prat of Global Abogados in Barcelona for this information.

45 FA 2008 Sch 36 paras 10(1), 10(3)

HMRC's justifications for unfettered inspection of any premises not convincing

The rationale given for this by HMRC is misleading and insufficient. The January 2008 consultation document states:

> "*The ability of fiscal authorities to see business records, assets and premises is the norm throughout OECD countries*"[46].

As the OECD's statistics show, this is true of the authorities' powers in relation to pure business premises but not at all in relation to homes also used for business.

The consultation then seeks to justify an unfettered inspection right for both kinds of premises as follows:

> "*Where a business is being checked, the ability to see the business can give the officer a better commercial perspective and a more complete picture of the records, assets and business activities. This can reduce the time taken and avoid the asking of what turn out to be unnecessary questions.*"[47]

This may be 'useful' or 'desirable' but in terms of the test in *Silver* it has certainly not been demonstrated to be a 'pressing social need' for home-offices when three-quarters of OECD countries do not have such a right and HMRC have managed without it for two centuries of administering direct taxes.

In the sphere of tax, there would also appear to be no reported cases where the Court has sanctioned powers of entry by administrative authorities into private homes without judicial supervision. And in the many challenges to the use of entry and seizure powers by tax officials that were ruled inadmissible, the Commission often stressed that the fact of proper judicial supervision provided adequate safeguards.[48]

Strasbourg allows only limited scope for search powers for administrative authorities without judicial supervision

While also emphasising the importance of judicial supervision, the Court in *Funke*, left open the question of whether every search carried out by administrative (i.e. non-police) authorities in pursuit of crime must be accompanied by a judicial warrant. There has been one instance of the Court not insisting on this. In

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46 *A New Approach to Compliance Checks – Responses to Consultation and Proposals* , at para 7.18

47 para 2.11

48 e.g. *Winifried Hildebrand v. Germany*, Application 31513/96 involving a search of personal and professional premises on suspicion of tax evasion: 'With regard to the safeguards provided by German law, the Commission notes that the search warrant was issued by a court and that the seizure of objects during the search was confirmed by a court.'

Camenzind v. Switzerland[49] it was willing to allow officials of the Swiss telecommunications authority acting under a warrant issued by its area director to enter a person's home and check his telephones because he was suspected of having used an unauthorised phone on a military radio frequency. However, the Court again stressed that it must be:

> "particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant."[50]

The Court found that in this case no need for judicial supervision and no breach of Article 8 arose because of the extremely short and limited incursion into the home, and because the relevant law imposed very substantial safeguards: the search had to be authorised by a the director or area director of the relevant authority; there had to be a likelihood that the property searched contained a fugitive suspect or evidence of the commission of a crime; a public official such a policeman needed to accompany the officer of the administrative authority to ensure that the search did not deviate from its purpose; suspects were entitled, whatever the circumstances, to representation; anyone with an interest worthy of protection could complain to the Indictment Division of the Swiss Federal Court; and a suspect who was found to have no case to answer could seek compensation for the losses he has sustained.

Wide scope of Schedule 36 inspection power in homes used for business necessitates judicial supervision

These safeguards are far removed from the wording of Schedule 36 inspection powers, where the only safeguard is that an inspection is 'reasonably required' for the purpose of 'checking' a person's tax position.

Admittedly an inspection under Schedule 36 is not a search. Officers may not search premises but merely have power to inspect documents. But an HMRC inspection is potentially far more intrusive and burdensome than the search in *Camenzind*. The business and individual's financial records that may be requested are of a much more personal nature than a quick check of a few telephones. An inspection by HMRC is likely to last far longer and may be repeated. If it were unannounced it would not, unlike in *Camenzind*, need to be authorised by Dave Hartnett or one of HMRC's regional heads but merely by an 'authorised officer' whose rank is not laid down in the statute.[51] And as described above there is not even a requirement that an inspection is likely to reveal evidence of a crime, or any wrongdoing or even negligence by the taxpayer. The inspection need only be reasonably required 'to

49 Application 21353/93, 16 December 1997

50 *Ibid.* para 45

51 FA 2008 Sch 36 para 12(2)(b)

check that person's tax position'. Nor is there is a right of appeal against an inspection, less still a right to compensation for loss if it reveals no tax to be due.

For all these reasons the Court is likely to find that in the absence of judicial supervision such wide powers of entry to the home constitute a breach of Article 8 because of the real risk that they may be used inappropriately. One could distinguish announced from unannounced inspections in terms of their degree of disruption. But they are almost equally intrusive and in terms of their *necessity* 'in a democratic society' in the absence of any suspicion of wrongdoing the case for either is equally weak. If a test case were taken to Strasbourg it would very likely involve an unannounced inspection. The Court may conceivably take into consideration that something under a third of Council of Europe states would appear to allow such inspections and so regard them as within states' 'margin of appreciation'. But given the Court's historic role as protector of individual freedom's against excessive executive interference and its frequent pronouncements on the need for judicial supervision of entry by the administrative authorities into the home, it is far more likely have regard to the fact that over two thirds of Council of Europe states appear to be managing perfectly well without such a right so that it cannot be 'necessary in a democratic society.' It is therefore very likely that Schedule 36 inspection powers in the absence of judicial supervision would be found to be in breach of Article 8.

ii) Document removal power in flagrant breach of Article 8

All the above applies equally in relation to the Schedule 36 power to remove documents. Only here the position is if anything more extreme.

In terms of a comparison with other member states of the Council of Europe, the figures for the right to enter a private home and seize documents where the entry was not authorised by a judge are even more stark. Out of 26 Council of Europe states surveyed excluding the UK, such seizures were permitted in only three.[52] Of these, one country also required reasonable suspicion.[53] This would leave the United Kingdom in a minority of 4 out of 27 allowing such seizures. This is because the Schedule 36, power to remove documents from inspected premises is not even made dependent on an objective test of reasonableness. Instead, the power to seize documents exists, 'if it appears to the officer to be necessary to do so'.[54] This is very reminiscent of the 1945 French statute struck down in *Funke* that permitted officers to seize documents 'of any kind relating to operations of interest to their department'.

52 Greece, Iceland and Ireland, ('Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series', OECD 2006, Table 18, page 89)

53 Greece, *ibid.*

54 FA 2008 Sch 36 para 16(1)

As in *Funke*, there can be no doubt at all that this is in breach of Article 8.

Article 6 – Right to a fair trial

Surprisingly perhaps given that the Court sees itself as a guarantor of minimum standards of procedural fairness in all member states of the Council of Europe, the breach of Article 8 involved in inspections of home-offices will have no impact on the validity of subsequent tax proceedings.

No right to fair trial in tax except for criminal cases

The Court has recently confirmed its previous case law that the right to a fair trial in tax proceedings is limited to criminal cases. In *Ferrazzini v Italy*[55] it split 11:6 but confirmed that the minimum standards of due process guaranteed by Article 6 for all civil and criminal trials did not extend to public law obligations and that these included the duty to pay tax. That leaves only criminal tax matters protected. Philip Baker has argued persuasively that this distinction is nonsense and that *Ferrazzini* was wrongly decided.[56] Certainly the rationale is not clear. Perhaps it is to avoid a duty to provide legal aid. But the result is that states are free to conduct the majority of tax proceedings as unfairly as they like. Possibly in response to this the Court has partly back-pedalled by extending the meaning of 'criminal' even to tax disputes where the only penal sanction is a penalty of 10% of the outstanding tax.[57]

Even where right to fair trial exists not affected by breach of Article 8

So what is the effect of this on an ordinary penalty case where HMRC have gathered its evidence through an inspection in breach of Article 8? What if that inspection was grossly disproportionate and burdensome? Could HMRC then still levy a penalty even though the taxpayer's rights to privacy under Article 8 had been breached? In principle this is hard to justify. Where the taxpayer's wrongdoing was not especially serious, so that only a 10% penalty was sought, it would be surprising if HMRC were then able to use evidence it had obtained perhaps in serious breach of the taxpayer's rights in support of the penalty. However, the Court has held that a breach of Article 8 does not of itself make a trial unfair.[58] This was confirmed by *Khan v United Kingdom*.[59] There was a strong dissent by Judge Loucaides: 'I do not think one can speak of a fair trial if it is conducted in breach of the law'. David

55 Application no. 44759/98 (2002) 34 E.H.H.R 45

56 Intertax (2001), 360-361

57 *Jussila v. Finland*, Application 73053/01, 23 November 2006

58 (1988) *Schenk v Switzerland* 13 E.H.R.R. 242

59 Application 35394/97, 12 May 2000

Ormerod has proposed that there ought to be a presumption in favour of exclusion where Article 8 is breached, which would be rebutted only if the breach were minor and technical.[60] This seems right. But it is not the law in either Strasbourg or the UK.

The result is that a breach of Article 8 does not render a trial unfair either in ordinary tax proceedings or in criminal tax cases such as penalty cases. Where there is a breach of Article 8 both the outstanding tax and any penalties can be recovered. The Commissioners would still have an independent discretion to exclude tainted evidence. But their willingness to do so would not be affected by Article 6.

Article 13 – Right to an effective remedy

This provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Information wrongfully sought by a foreign state under exchange of information powers

Even where an inspection is carried out which the Court would consider not to represent a breach of Article 8 – for example because the inspection was pre-announced and carried out in a proportionate manner – there is nevertheless one situation where a taxpayer's rights could be breached and he would be left without an effective remedy. If HMRC are seeking information under a request from another state, that request may have been completely unjustified or disproportionate. The Commission has decided that in this situation it would not be for HMRC to assess the legality or proportionality of the request.[61] So long as the inspection was carried out compatibly with the Convention from the UK's point of view, the taxpayer would be stuck. In practice, he would be unable to seek redress from the foreign state requesting the information. His only remedy would be under Article 13.

If UK Courts ignore breach or fail to be able to interpret statute in compliance

That same problem would occur if the UK courts either ignored the breach of Article 8 represented by Schedule 36 inspection rights of home-office premises or found that they could not interpret the inspection rights to be compatible with the

60 ECHR and the Exclusion of Evidence: Trial Remedies for Art.8 Breaches, [2003] Crim. L.R. 61

61 R v. *Austria*, Application 12592/86, 6 March 1989

Convention. In either case HMRC could continue to exercise their rights as enacted and the taxpayer's only remedy would be under Article 13.

So how would a UK court deal with the issues of compatibility?

How are the UK courts likely to respond?

Powers of the courts to deal with breach of Convention rights

Since the passage of the Human Rights Act 1998, the higher UK courts have enjoyed wide powers effectively to re-write legislation and make it compatible with Convention rights[62] so long as this does not involve a departure from a fundamental feature of the legislation or go against the grain of it.[63] In arriving at this re-interpretation the UK courts must fully reflect the Strasbourg jurisprudence but should not go beyond it.[64] HMRC would then be bound both prospectively and retrospectively by the re-interpretation.[65] Where this re-interpretation proves to be impossible to perform then under the Act the courts can only issue a certificate of incompatibility. The legislation then remains in force and HMRC can continue to rely on it until it is amended by parliament.[66]

However, where legislation conflicts with Community law, all courts enjoy power independently of the Human Rights Act to strike it down. This is because Convention rights form a part of Community law.[67] So in the tax sphere, a VAT tribunal could strike down Schedule 36 rights to inspect home-offices as they would be in breach of Community law human rights implicit in the 6th Directive. But it may take a brave Tribunal Judge to do so.

In any case the courts will have to address the issue of compatibility of the inspection and document removal powers with Article 8.

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62 HRA 1998, s. 3

63 *Ghaidan v. Godin-Mendoza* [2004] 2 A.C. 557

64 *R. (on the application of Ullah) v Special Adjudicator* [2004] 2 A.C. 323 per Lord Bridge at 350

65 HRA 1998 s. 6(1)

66 HRA 1998 s. 6(2)

67 *Kadi v Council of the European Union* (C-402/05 P) [2008] 3 C.M.L.R. 41

Pre-authorisation by the First Tier Tribunal of all unannounced inspections of homes used for business

Assuming the courts find unannounced inspections of home-offices to be in breach of Article 8, they could impose the requirement which HMRC initially resisted that unannounced inspections of such homes be made subject to prior approval by the First Tier Tribunals. This would be simplest. If HMRC's draft code of practice is correct to stress that unannounced inspections generally would only be required in 'exceptional circumstances',[68] then it is unlikely that HMRC's fears will be realised that such pre-authorisation would 'risk overloading either the judicial system or the new tribunals.'[69] Perhaps the courts may be slightly shy of using their authority to expand the powers of the judiciary in defiance of the intention of parliament. However, they would have ample authority from Strasbourg to do so.

Although as above, in principle Strasbourg is also likely to disapprove of the absence of judicial supervision of announced visits, there is at least more room for argument here. The UK courts may therefore draw back from requiring announced visits to be judicially supervised, particularly because imposing such a requirement comes close to departing from a fundamental feature of the legislation or going against the grain of it.

For all inspections at a home also used for business, insert safeguards into the statute that are currently contained in the draft code of practice only for unannounced inspections

Alternatively or additionally the Courts could imply into the legislation some of the sensible guidelines that HMRC have adopted in their draft code of practice for unannounced inspections but apply them to all inspections of domestic premises. For example:

> "Such visits would need pre-authorisation within HMRC at a senior level. The authorising officer would be accountable for actions undertaken during the visit and would need to be satisfied in advance that:
>
> - there was evidence to suggest deliberate understatement of tax or deliberate over claims of repayments; and
> - there would be no infringement on the taxpayer's private life or that of other family members or that infringement was proportionate to the risk"[70]

68 *A New Approach to Compliance Checks – Responses to Consultation and Proposals* at para 7.18

69 *Ibid.* at para 5.33.

70 *Ibid.* at para 7.18

Adopting these guidelines into the Schedule might deal with likely concerns from Strasbourg about a power to make unannounced and judicially unsupervised inspections at a home when no crime or even wrongdoing is suspected. As above, when seeking to justify the interference with the taxpayer's rights under Article 8, there is no reason in principle to apply a less strict test of necessity for announced inspections to a home than for unannounced ones. So in terms of applying stricter safeguards other than judicial supervision into the legislation, it would be only consistent to apply the same ones to both types of inspection. If this were done, it would at least lessen the risk that on any subsequent challenge to Strasbourg the court there would insist also on judicial supervision. And certainly if these additional safeguards for all inspections were also coupled with a requirement for judicial inspection of unannounced inspections then Strasbourg may be more willing not to interfere with announced inspections not being judicially supervised. But before that were possible, the problem of the wide scope of document removal powers would need to be dealt with.

Imply a test of reasonable need to the removal of documents

It should be wholly uncontroversial that the need to remove documents must be based on an objective test and not on whether it 'appears to the officer to be necessary to do so'. So the UK courts would as a minimum have to make it subject to a test of reasonable need. But they may well have to go further. Considering that a much smaller minority – 3 out of 26 other Council of Europe states – in the OECD survey allowed both judicially unsupervised inspections and removal of documents whereas a more sizeable minority of 10 out of 29 allowed judicially unsupervised inspections alone, it may be that the presence of even such a document removal power on the basis of reasonable need would diminish any hope of successfully arguing in Strasbourg that the lack of judicial supervision of Schedule 36 inspections and document removal lies within a state's margin of appreciation. If the UK courts wish to avoid Strasbourg requiring judicial supervision even for announced inspections, it may be that they would do well to make document removal powers subject to a much stricter safeguard, such as reasonable suspicion of a substantial underpayment of tax or even of crime.

No declaration of incompatibility

The last option of issuing a certificate of incompatibility is unnecessary and counterproductive. Implying the suggested terms into the inspection powers for homes used for business would not be going 'against the grain' of the legislation. Issuing a certificate would also leave the scope of any additional safeguards up to the whim of parliament. This is unlikely to prove fruitful when parliament has already been extensively lobbied to insert additional statutory safeguards but has declined. Issuing a certificate would also leave all those taxpayers without a remedy who had suffered a breach of their Article 8 rights before parliament got round to amending the legislation.

So to make the inspection powers compatible the UK courts are likely

In relation to inspections at homes used for business:

- to make unannounced inspections subject to pre-authorisation by the Tribunal; and/or

- to read into all such inspections certain safeguards currently contained in the draft code of practice for unannounced visits; and

In relation to document removal powers

- At the very least to introduce a requirement that any removal of documents is reasonably necessary and perhaps make it subject to reasonable suspicion of substantial underpayment of tax or the commission of a tax crime.

What difference would this make in practice?

As above, when the Schedule 36 powers first come into force, a taxpayer could seek an interim injunction pending judicial review of them. Assuming the courts then make the new inspection and removal powers in Schedule 36 subject to additional safeguards then where there is a breach of any of the safeguards the taxpayer would have an action for damages against HMRC under ss 6(1) and 8 HRA 98. But this may be of relatively little use. Only the wealthy or very determined would bother to pursue it.

Nor would HMRC be precluded from using information it had found during an inspection in breach of Convention rights in proceedings against the taxpayer. Since a breach of Article 8 privacy rights does not render a trial unfair even in those few cases where a right to a fair trial applies in tax proceedings, HMRC will always be able to use evidence discovered during inspections to levy the outstanding tax due. In one sense this is a good thing. Tax that is due ought to be collected. But the rule is also likely to hit vulnerable taxpayers most. Where the amount due is small and yet HMRC has behaved improperly or disproportionately, such taxpayers are unlikely to be able to seek separate redress for a breach of their Article 8 rights. So the incentive for HMRC to act properly when there are other pressures on them to collect as much tax as possible may not be all that great.

HMRC could even go further and seek to levy penalties where it had itself been substantially at fault in carrying out inspections. Of course HMRC may voluntarily waive penalties. But if not, taxpayers' only option would be to seek separate redress for breaches of Article 8. In most cases they would have neither the energy nor the means for this.

Overall: where HMRC are determined to be mean the court's insertion of Convention rights would make little practical difference. But in the ordinary case where HMRC abide by the rules, the judges' insertion of legally binding safeguards into the new Schedule 36 inspection powers to make them comply with Article 8 would send an important signal to HMRC of where the limits lie and also give determined taxpayers a means of legal redress if they were breached. This would go some way towards restoring the imbalance that caused Lord Scarman such concern in *ex parte Rossminster*:

> "*If power exists for officers of the Board of Inland Revenue to enter premises, if necessary by force, at any time of the day or night and then seize and remove anything whatsoever found there which they have reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of any office or offences involving any form of fraud in connection with, or in relation to, tax, it is the duty of the courts to see to it that it is not abused; for it is a breath-taking inroad upon the individual's right of privacy and right of property. Important as is the public interest in the detection and punishment of tax frauds, it is not to be compared with the public interest in the right of men and women to be secure in the privacy of their homes, their offices and their papers.* "[71]

71 [1980] AC 952 at 1022