

A **In The Supreme Court of the United Kingdom**

**ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL**

B **COURT OF APPEAL REFERENCE: C1/2008/2488 and C1/
2008/2690**

**NEUTRAL CITATION OF JUDGMENT APPEALED AGAINST: [2010]
RWCA Civ 83**

BETWEEN:

C **THE QUEEN**

**(on the application of ROBERT JOHN DAVIES & MICHAEL JOHN
JAMES)**

Appellants

and

THE COMMISSIONERS FOR HM REVENUE & CUSTOMS

Respondents

D **THE QUEEN**

(on the application of ROBERT GAINES-COOPER)

Appellant

and

E **THE COMMISSIONERS FOR HM REVENUE & CUSTOMS**

Respondents

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CASE FOR THE RESPONDENTS

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INTRODUCTION

1. These appeals raise questions concerning the interpretation of IR20 (1999 version) and its application to the facts of each Appellant taxpayer's case. Issues of residence give rise to complex questions of fact. The principles depend on case law not on statutory definition. Many of the questions that must be answered to determine issues of residence require value judgments which may express a wide range of views all of which are within the area of reasonable conclusion. The same is true of IR20; its very terms require an assessment of the relevant facts and that a value judgment be made on those facts.
2. Her Majesty's Revenue and Customs ("HMRC") accepts that a taxpayer has a legitimate expectation that HMRC will apply the guidance of IR20 to the facts of his particular case and, if satisfied that the facts and evidence fall within one of the circumstances in chapter 2 of IR20 indicating a certain residence treatment, will treat him accordingly.
3. The critical question, as the Appellants recognise, is a question of interpretation: what does the guidance in IR20 mean? On this question, HMRC submits, and the Court of Appeal held, IR20 sets out guidance in relation to particular factual circumstances likely to be sufficient to establish that a taxpayer is not resident or ordinarily resident. As is made clear in the Preface and paragraph 1.1 of IR20, the guidance is based on and consistent with the case law on residence¹ and HMRC has not sought to depart from it. Importantly, the relevant paragraphs of the guidance relied upon by the Appellants do not contain clear and unequivocal bright line tests; they involve evaluative judgments which provide no certainty of outcome.
4. Subject to that qualification, under IR20 a taxpayer may establish that he is not resident and not ordinarily resident in two

¹ The case law on residence is summarised in the Appendix to this Printed Case

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distinct ways, either by establishing that he left for full-time employment abroad which he has maintained for at least a whole tax year (2.2), or by leaving permanently or indefinitely (2.7-2.9). The criteria for achieving that status are not the same and are not expressed in the same way in IR20.

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5. The correct interpretation of those paragraphs of the Guidance is as follows:

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(i) 2.2: to come within this paragraph a taxpayer must leave the UK for and remain absent and in full-time employment abroad throughout the relevant tax year (and this will be sufficient to establish the necessary break with his former residence status in the UK). Full-time employment throughout any subsequent tax years does not affect the date when a taxpayer first attained non-resident status; that date is determined by reference to the date the taxpayer left to work full-time abroad. The question what is full-time employment abroad is a question of fact and degree susceptible of different answers and influenced by different factors depending on the circumstances, as 2.5 makes clear.

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(ii) 2.7-2.9: to come within these paragraphs a taxpayer must have left the UK (so as to break his former residence status in the UK) permanently or indefinitely. Significantly, the opening words of paragraph 2.8 are "If you claim you are no longer resident and ordinarily resident we may ask you to give some evidence that you have left permanently or to live outside the UK for 3 years or more". Paragraph 2.8 continues by describing the evidence that may be required to demonstrate that the taxpayer has left the UK permanently or to live outside the UK indefinitely: "This evidence might be, for example, that you have taken steps to acquire accommodation abroad to live in as a permanent home, and if you continue to have property in the UK for your use, the reason is consistent with your stated aim of living abroad

permanently or for three years or more". This is but an example of evidence that demonstrates severance of UK ties and makes clear that the extent to which the taxpayer retains UK ties will have a significant and often dispositive impact on the question whether the taxpayer has left permanently or indefinitely. That such severance of UK ties is necessary is further confirmed by paragraph 1.4 which warns the taxpayer that residence abroad does not mean that the taxpayer is not also resident in the UK. Permanent or indefinite absence abroad for these purposes connotes a severance of that which previously bound the taxpayer to the UK as a resident of the UK.

6. The Court of Appeal interpreted the guidance in IR20 to determine its objective meaning. Its judgment and in particular the reasoning of Moses LJ (with whom Dyson LJ agreed) is fully supported.
7. If that interpretation is the correct one, as the Court of Appeal held it to be, the Appellants contend that whatever the true meaning of IR20, HMRC has changed its construction of IR20 in an unannounced change of policy, and retrospectively applied that construction to the cases of these Appellants, thereby acting unlawfully. Both appeals have proceeded on the basis of the Appellants' express assertion that the change of policy occurred in 2004/05² and HMRC addressed this allegation in witness statements, responding to the material produced by the Appellants, and by disclosing such relevant, internal correspondence and documents as were retained centrally³. It is therefore a matter of surprise and regret that Messrs Davies and James have seen fit by reference to a document available to them but not put in evidence, to charge HMRC with lack of candour in circumstances where the allegation has never previously been

² See Paragraph 2.3.3 of the D&J Case

³ As Moses LJ recorded at [64] HMRC has no central store for files and wording takes place after six years.

A ventilated before a court at any level and where the only document that supports their claim was in fact disclosed by HMRC.⁴ The allegation is denied, and is dealt with substantively below.

B 8. On this issue of an alleged change of practice, HMRC submits, and the Court of Appeal held, that HMRC's interpretation of chapter 2 IR20 has not changed, and there has been no change of policy or practice as the Appellants contend. The evidence does not establish a settled or any consistent practice by HMRC of not requiring a distinct break in the pattern of a taxpayer's life in the case of taxpayers relying on 2.7-2.9 of IR20 that even arguably forms the basis of any alternative legitimate expectation of these Appellants.

C 9. If HMRC's interpretation of the guidance in IR20 is correct and there has been no unlawful change of policy, it follows that HMRC has applied the guidance reasonably and rationally in each taxpayer's case. HMRC's refusal to treat each of the Appellants as not resident or ordinarily resident cannot be impugned, as the Court of Appeal held.

D 10. In each of the cases before the Court HMRC applied the guidance of IR20 to the facts of the taxpayer's case but was not satisfied that the facts and evidence established that any one of them fell clearly within the terms of paragraphs 2.2 or 2.7 to 2.9 of IR20. In this regard, the principal focus of all of the Appellants is now paragraphs 2.7 - 2.9. It cannot be said that HMRC's conclusion that none of the three Appellants left the UK permanently or to live outside the UK indefinitely was irrational in circumstances where each returned regularly to the UK to their homes, wives and children and to work as employees in their UK offices and pursue other extensive UK business or social activities.

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⁴ The statement in the final sentence of paragraph 1.7 of the RGC Case is similarly unfortunate and surprising.

I APPLICABLE LEGAL PRINCIPLES

11. The Appellant taxpayers in these appeals rely upon the alleged creation of a substantive legitimate expectation based on IR20. HMRC accepts that a taxpayer has a legitimate expectation that HMRC will apply the guidance of IR20 to the facts of his particular case and, if satisfied that the facts and evidence fall within one of the circumstances in chapter 2 of IR20 indicating a certain residence treatment, will treat him accordingly².
12. However, in approaching the issues of interpretation that lie at the heart of these appeals it is necessary to be clear both as to the principles to be applied in considering a claim that a public body has created a substantive legitimate expectation; and as to the nature of IR20 and the context in which it sits.

A clear, unambiguous, unqualified promise

13. The first, and the key, ingredient required for the creation of such an expectation in the case of guidance such as IR20 is the existence of a representation or promise that is "clear, unambiguous and devoid of relevant qualification"; see eg R v IRC ex p. MFK Underwriting [1990] 1WLR 1545 at 1569G (per Bingham LJ); cited with approval by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2) [2009] AC 453 at [60]; see also Lord Rodger at [115] and Lord Carswell at [134]; Bancoult being itself cited with approval by the Privy Council (Sir John Dyson) in Paponette v AG of Trinidad and Tobago [2010] UKPC 32 at [28].
14. It is for the Court to determine the meaning of the guidance in question: see R (Lolli Raiser) v SSHD [2008] EWCA Civ 72; First Secretary of State v Sainsbury's Supermarkets Ltd [2005]

² Both cases mischaracterise HMRC's position in this respect (see: paragraphs 10, 11 and 13 of the RGC Case and 5.1 D&J Case). HMRC's case has not changed, but the Appellants' Cases have done so. The Appellants previously contended that IR20 contained "bright line tests" that HMRC was bound to apply irrespective of the facts. See to this respect Moses LJ at [22].

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BWCA Civ 520 at [16]; and (in a tax context) Accenture v HMRC [2009] STC 1503 at [33] (Sales J). The question is thus what the guidance means, and not what the public authority might rationally conclude it to mean.

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15. In determining such meaning it is trite that:

(i) the court is not construing a statute but statements of general guidance;

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(ii) the true meaning of parts of the guidance should be read in the light of the document taken as a whole⁶, and having particular regard to the purposes for which it was made (derived from either or both of its context and its express terms).

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16. In determining whether a promise of this kind has been made by the public authority, and if so what the content of any such promise may be, the context is all-important. As Bingham LJ put it in MFK Underwriting (supra) at 1569A-C:

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“... in assessing the meaning, weight and effect reasonably to be given to statements of the revenue the factual context, including the position of the revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law: *Reg. v Attorney General, ex parte Imperial Chemical Industries Plc.* (1986) 60 T.C.J., 64g, per Lord Oliver of Aylmerton. Such taxpayers would appreciate, if they could not so pithily express, the truth of the aphorism of “One should be taxed by law, and not be untaxed by concession.” *Vestey v Inland Revenue Commissioners* [1979] Ch. 177, 197 per Walton J.”

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17. As this passage indicates, the position of HMRC is an important element of the context, influencing both the existence and the precise nature of any alleged promise said to have created a

⁶ As Wilkie J said, IR20 is a document that “has to be viewed whole and not piecemeal”. [10] [DJ App I p51]. See also Moses LJ at [34] to similar effect.

substantive legitimate expectation. The following points are of note:

- (i) HMRC, as Bingham I.J emphasised, is a tax-collecting agency charged with the function of collecting the taxes that Parliament has decided should be imposed on taxpayers.
- (ii) HMRC cannot act *ultra vires*; and thus any promise, however clear, to do that which HMRC did not have power to do would be incapable in principle of generating a legitimate expectation⁷. HMRC has a wide managerial discretion.⁸ However, there is a *vires* line beyond which this discretion can no longer be exercised.⁹ Thus, for example, s1 of the Taxes Management Act 1970 cannot authorise HMRC to announce in its published guidance that it will deliberately refrain from collecting taxes that Parliament has decided shall be paid. HMRC's power to publish concessions is a power that may lawfully be exercised in relation to concessions *only* where those will facilitate the overall task of tax collection, but with a view to the best manner of obtaining for the national exchequer the highest net return that is practicable: Wilkinson [2003] EWCA Civ 813 (Phillips MR at [45] and [46]); approved by Lord Hoffmann at [20] and [21]. This feature suggests a properly cautious approach to guidance – both in relation to whether HMRC has indeed bound itself in public law in summary to forgo tax, and, even if it has, as to the nature and extent of any such alleged concessions.

⁷ Al Fayed v Advocate General of Scotland 77 TC 173.

⁸ The Taxes Management Act 1970 (s1) places income tax under the care and management of HMRC and for that purpose confers upon HMRC certain discretion in the exercise of its powers. The managerial discretion is wide, extending to cover: "... the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection" (R v Commissioners of Inland Revenue ex parte National Federation of Self Employed [1987] AC 617, 636 (per Lord Diplock)).

⁹ Wide as it is, the managerial discretion does not extend so wide as to permit HMRC to act contrary to its statutory duty. R (Wilkinson) v IRC 77 TC 78 (HL, Lord Hoffmann at [21], approving the decision of the CA in that respect, see [2002] EWCA Civ 814 at [46]). See also IRC v Bates [1968] AC 483, 516D-G (Lord Upjohn); Vestey v IRC [1980] AC 1148, 1172D-1173C (Lord Wilberforce) and, especially, 1194B-1195G (Lord Edmund-Davies).

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(iii) HMRC is also well aware that the concepts set out in legislation by reference to which the payment of tax is determined are interpreted and clarified by the jurisprudence of the Courts over the years. That jurisprudence is an integral part of being "taxed by law". That is of course not to say that there might not be real benefit in HMRC issuing guidance on some of the more complex concepts (that indeed is what HMRC has done in IR20). However, it would be inherently surprising, and potentially problematic legally, for HMRC by 'guidance' significantly to depart from principles established in the relevant jurisprudence.

18. As the passage from MFK Underwriting also indicates, the position of the taxpayer is also relevant. It is of course well established that the general approach is "how on a fair reading of the promise it would have been reasonably understood by those to whom it was made": per Dyson LJ in R (ABCTFER) v Secretary of State for Defence [2003] QB 1397 at [56], cited with approval by the Privy Council in Paponette (supra). However, some care is needed in considering the specific position of a taxpayer, including in particular as in these appeals those who seek to take advantage of non-resident status:

- (i) The target audience is, as Bingham LJ noted in the passage quoted above, "the ordinarily sophisticated taxpayer".
- (ii) He can be taken to know that which Bingham LJ ascribed to him – namely that "he will be taxed according to statute, not concession or a wrong view of the law". He will not necessarily have ascribed to him an intimate knowledge of the law. But nor can he simply proceed on the basis that the law (and for example, the guidance it may provide on the concepts used) will be irrelevant in the context of the guidance given by HMRC.

(iii) Importantly in the present context (see further below), the taxpayer must be taken to have read any guidance as a whole, paying proper attention to indications given as to its nature.

19. In these circumstances, the essence of the approach, with its emphasis both on the capacity of formally published statements to bind but also on the very important caveats, was encapsulated by Bingham LJ in MFK Underwriting (supra) at 1569C:

"No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them." (emphasis added)

20. Guidance such as IR20 will frequently include concepts requiring an evaluative judgment to be made in applying the concept to any particular set of facts. It is submitted that the correct approach in principle in relation to the application of such concepts to the facts is one of rationality. Thus, where on a proper interpretation of the guidance it calls for evaluative judgments in order to determine whether the taxpayer falls within the condition or conditions identified by the guidance, the proper approach for the court is to treat HMRC as the primary decision-maker. This was the analysis of Sales J in Accenture (supra) [34 - 36]¹⁰. He was considering the meaning and effect of extra statutory VAT concessions. He noted first that the proper interpretation of the concessions was a matter for the Court, and went on:

"34. ... in relation to the application of the Concession to the facts in this case, evaluative judgments were called for in relation to each of Conditions (a) and (b). Was ASL "supplying staff" to Barclays, as that expression is to be understood in the context of the Concession? Was ASL carrying on an "employment business" as defined in the 1973 Act? The judgments required on these points in the circumstances of the tripartite arrangement in this case were not simple and straightforward. They were evaluative judgments of the kind identified in, for example, Moyna v Secretary of State for Work and Pensions [2003] 1 WLR 1929,

¹⁰ Accenture involved the interpretation of an extra statutory concession intended to depart from the law: see [52] of the judgment of Sales J. The relevant parts of IR20 relied upon by the Appellants are not extra statutory concessions and are intended to reflect the common law of residence and should be interpreted (so far as possible) as so doing.

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HI, at [19]-[20]. Is it for the court to make the necessary evaluative judgments as primary decision-maker, having regard to all the evidence available to it at the time of the hearing? Or is the proper approach, on a question of this kind, for the court to treat HMRC as the primary decision-maker for making such evaluative judgments regarding the proper application of the Concession, having regard to the evidence before them, and subject only to review by the court to ensure that their judgment was not an irrational one?

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35. In my judgment, the latter is the correct approach on an issue of this kind. HMRC are the body entrusted by Parliament with the role of administering the tax system, who have made the relevant decision to promulgate and operate the Concession. They have experience and expertise in making evaluative judgments of the kind in question here. A decision was called for from them whether the Concession applied or not, and that is the decision which the court is asked to review in these proceedings. If they properly interpreted the terms of the Concession and reached a rational conclusion that it did not apply in the case of ASI, (even if the court might itself have reached a different conclusion), it could not in my view properly be said that they had acted unfairly or had committed an abuse of power. Accordingly, it could not then be said that there were any proper or sufficient grounds for the court to override their judgment by reference to the law protecting substantive legitimate expectations, since the foundation for the doctrine of legitimate expectations is unfairness or abuse of power. Moreover, in a case where HMRC rationally concluded that a person in the position of ASL did not fall within the terms of the Concession, it could not properly be said that that person had a case "falling clearly within" those terms, as required under the test stated by Bingham LJ in ex p. MFK Underwriting Agencies Ltd and reiterated by Collins J in Greenwich Property Ltd.

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36. I therefore consider that it is for the court to rule upon the proper interpretation of the Concession, but that otherwise the proper legal test in relation to the evaluative judgments made by HMRC in deciding whether Conditions (a) and (b) were satisfied or not is a test of rationality, applied to the decisions contained in the First Decision Letter in light of the evidential material available to HMRC at the time that letter was sent."

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The specific features of the present context

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21. The general features dealt with above relating to the position of HMRC when publishing guidance of this kind; and of the ordinarily sophisticated taxpayer are noted and not repeated.
22. However, it is necessary and important in considering the issues of interpretation raised by these appeals to have regard to the Preface to the Guidance. It is to be noted that in both Cases, the

Appellants focus exclusively on chapter 2, and choose simply to ignore the Preface and chapter 1 IR20. They state, so far as relevant at this stage:

"The notes in this booklet reflect the law and practice at October 1999. They are not binding in law and do not affect rights of appeal about your own tax.

You should bear in mind that the booklet offers general guidance on how the rules apply, but whether the guidance is appropriate in a particular case will depend on all the facts of that case. If you have any difficulty in applying the rules in your own case, you should consult an Inland Revenue Tax Office – see paragraphs 7 to 9 of the Introduction on contacting the Inland Revenue.... Some practices explained in this booklet are concessions made by the Inland Revenue. A concession will not be given in any case where an attempt is made to use it for tax avoidance.

1 Residence and ordinary residence

1.1 The terms 'residence' and 'ordinary residence' are not defined in the Taxes Acts. The guidelines to their meaning in this Chapter and in Chapters 2 (residence status of those leaving the UK) and 3 (those coming to the UK) are largely based on rulings of the Courts. This booklet sets out the main factors that are taken into account, but we can only make a decision on your residence status on the facts in your particular case."

23. HMRC does not rely on these paragraphs as a basis for arguing that it is not bound to apply IR20 where the factual circumstances fall clearly within its terms (HMRC applying appropriate judgments to the evaluative concepts it contains). However, the following are immediately apparent¹¹:

- (i) The stated intention of the Guidance was to reflect the law and rulings of the courts and practice at a particular date. HMRC published IR20 based on the principles established by case law and consistent with those principles. There is no divergence between IR20 and the law. The Preface, fairly read and from its outset, puts the ordinarily sophisticated

¹¹ HMRC does not contend that the reference to the Guidance not being "binding in law" is in itself sufficient to preclude a legitimate expectation arising. That reference is consistent however with the thrust and tenor of the Preface, as analysed in this paragraph of the Case.

A taxpayer on notice that the Guidance was intended to be reflective of, and not a departure, from the relevant law. The same theme appears in the reference in the first sentence of the second paragraph to the Guidance being as to the underlying and governing "rules". He is also put on notice that the law and practice is as at a particular date (October 1999). No doubt, if a legal development radically altered a part or parts of the Guidance, HMRC could and would issue revised Guidance. However, the taxpayer is given no promise or expectation that the Guidance is doing more than summarising law and practice at that date.

(ii) There is an express warning and an express solution offered.

The warning is that the Guidance is general, not necessarily comprehensive (see the reference to the "main factors" in paragraph 1.1) and the analysis of the application of the Guidance is necessarily fact specific. That is unsurprising given, and is reflective of, the evaluative nature of almost all of the concepts used in the Guidance and the underlying legal principles. IR20 contains very few bright line tests of certain application. The solution is to consult the taxpayer's Inland Revenue Office. That should be done, according to the express terms of the Preface, in the case of "any difficulty in applying the rules [the same concept as has been used earlier] in [the taxpayer's] own case".

(iii) Thus, to ground any legitimate expectation in the face of this Preface and in circumstances where he has chosen not to consult the relevant tax Office, it is necessary for the taxpayer to demonstrate that, on its true interpretation, the Guidance is clear to the point of there being no difficulty in the application of the underlying "rules" as reflected in the Guidance.

24. The terms of the Preface and of paragraph 1.1 of the Guidance are properly and accurately descriptive of the content of the guidance that follows. Thus, in summary at this stage:

- (i) Both under common law principles and IR20 it is possible to be resident (or ordinarily resident) in both the UK and some other country at the same time. Accordingly, the Guidance paragraph 1.4 warns taxpayers of this possibility and of the fact that simply because a person is resident abroad does not mean that he cannot also be resident in the UK.
- (ii) The tests for establishing non-resident status in 2.2 and 2.7-2.9 are evaluative or qualitative not merely quantitative as the Appellants contend (RGC Case paragraphs 24-26; D&J Case paragraphs 2.4.2 - 2.4.3). Absence alone is not sufficient, however long. It is the nature and character of the absence that matters, and these are questions of fact and degree. A person who usually lives in the UK but takes holidays or makes business trips abroad exemplifies the obvious case where the necessary quality of absence from the UK cannot be established. This is specifically identified in 2.1.
- (iii) There is only one bright line test establishing resident or non-resident status in IR20 that can be applied without any wider factual enquiry, and is capable of certain conclusion. It has statutory foundation in s336(2) ICTA 1988, and is found in IR20 1.2: a person will always be resident if present in the UK for 183 days or more in any one tax year; there are no exceptions to this, as IR20 expressly states. As stated, this bright line test is laid down by statute. The day-count rules (which have no statutory basis) are not a test for establishing non-residence, but concern visits to the UK once the taxpayer has already left and established his non-resident status: see *Mosca LJ* at [56].

A 25. Nor does IR20 limit the scope of HMRC's factual enquiry as the
Appellants have appeared to contend. But this does not diminish
or detract from its utility, as *Mosca LJ* recognised [17]. If a
taxpayer falls clearly within the specific factual situations
described by 2.2 or 2.7-2.9 (the appropriate evaluative judgments
having been made), HMRC will treat that taxpayer in accordance
B with the terms of IR20. Similarly, the fact that a construction
may, in some cases, lead to uncertainty, does not call into
question its correctness (contrary to paragraph 40 - 42 of the
RGC Case). In a field fraught with borderline cases relating to an
enormous variety of circumstances, IR20 assists taxpayers in that
C regard, but does not set out bright line tests that lend themselves
to a certain conclusion, which would be a fundamental departure
from the common law approach.¹²

Change of practice - legal principles

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substantive, is founded on the establishment of an abuse of
power, which is in turn founded on the related principles of
fairness and good administration: see eg *In re Preston* [1985] 1
AC 835 at 864G; *R v Inland Revenue Commissioners ex parte*
E *Matrix Securities Ltd* [1994] 1 WLR 334 at 352 and 356; *R*
(Nadarajah) v Secretary of State for the Home Department
[2005] EWCA Civ 1363 at [68]-[70].

F 27. It is accepted that there may be circumstances in which a
legitimate expectation may be established absent a clear,
unambiguous and unqualified promise; and that a departure from
a practice can amount to an abuse of power, because such a
departure would be unfair and contrary to good administration.

G ¹² The scope for legitimate disagreement between the taxpayer and HMRC on whether he falls clearly within the relevant paragraphs in IR20 is further recognised by Chapter 10 which informs the taxpayer that if he disagrees with HMRC's interpretation of the facts he has the right to appeal to the Tax Tribunal which will consider the question of residence status on common law principles.

28. It is to be noted at the outset that the Appellants here claim that they have a substantive legitimate expectation that an asserted practice would continue. The differences between this and procedural legitimate expectation have been much analysed in the Courts – see especially, and by way of example, R (on the application of Bhatt Murphy) v the Independent Assessor [2008] EWCA Civ 755.

29. The authorities have recognised that the establishment of a substantive legitimate expectation based on a past practice, and not involving a clear, unambiguous and unqualified representation or promise, will be exceptional or “rare indeed”: see eg R v Inland Revenue Commissioners, Ex parte Unilever [1996] STC 681 (CA, Sir Thomas Bingham MR and Simon Brown LJ delivering the two principal judgments, with both of which Hutchinson LJ agreed; the “rare indeed” quote being from p695); Bhatt Murphy (supra) at [41] citing Lord Templeman in In re Preston (supra). So in R (ABCIFER) (supra), Dyson LJ giving the judgment of the Court (also comprising Lord Phillips MR and Schiemann LJ) having analysed ex parte Unilever (supra) stated at [72]-[73] that it was

“72. ... clear that it will only be in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation. That is because it will only be in a rare case where, absent such a representation, it can be said that a decision maker will have acted with conspicuous unfairness such as to amount to an abuse of power.

73. ... there is no warrant for treating this case as so exceptional that the need for a clear and unequivocal representation to found a legitimate expectation can be dispensed with.”

30. The principled reasons for the Courts only being prepared exceptionally to intervene in this sort of case were explored in Bhatt Murphy (supra). The Court of Appeal noted at [41] that this exceptionality was based on the fact that “a public authority will not often be bound by law to maintain in being a policy [or

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practice] which on reasonable grounds it has chosen to alter or abandon"; and that this is because public authorities typically enjoy wide discretion which it is their duty to exercise in the public interest, deciding as they have to both the content and the pace of change.

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31. What is necessary to be established in order to found such a practice? It is submitted that, first, the practice must have at least the same degree of clarity and lack of ambiguity and qualification as is required in order to make out a promise or representation of a kind giving rise to legitimate expectation. There is no reason in principle for the requirements in relation to a practice to be any less stringent than they are in relation to a promise or representation. On that basis, and on the basis of authority (see R v Inland Revenue Commissioners, Ex parte Unilever (supra), what is needed is "a clear and consistent pattern" of an "invariable" practice over a prolonged period; or a "settled and established" practice (R (on the application of Bhatt Murphy) (supra) at [32]). On the "unique" (p691G) facts of Unilever, there had been an invariable practice of not insisting on time limits (that were in any event "demonstrably pointless" given the processes followed) covering a large number of cases, involving the same taxpayer, over a period of over 20 years.

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32. Secondly, the jurisprudence also indicates that the practice must amount in effect to a promise or undertaking of a particular character. In essence, the public authority must, by the practice, have given an assurance that the policy or practice would continue. As it was put by Laws J in Bhatt Murphy at [43]:

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"Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact ... that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. Lord Templeman in Preston referred (866 — 867) to "conduct [in that case, of the Commissioners

of Inland Revenue] equivalent to a breach of contract or breach of representations".

33. Thirdly, and flowing from this quote, it will be relevant to the claim that a substantive legitimate expectation has been created to consider the class of person said to be able to rely upon it. In Bhatt Murphy, Laws LJ went on to identify the "pressing and focussed nature" ([46]) of the promise given in Coughlan. He noted that in theory there might be no limit to the number of beneficiaries of a promise of a substantive legitimate expectation. However, "... in reality it is likely to be small" because "it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class": [46] (See to like effect eg Lord Carswell in R (Bancoult) (supra) at 513).

34. Fourthly, whilst reliance on the asserted policy or practice might not be essential in all cases, it is a relevant factor.

35. Fifthly, running through the cases, and specifically those involving taxpayers in effect asserting that HMRC has foregone its ability to collect tax, is a principle of open dealing. In MEK Underwriting (supra) at 1569E-F, Bingham LJ emphasised the need for the taxpayer to "put all his cards face upwards on the table". It is submitted that there is every reason why the same principle should apply in the context of an asserted practice: a finding of abuse of power should only be made if the Court is entirely satisfied in summary, that the public authority has clearly committed itself to a position on an issue squarely raised with and considered by it. In the context of a practice, it is always open to an individual taxpayer to do that which the Preface to the Guidance specifically invites him to do. The same applies with a professional adviser. If the latter believes that HMRC is following a general practice, particularly one that involves HMRC foregoing an ability to collect tax, he can and he should raise it squarely with HMRC and invite HMRC to agree with his view or to clarify the position.

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36. The establishment of such a practice by HMRC is all the more difficult in a context in which the following notable features are present:

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(i) The practice asserted does not arise in relation to the taxpayer who claims that HMRC has bound itself to treat him in a particular way. This stands in stark contrast to the position in Unilever. Instead, the attempt to establish the practice is sought to be based in particular on their advisers' experience of other cases.

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(ii) The practice is said to go beyond the clear and express terms of the Guidance; and thus in effect to bind HMRC to forego tax across a potentially wide swathe of cases.

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(iii) The practice is said to do so in a context in which in almost all cases (and these were no exceptions) a number of evaluative judgements needed to be made based on the particular facts of the individual cases.

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(iv) The practice is said to have arisen so as to provide what is in effect a binding gloss on Guidance which contains at its very outset the clearest indication that (a) it is intended as a reflection of law and practice at a particular date; (b) it is general in nature; and (c) careful consideration of the particular facts of the case in question will be needed.

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II CORRECT APPROACH TO THE INTERPRETATION AND APPLICATION OF GUIDANCE IN IR20

Paragraph 2.2

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37. The interpretation of paragraph 2.2 is relevant only to Mr Davies and Mr James. Mr Gaines-Cooper rightly places no reliance on it. (But in fact, the real focus of the dispute in the cases of Mr Davies and Mr James is whether their employment was in fact

full-time in the relevant tax year so that they could be said to have "left to work full-time abroad" for the whole of the relevant year. HMRC has always disputed this point, despite the repeated assertions to the contrary in the D&J Case.)

38. *Relevant tax year:* The Appellants contend that HMRC has misconstrued 2.2 and in particular:

"Your absence from the UK and your employment abroad both last for at least a whole tax year; ..." (emphasis added).

They contend that this reference to "a whole tax year" is a reference to any whole tax year and not necessarily *the* tax year in respect of which the charge to capital gains tax is raised. The point is important in their cases because HMRC has always maintained that whilst full-time employment might have been established at some later stage in the tax year 2001/02, the facts do not support a conclusion that these taxpayers were working full-time in Belgium by 6 April 2001.

39. By extra-statutory concession A11 (reflected in paragraph 1.5 IR20 and cited below) a taxpayer who leaves part way through a tax year may receive split-year tax treatment for the year in which he leaves, but it is common ground that this concession does not apply for capital gains tax purposes. Accordingly, if the taxpayer does not leave the UK to work full-time abroad prior to or by the commencement of a tax year, he will be resident in the UK for at least part of that tax year and therefore treated as resident for the whole year for purposes of, and liable to, capital gains tax.

40. IR20 must be construed as a whole, by reference to all its provisions and so far as possible so that they do not contradict each other. As Moses LJ stated, at [34], it makes no sense to permit a taxpayer to claim non-resident status under 2.2 notwithstanding that the full-time employment started only part way through the relevant tax year in light of paragraph 1.5

A (headed "leaving or coming to the UK part way through the tax year") which provides:

B "Strictly, you are taxed as a UK resident for the whole of a tax year if you are resident for any part of it. But if you leave or come to the UK part way through a tax year, the year may, by concession ...be split. Where this applies, your tax liabilities on income which are affected by residence will be calculated on the basis of the period of your actual residence here during the year...this has the same effect as splitting the tax year into resident and non-resident periods."

C 41. Further, full-time employment in subsequent years cannot affect the starting date for non-resident treatment, which is determined by reference to the date the taxpayer left to work full-time abroad (for 2.2 purposes): see Moses IJ at [33]. Full-time employment throughout any later tax year cannot therefore affect the taxpayer's residence status in an earlier tax year if he left only part-way through that tax year.

D 42. As Ward IJ stated, at [115], the plain and ordinary meaning of the words of paragraph 2.2 is that the taxpayer is to be treated as non-resident and not ordinarily resident if in the year in which he claims to have that status he not only has been absent from the United Kingdom but has also been in full-time employment abroad for at least the whole of the year in which he claims exemption.

E 43. Consequently, if it was open to HMRC to find that Messrs Davies and James were not in full-time employment in, or by 6 April 2001 (a possibility conceded by Mr Glyn Davies [2nd w/s para 85]), their departure in March 2001 was not to work full-time and their cases do not fall within paragraph 2.2 at all.

F 44. *Nature of leaving:* Leaving the UK to work full-time abroad for at least a whole tax year, provided the day count is met in respect of return visits, is sufficient in itself to establish non-residence

for 2.2 purposes. This is consistent with the case law. In Re Combe (1912) 17 TC 407 the taxpayer who left the UK to take up full-time employment abroad in New York was held to have made a distinct break with the UK and therefore become non-resident. Taking up genuine full-time employment abroad that subsists throughout the tax year, will usually be a sufficiently significant change in the taxpayer's life to constitute a distinct break with the UK. It is therefore regarded as sufficient evidence (subject to compliance with the day count requirements in respect of return visits) that the individual has "left" and become non-resident in that tax year (Mrs Melcan-Tooke w/s para 61).

45. For 2.2, the taxpayer must leave for and remain in full-time employment throughout the relevant tax year. Anything less than full time employment will not satisfy 2.2. Whether employment is full time is a question of fact and degree, determined by the particular circumstances of each case (see paragraph 2.5). Facts, such as the nature of the duties abroad and the extent of substantive duties in the UK are relevant to whether employment is full-time within 2.2 and are expressly stated to be relevant in paragraph 2.5. The factual enquiry in 2.5 is therefore an intrinsic part of 2.2 and if a taxpayer fails at that hurdle, he cannot bring himself within 2.2 at all.
46. Paragraph 2.2 does not require the taxpayer to cut further ties with the UK. Again, this is consistent with the law, as Moses LJ held at [54]¹³. Nevertheless, 2.5 makes clear that ties retained with the UK may impact on the question whether employment abroad is genuinely full-time and may legitimately be the subject of HMRC inquiry¹⁴. As stated above, if established on the facts, leaving the UK for genuine full-time employment abroad which continues throughout the relevant tax year will be sufficient

¹³ Section 335(1) IETA provides that where a taxpayer works full time outside the UK, the question whether he is resident in the UK falls to be decided without regard to any place of abode maintained by him in the UK.

¹⁴ A recent example of this is the Decision of the FTT in Hankinson v HMRC [2009] UKFTT 384 (TC)

A evidence that the taxpayer has left the UK so as to become non-resident under paragraph 2.2 [see Mr West w/s para 49].

ET App 11
p. 1670

Paragraphs 2.7 to 2.9

B 47. The Appellants in both Cases rely on paragraphs 2.7-2.9 but their arguments differ in two important respects.

48. Mr Gaines-Cooper contends that the test in paragraphs 2.7 – 2.9 is:

C (a) "long term absence from the UK (i.e. for three years or more), coupled with observance of the day count during that absence" (paragraphs 25 and 45 RGC Case);

(b) 2.9 is predicated on the taxpayer not being able to provide the evidence identified in 2.8 (paragraph 23 RGC Case);

D (c) No severance of UK ties is required at all (paragraph 36 RGC Case).

E 49. In Mr Davies' and Mr James' Case by contrast, they accept that "context plays a large part in the interpretation of 2.2, 2.8 and 2.9" (paragraph 4.5 D&J Case). Moreover and significantly, they recognise that a taxpayer must change or break the pattern of his or her life in order to fulfil these circumstances (paragraphs 2.3.2, 4.10.3 and 9(ii) D&J Case). To this extent HMRC agrees. However, in their Case they contend:

F (a) Contrary to the concession made on their behalves below, 2.9 is a free-standing test and not parasitic on 2.7-2.8 (paragraph 4.5 D&J Case);

G (b) The critical question is what was the tax-payer's reason for leaving the UK – was it to work abroad? Was it to be abroad for three years or more? Was it for a settled purpose? – and were their visits to the UK from abroad within the limits of IR207 (paragraph 4.8.2 D&J Case).

50. These are inaccurate paraphrases of paragraphs 2.7 – 2.9 which, contrary to both Cases, do not enable a taxpayer who reads the guidance to know exactly what he must do to become non-resident. They do not answer what constitutes “long term absence for three years or more” or “[going or being] abroad for three years or more”. Moreover, they misconstrue or fail entirely to address the words of 2.5 and their impact on the relevant factual circumstances described; and they misunderstand 2.9.

51. In paragraphs 2.7 to 2.9, the words “go abroad”, “leave” and “left” take their meaning from the context of those paragraphs and the factual situations described:

(a) Paragraph 2.7 is self-explanatory and requires the taxpayer to go abroad permanently.

(b) Paragraph 2.8 makes clear that a taxpayer relying on 2.7-2.9 will be claiming that he is no longer resident or ordinarily resident in the UK. Moreover he must make good that claim with evidence likely to be required to establish that the taxpayer has “left the UK permanently, or to live outside the UK for three years or more”.

(c) Whether leaving permanently or for three years or more, the evidence required is to establish the quality and nature of the separation from the UK. For example, HMRC will look (and is entitled to look) at the nature of links with the foreign country (“steps to acquire accommodation abroad to live in as a permanent home”) and the nature of remaining links with the UK (“if you continue to have property in the UK for your use, the reason is consistent with your stated aim of living abroad permanently or for three years or more”).

(d) The example given in 2.8 is just that, an obviously relevant factual example of something that binds a taxpayer to his country of residence – his home. The general Guidance cannot possibly cover the range of circumstances that might

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apply to a taxpayer at different stages of his or her life, still less to the variety of taxpayers' lives potentially engaged. Nor is it an exhaustive list of relevant factors.

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(e) 2.8 makes clear that it is not sufficient for a taxpayer simply to live abroad for three years, even if that satisfies the test for residence in the foreign country. What matters is that he has "ceased to be resident in the UK". That "living outside the UK" involves a severance of that which previously bound the taxpayer to the UK is clear from the fact that the retention of a home (or business, family or other relevant ties) in the UK can be inconsistent with the taxpayer's stated aim of living abroad permanently or for three years or more. If a taxpayer's ties with the UK, including home, family, business or social ties, are such that he is not "living outside the UK", he will not fulfil the requirements of paragraph 2.8 and will not be treated as not resident or not ordinarily resident.

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(f) Failure to establish sufficient severance or separation will lead, at best, to the conclusion that dual residence has been established. The very concept of dual residence despite departure abroad (reflected in 1.4) reveals the adhesive quality of previously held residence status for a UK resident.

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(g) Whether a taxpayer has left to live outside the UK for three years or more (and therefore whether he has left the UK permanently or indefinitely) is accordingly a question of fact and degree and he must provide evidence to satisfy HMRC that he has left the UK, in the sense of severing his ties with the UK, sufficient to divest himself of residence. Simply leaving in the physical sense of going abroad and maintaining visits below the specified day count (as contended by the Appellants) does not satisfy the requirements of 2.7-2.9.

- (h) That paragraph 2.2 imposes no requirement for a taxpayer to demonstrate that he has cut persisting ties with the UK (other than UK based employment ties) is no warrant for construing the differently worded paragraphs 2.7-2.9 in the same way. This distinction is supported by s335 ICTA which provides that the residence status for a person working full time abroad is to be determined without regard to any place of abode maintained in the UK. The statute's exclusion of that factor demonstrates the significance of a severing of ties when non-residence is claimed for reasons other than full time employment abroad¹⁵.
- (i) IR20 provides that a taxpayer may establish that he is not resident and not ordinarily resident in two distinct factual circumstances: either by establishing that he left for full-time employment which he has maintained for at least a year; or by leaving permanently or indefinitely. The criteria for achieving that status are not the same and are not expressed in the same way: see Moses LJ at [48].
- (j) Paragraph 2.9 does not provide a separate free-standing test from paragraph 2.8¹⁶. If it did, there would be no need of, nor any purpose to paragraph 2.8. Rather, the test remains that stated in paragraph 2.8 – the taxpayer must show that he has left the UK permanently, or to live outside the UK for three years or more.
- (k) Thus the purpose of paragraph 2.9 is to provide the taxpayer with a further evidential means of satisfying that test if he

¹⁵ In this respect paragraph 3.5.2.1 of the D&J Case is wrong. The rule in section 336(3) ICTA has been mis-stated. It concerns visitors to the UK (i.e. chapter 3 IR20). It provides that the question of whether a person is in the UK for some temporary purpose only and not with the intention of establishing his residence here is to be decided without regard to living accommodation available in the UK for his use. The introduction, purpose and application of s336(3) is considered further at paragraph 70 of HMRC's Case.

¹⁶ As noted by Moses LJ, at [51] all of the Appellants in their Joint Supplementary Written Submissions, dated 12 October 2009, expressly accepted that paragraph 2.9 does not set out a "specific scenario"; it applies to a taxpayer who contends that he has left indefinitely or permanently but does not have the evidence to support that contention. This was also confirmed in Mr Gairns-Cooper's Supplementary Skeleton Argument, dated 19 October 2009.

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does not have the evidence when he leaves. As Moses LJ noted, at [50], it would be absurd if a taxpayer could acquire non-resident status on the basis of his claim that he has left permanently or indefinitely, without establishing that he has made a distinct break from social and family ties in the United Kingdom, merely because he cannot provide the evidence he has done so, and thus falls within paragraph 2.9.¹⁷ Accordingly, any "going abroad for a settled purpose" must be consistent with a distinct break with the previous ties that made the taxpayer resident in the UK.

(l) The separation from the UK must be of the same nature and quality as required in paragraph 2.8. In this regard, "settled purpose" has an established meaning in the case law on residence. Departure from the UK for a settled purpose is to be contrasted with departure for the purpose of occasional residence: see Reed v Clark [1985] STC 323 at 345f¹⁸ (Nicholls J).

(m) What constitutes a settled purpose is a question of fact and degree dependent on the circumstances of the particular case. It is not a bright line test capable of certain conclusion. Moreover, HMRC is not bound to accept a taxpayer's presentation or interpretation of the facts to support his contention that he has left indefinitely for a settled purpose.

52. To the extent that there is uncertainty caused by the need to sever ties sufficient to divest a taxpayer of UK residence, this will typically be in factually complex cases or those cases on the margins. Such uncertainty results from the fact that these paragraphs (2.7-2.9) require consideration of the particular facts of the taxpayer's case and that a judgment is made on those facts.

¹⁷ This absurdity is also demonstrated by the fact that Mr Davies and Mr James rely on the same employment which does not satisfy paragraph 2.2 as the settled purpose entitling them to non-resident status under paragraph 2.9. If that construction is correct there would be no need for any of paragraphs 2.2 - 2.8: see paragraph 4.3 of their Case.

¹⁸ It was material to the decision of Nicholls J [at 347] that Mr Clark, who left and did not make any visits to the UK in the relevant tax year, had made a "distinct break" in the pattern of his life in the UK.

Even where facts are largely undisputed, as explained in the proface and paragraph 1.1, a view will have to be taken and in many cases opposite but equally reasonable views might be taken: see Moses LJ at [26–29] and [110]. This does not, as Mr Guines-Cooper contends in paragraphs 41 and 42 of his Case, call into question the correctness of HMRC's construction of IR20. It simply reflects the value judgements inherent in considering an individual's residence status.

53. The Appellants contend that the Court of Appeal erred in having regard to or taking account of common law principles of residence law (paragraph 43 RGC Case; paragraph 4.7 D&J Case). In fact, Moses LJ concluded that paragraphs 2.7 – 2.9 required a distinct break from previous ties within the UK on the terms of IR20 without reference to the case law on residence: see [30] – [51] of his Judgment.¹⁹ He went on to say, at [52], that he was confirmed in that view by the objective of IR20 stated in the opening words of the Preface, that it is designed to reflect the law.²⁰ It would, therefore, he noted, be surprising if IR20 had the effect of contradicting established jurisprudence.

54. The notion of a distinct break from previously held ties provides a clear test²¹ as to whether previously held residence in the UK has ceased. It distinguishes exclusive residence abroad from dual residence. As Moses LJ stated, at [53], whilst IR20 is designed to guide and simplify, paragraph 1.4 requires a value judgement to be made as to whether a taxpayer, claiming to come within 2.7 – 2.9, has ceased to be resident in the UK.

¹⁹ Similarly, at [112], Moses LJ stated expressly that the Appellants' appeals failed not because of the jurisprudence in relation to residence but because on a proper interpretation of IR20 they fell outside the circumstances which would have gained them non-residence status.

²⁰ Furthermore, paragraph 1.1 of IR20 states that the tests in Chapter 2 are largely based on rulings of the Courts.

²¹ This test has been developed and recognised by the Courts in *Levens*, *Coombe*, *Reedy*, *Clark and Grace*. The distinction the D&J Case seeks to make (see e.g. paragraph 2.2.3.2) between a break of ties and a break in the pattern of a taxpayer's life is a distinction without a difference. In *Grace* at [5(XII)] the Court stated: "Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have 'left' the United Kingdom) unless there has been a definite break in his pattern of life: *Re Coombe* (1932) 17 TC 405, 411."

A 55. There can be no sensible reason why one of the most telling
features of cessation of UK residence, a distinct break from
family, social or other relevant ties in this country, should be
B ignored. It would not create clarity or simplicity; it would
morely remove from consideration an obvious test of permanent
or indefinite absence abroad. This is why paragraph 2.8
provides, by way of example, that if the taxpayer retains property
in the United Kingdom the retention of that link must be
consistent with his stated aim of leaving permanently or
C indefinitely. It is significant in this respect that the D&J Case
recognises this by stating that IR20 tells the taxpayer the factual
circumstances which HMRC will recognise as "breaking" their
pattern of life so as to make them non-resident: paragraph 2.3.2
D&J Case.

D 56. If HMRC properly interpreted the terms of IR20 (paragraphs 2.2
and 2.7-2.9) and reached a rational conclusion on the evidence
available, that the Appellants did not fall clearly within its terms
(even if the court might itself have reached a different
E conclusion), it cannot properly be said that HMRC acted
irrationally, unfairly or committed an abuse of power. In this
respect, the Case for D&J is wrong: see paragraphs 2.4.2, 2.4.3,
and 4.9.2.

III CHANGE OF PRACTICE

F 57. The applicable legal principles are set out at paragraphs 26 to 36
above.

G 58. The Appellants claim that in 2004/2005²² HMRC began, for the
first time, to require taxpayers to demonstrate that they had made
a distinct break from ties in the United Kingdom in order to
establish that they had left permanently or indefinitely. That
alleged change in approach, they say, breached their legitimate

²² See D&J Case at paragraph 2.3.3

expectation that HMRC would continue, as a matter of practice, to apply IR20 in the manner in which they said it had been applied consistently in the past, until it publicly announced that it proposed to change its practice for the future.

59. In contrast to the taxpayers in Unilever (supra), the Appellants have no direct experience of the previous practice on which they rely to found the legitimate expectation. They rely on their advisers' experience of other cases and published papers in order to try and establish the existence of a previous settled practice as to how HMRC was interpreting and applying IR20.

60. However, their advisers' evidence is inconsistent on this point, and is contradicted by the witness evidence submitted by HMRC. Moreover the published papers do not support the settled practice contended for.

61. Before the Court of Appeal, there were three witness statements served on behalf of HMRC from Mrs Susan McLean-Tooke ["SMT"], policy adviser on residence and domicile from 1 June 2001 to 29 March 2009; Mr Stephen Anthony Symonds ["SAS"], technical specialist on residence and domicile between January 2003 and March 2007; and Mr David West ["DW"], compliance consultant in the Centre for Non-Residents ["CNR"] from Autumn 2004. Mrs McLean-Tooke and Mr Symonds worked directly with colleagues who had worked in the relevant department before 2001 and were able to give evidence of their understanding as to what the previous position had been [see Mrs McLean-Tooke w/s para 2; Mr Symonds w/s para 10]. These witnesses were all clear that there had been no change of practice in HMRC's interpretation or application of IR20 [see Mrs McLean-Tooke w/s paras 9, 24, 31, 42, 50, 54, 61, 64; Mr Symonds w/s paras 19, 37, 59, 81; Mr West w/s para 77].

62. At paragraphs 5.1, 5.2.1 and 5.2.2.3 D&J Case, it is asserted that HMRC's witnesses claimed that a uniform practice was adopted by HMRC across all the relevant paragraphs of Chapter 2 of

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A IR20, which is asserted to be contrary to the exhibits and
HMRC's case. These assertions are incorrect, and
misunderstand what the witnesses said. It is a consistent
requirement for paragraphs 2.2 and 2.7 to 2.9 that a taxpayer
must have left the UK in order to become non-resident, requiring
a distinct break from the UK [see Mrs Mclean-Tooke w/s paras
48, 54; Mr Symonds w/s para 17(d)]. However, the witness
statements explain that there are two different factual situations
described for non-residence status within chapter 2 of IR20 [see
Mrs Mclean-Tooke w/s paras 43; Mr Symonds w/s para 17(i)].
The first is working full time abroad for a whole tax year which
will, under paragraph 2.2, generally be sufficient to show that a
tax payer has left the UK in the residence sense [see Mrs
Mclean-Tooke w/s paras 61; Mr West w/s paras 38, 49]. There
is therefore no requirement under paragraph 2.2 for a tax payer
to provide other evidence to show that he has left the UK, such
as would be required under paragraphs 2.7 to 2.9 [see Mrs
Mclean-Tooke w/s paras 62 and Mr West w/s para 63].

DJ App IIc
p. 1526-1528;
1607

DJ App IIc
p. 1523; 1608

DJ App IIc
p. 1532;
1665; 1670

DJ App IIc
p. 1532; 1676

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63. Before the Court of Appeal, the Appellants subjected the exhibits
in SM11 to close forensic scrutiny in an attempt to demonstrate
that HMRC had not, prior to 2004/2005, required a taxpayer to
establish any severing of ties or distinct break with residence in
the UK in order to bring himself within paragraphs 2.7 - 2.9.
Moses LJ carefully analysed the exhibits and concluded, at [72]
and [87], that with the exception of one document, none of the
correspondence supported the Appellants in establishing any
change of practice in relation to requiring a distinct break in
paragraphs 2.7 to 2.9. The documents on which the Appellants
relied revealed a consistent approach by HMRC to paragraph
2.2, which was consistent with HMRC's approach in these
proceedings, namely that social and family ties did not need to
be severed. However, it did not follow that a taxpayer could
establish non-resident status under paragraphs 2.7 - 2.9 without
such a distinct cut. Further, he noted, there is no warrant for

eliding the assurances given by HMRC in relation to paragraph 2.2 with its approach under paragraphs 2.7 – 2.9.

64. Importantly, as noted by Moses LJ at [74 – 76], the evidence before the Court of Appeal demonstrated the “unequivocal recognition” by one of the then leading accountants, Arthur Andersen, of the distinction HMRC and IR20 drew between 2.2 and 2.7 – 2.9.²³ This evidence was contained in a note of a meeting with HMRC on 22 June 2001, which included the following important paragraph expressing Arthur Andersen’s comments on the residence rules:

“They recognised the problems of deciding whether someone had ‘left’ the UK, but apart from that they found paragraph 2.2...straightforward. If an individual had full-time employment abroad, it was *not necessary to look at the wider factors in paragraph 2.7 about personal circumstances such as accommodation, family life etc*” (Moses LJ’s emphasis).

Consistent with this evidence was that of Mr Glyn Davies (who had advised Messrs Davies and James), who in paragraph 15 of his second statement recognised the relevance of considering the remaining links retained with the UK in determining whether someone had ceased to be resident: paragraph 15 is set out by Moses LJ at [76]. In this regard, paragraph 5.3.1 of the D&J Case is contradicted by their own adviser’s evidence. In his letter, dated 20 December 2004, Glyn Davies acknowledged that “Paragraph 2.7 is clearly the outright permanent emigration of someone who *severs ties with the UK...*”.

65. The April 2001 Tax Bulletin²⁴, published by HMRC, dealt with the application of paragraph 2.2 of IR20 to mobile workers. This category of mobile workers were regarded as usually living in

²³ RGC erroneously asserts in paragraphs 59 and 64 of his Case that HMRC has not produced any evidence to suggest paragraph 2.7 – 2.9 required tax payers to sever social and family ties. Significantly, neither of the Appellants address this evidence in their Cases.

²⁴ Published on the HMRC website in February 2001 [DJ App Ilc p1561]

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A the UK because "their home continues to be in the UK and their settled domestic life remains here". Accordingly, they had not "genuinely left" the UK and ceased to be resident here. Paragraph 8 of the Bulletin noted that "different considerations apply to those who have left the UK to live abroad permanently" (emphasis added). It noted that paragraphs 2.7–2.9 IR20 explain the circumstances in which such individuals may be treated as non-resident, including that they may be required to provide evidence that they have left the UK permanently or to live outside the UK for three years or more. HMRC noted that they had encountered cases where mobile workers had claimed to have gone abroad permanently but evidence had later emerged that put the validity of those claims in doubt. HMRC stated that such established invalidity would lead to the individual falling to be treated as resident and ordinarily resident in the UK on the basis that they did in fact "usually live in the UK". As indicated above, Paragraph 2 of the Bulletin explained that "individuals usually live in the UK if their home continues to be in the UK and their settled domestic life remains here". This is a clear published statement consistent with IR20 (and HMRC's case) that an individual whose home and settled domestic life is in the UK will fall to be treated as not satisfying the conditions in 2.7 – 2.9 and will instead be treated as resident and ordinarily resident in the UK.

66. As the Court of Appeal held, with the exception of the document referred to below, the correspondence and documents exhibited to HMRC's witness statements show that HMRC's approach to IR20 did not change and was consistent with its objective interpretation: see Moses LJ at [82].

67. The exception in the documents disclosed by HMRC is a letter dated 7 July 1999 from a Higher Executive Officer²⁵ at HMRC, Brian Wilks to Mr Sawyer of Wilfred Fry Ltd. The Appellants

RGC App II
p. 652

²⁵ Not a fully trained inspector: see witness statement of Susan Melcan-Took [16]

