CASE NO.C1/2008/2488
CASE NO. C1/2008/2690

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
AMINISTRATIVE COURT
(MR JUSTICE WILKIE
and MR JUSTICE LLOYD JONES)

B E T W E E N:

THE QUEEN

(ON THE APPLICATION OF ROBERT JOHN DAVIES & MICHAEL JOHN JAMES)

Appellants

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

THE QUEEN

(ON THE APPLICATION OF ROBERT GAINES-COOPER)

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

SKELETON ARGUMENT ON BEHALF OF THE RESPONDENTS

Hearing window: 29 June 2009 – 3 July 2009

References to documents are to those contained within the Appellants' Appeal Bundles as follows [RGC/Vol/tab/page number] and [DJ/ tab/page number]. References to the correspondence contained in the Davies and James Bundle of Correspondence is as follows [CB/page number].

Suggested pre-reading: (1 day)	Decision of the Special Commissioners in Gaines-Cooper [RGC/2/2/200]
	Summary Grounds of Defence – Gaines-Cooper [RGC/1/14/89]
	Summary Grounds of Defence – Davies and James [DJ/8/87]
	IR20 1999 [References below are to the version of IR20 in the Davies and James Appeal Bundle at tab 29]
	Judgment of Lloyd Jones J [RGC/1/4/13]
	Judgment of Wilkie J [DJ/4/17A]

Overview

1. This Skeleton Argument is served by the Commissioners for Her Majesty's Revenue and Customs (referred to throughout as "HMRC") who resist these consolidated appeals from the judgments of Lloyd-Jones J and Wilkie J. In both cases, the Judge heard full argument and refused permission to apply for judicial review of decisions made by HMRC in relation to the Appellants' residence and ordinary residence status. In both cases, the Judge was correct to do so, and these appeals should be refused.

2. Both appeals concern the correct meaning and status of an HMRC booklet IR20 ("Residence and non-residence: Liability to tax in the United Kingdom"); and the effect of IR20 in determining the residence and ordinary residence status of each Appellant. The circumstances of Mr Davies and Mr James are very similar and can be taken together. But the circumstances of Mr Gaines-Cooper's case are different; in particular, a competent tribunal with jurisdiction to determine questions of residence and ordinary residence has already determined that status in his case and he has not appealed that determination.

3. In short summary, on both appeals, HMRC contends

   (a) Questions of residence status are questions of fact and degree.

   (b) The principles in IR20 with which this case is concerned are based on and do not depart from the principles established by the case law governing the determination of residence and ordinary residence.

(c) IR20 is not designed to be a blueprint for somebody to establish themselves as not resident or ordinarily resident. The explanatory booklet offers general guidance to taxpayers including, where appropriate, setting out the main factors that are likely to be taken into account but making clear that a decision in any particular case will depend on the facts of that particular case.

(d) IR20 does not contain bright line tests determinative of residence status. Nor does it contain binding promises to taxpayers that they will be "treated" as non-resident irrespective of the full facts or findings of the Special Commissioners in their cases.

(e) There are questions as to the extent of the reliance by each Appellant on certain paragraphs of IR20 in any event.

(f) Further, in Mr Davies and Mr James' case, even on the Appellants' interpretation of IR20, there is a significant factual issue at the heart of this case which entitles HMRC to say that it is not satisfied that the Appellants have brought themselves within the particular paragraphs of Chapter 2 IR20 relied on.

(g) In the case of Mr Gaines-Cooper, the findings of the Special Commissioners are inconsistent with his contention that he had left the UK permanently, or for at least three years or that he had gone abroad for a settled purpose. Accordingly, he too cannot bring himself within the particular paragraphs of Chapter 2 IR20 relied on. Further and in any event, the Special Commissioners having determined that Mr Gaines-Cooper was resident in the UK in the relevant tax years, any legitimate expectation of different treatment, has become illegitimate.

4. *Gaines-Cooper:* In April 2005, HMRC made a number of assessments, amendments to self-assessments and issued notices which were predicated on the basis that Mr Gaines-Cooper was domiciled, resident and ordinarily resident in the UK for the tax years 1992/93 to 2003/04. Mr Gaines-Cooper elected to appeal those assessments under the statutory mechanism set out in the Taxes Management Act 1970 ("the TMA 1970") on the basis that he was neither domiciled, resident nor ordinarily resident in the UK.

5. Following a ten day hearing, the Special Commissioners concluded that Mr Gaines-Cooper was domiciled, resident and ordinarily resident in the UK during the relevant tax years and dismissed his appeal. Mr Gaines-Cooper appealed the decision on domicile only (though his appeal was unsuccessful). Following receipt of the Special Commissioners' Decision Mr Gaines-Cooper's representatives wrote to HMRC requesting that he be treated as not resident or ordinarily resident in accordance with the guidance in IR20. By letter dated 25 January 2007 HMRC confirmed its opinion that the guidance set out in IR20 is consistent with the legal principles governing residence and ordinary residence and therefore that a proper application of that guidance to the facts found by the Special Commissioners in Mr Gaines-Cooper's case produces the same result as the Decision.

6. In his application for judicial review, Mr Gaines-Cooper has sought to elevate the response in that letter into a "decision" relating to his residence – a matter which – in the absence of any appeal - had already been conclusively determined by the Special Commissioners.

7. The application for permission was considered on the papers by Beatson J on 19 October 2007 who refused permission, observing that it is not arguable that IR20 means that Mr Gaines-Cooper should be regarded as resident or ordinarily resident outside the UK, having regard to the findings made by the Special Commissioners which have not been appealed. Beatson J said:

> "For the reasons given in the Acknowledgement of Service it is not arguable that the Special Commissioners erred in law in concluding that the Claimant was resident or ordinarily resident in the United Kingdom in the relevant years or that IR20 meant that he should not have been so regarded. **Since the Commissioners found on the facts that he was resident in the period and had not made a distinct break with the UK, he is not assisted by IR20.**"

8. Mr Gaines-Cooper renewed his application for permission and on 17 March 2008, Cranston J ordered that the application for permission be adjourned for consideration at the same time as any consideration of the judicial review

application itself. Lloyd Jones J, heard submissions over the course of two days, and in a reserved judgment refused permission. In summary he held (references to paragraphs below are to the Judgment):

(i) The relevant provisions of IR20 cannot be construed as a binding promise that HMRC will ignore an individual's residence status in law or will treat him as a non-resident by ignoring findings of fact that he is resident and ordinarily resident in the United Kingdom [23].

(ii) IR20 merely informs taxpayers of how, as a matter of generality, HMRC would approach the purely factual questions of residence and ordinary residence but contains no warrant as to the conclusion HMRC will reach in a particular case [22].

(iii) The principles set out in IR20 with which this claim is concerned do not depart from the legal rules governing the determination of residence and ordinary residence [24].

(iv) Even if Mr Gaines-Cooper were correct in his submission that IR20 is capable of giving rise to a legitimate expectation to be treated in a manner which differs from the legal rules on residence or ordinary residence, IR20 does not assist him on the facts of his case [31].

(v) The findings of the Special Commissioners are inconsistent with the contention that Mr Gaines-Cooper had left the United Kingdom permanently or for at least three years or that he had gone abroad for a settled purpose as is required by paragraphs 2.8 and 2.9 of IR20[33]. Consequently, he cannot bring himself within paragraphs 2.8 or 2.9 of IR20 [39, 42 and 43].

(vi) Whilst unnecessary for disposal of the application, there was considerable force in the submission that the Special Commissioners having determined that Mr Gaines-Cooper was resident in the relevant tax years any legitimate expectation that he may have had that he would have been treated as if he were a non-resident had become illegitimate.

9. The Judge was correct for the reasons he gave; and for the further reasons given by Wilkie J in the connected appeal.

10. Furthermore, if the Court of Appeal considers that the Judge erred in refusing permission to apply for judicial review by imposing too high a threshold test for permission, the Court is invited to vary the Judge's order (pursuant to CPR 52.10) by granting permission but refusing the substantive application for judicial review for the reasons given below: there was no error in the Judge's conclusion as to the meaning and status of IR20, nor in his application of IR20 to the facts as found by the Special Commissioners.

11. *Davies and James:* Mr Davies and Mr James contend that in the tax year ended 5 April 2002 they were neither resident nor ordinarily resident in the United Kingdom with the consequence that neither is liable to capital gains tax on the disposal of his shares in that tax year, in a UK company, for £4.5m respectively. They maintain that they left the UK before 6 April 2001 to work full-time in Belgium thereby becoming non-resident and not ordinarily resident in the UK. Since the Belgian tax authorities do not impose capital gains tax on the disposal of such assets, they would avoid tax altogether on these transactions if their claims for non-residence are substantiated.

12. Throughout a lengthy period of correspondence between the parties, HMRC was and remains not satisfied that Messrs Davies and James in fact left the UK to work full-time abroad before 6 April 2001. By formal determinations dated 28 November 2006 of ordinary residence in the United Kingdom and decisions contained in letters dated 29 November 2006 in each of their cases, HMRC concluded that it had not been established that their employments in Belgium were full-time employment throughout the tax year to satisfy a claim to be non-resident under paragraph 2.2 IR20; and/or that they had left the UK permanently or indefinitely so that they could be treated as not resident under any other part of the IR20 guidance and accordingly, that both remained resident and ordinarily resident in the UK for tax purposes throughout 2001/2002.

13. Messrs Davies and James challenged the determinations by appeals to the Special Commissioners dated 22 February 2007. In addition they sought permission to apply for judicial review of HMRC's decisions by application dated 27 February 2007.

14. On 27 November 2007, Stanley Burnton J, instead of determining the permission application, stayed the judicial review proceedings pending the outcome of their appeal to the Special Commissioners. Messrs Davies and James appealed that decision successfully to the Court of Appeal who remitted the case to the Administrative Court for a decision as to whether permission to apply for judicial review should be given. The Court of Appeal expressly stated that their decision should not be "taken to give any kind of preliminary indication as to whether permission ought to be granted or not": see Hughes LJ at [21].

15. On 10 October 2008, following a full day of argument, Wilkie J refused permission to apply for judicial review. In summary he held (references to paragraphs are to his Judgment):

    (a) IR20 has to be viewed as a whole and not piecemeal. The nature of IR20 is clear: it is for general guidance only and not designed to be a blueprint for somebody to establish themselves as not resident or ordinarily resident. It gives general guidance but subject to the particular facts. It makes clear from its terms that, in order to fall within any of the categories, a person must have left or gone abroad for the particular purposes. Other conditions provide clear guidance but they are, whilst necessary, not sufficient ([10] and [49]).

    (b) It is not arguable to suggest that paragraph 2.2 of IR20 could be satisfied by reference to any tax year other than the one in question [41].

    (c) It is clear from looking at the correspondence as a whole that, certainly from February 2006 the Inspector was wholeheartedly focused not just on paragraph 2.2 of IR20 but also on the

arguments put forward that Messrs Davies and James fell within 2.7 to 2.9. Further, it was clear from the terms of the decision letter that the author of it had regard to paragraphs other than just 2.2 and it can only be read on the basis that all the other relevant paragraphs of IR20 had been taken into account. Consequently, it was not arguable that HMRC acted unfairly by failing to consider the contentions put forward by the Appellants under 2.7 to 2.9 nor did they in the end abandon consideration of IR20 ([55] and [56]).

16. There was no error of law in the Judge's approach to the meaning and status of IR20; nor to its application to the facts of Messrs Davies and James' case. The application did not disclose an arguable case for judicial review for the reasons he gave and for the further reasons given by Lloyd Jones J in the connected appeal. In addition, their application did not warrant full investigation at a further hearing in the Administrative Court because:

    1) There is a significant factual dispute at the heart of Messrs Davies and James' case; namely, whether they left the UK permanently or indefinitely or for full-time employment abroad which lasted for the full 2001/2002 tax year. In other words, whether they in fact, satisfied all the conditions in paragraphs 2.2, 2.8 and 2.9 of IR20.
    2) Furthermore, there is a factual dispute about the extent of any reliance by Messrs Davies and James at the material time on certain paragraphs of IR20 in any event. HMRC has requested disclosure of contemporaneous evidence to support the alleged reliance but this has not yet been provided: see HMRC letter, dated 23 March 2009 (attached).

The meaning and status of IR20

17. The terms "residence" and "ordinary residence" are not defined in the Taxes Acts. Both expressions are used in their everyday, ordinary sense and have no special or technical meaning. They are used to describe a situation arising in a tax year, and not in relation to any shorter or longer period. The question is whether a taxpayer is resident (or ordinarily resident) in the UK in a particular

tax year. And it is common ground that this question is, as a matter of law, a question of fact and degree.

18. IR20 is an HMRC booklet containing general guidance given to taxpayers in relation to residence status. The guidance reflects the law, and HMRC practice, on residence. It contains no general promise to the world (still less a specific promise to these taxpayers) that compliance with it will insulate a person against any claim for tax in the UK. It is general guidance which may not be appropriate in every case (see IR20 Preface, [DJ/29/310]). It can only be general guidance given the fact sensitivity of residence decisions. In the vast majority of cases the guidance, if applied to the particular circumstances of a taxpayer's life is apt to tell him what HMRC's approach is likely to be. In a complex case, or a case involving tax driven transactions, such general guidance is likely to be inappropriate.

19. It is a misuse of that guidance to treat it as providing a design for how to become non-resident. Nor should it be characterised as containing bright line tests or promises to "treat" a taxpayer in a particular way irrespective of the full facts relating to his residence status. It is simply guidance given to the generality of taxpayers and hedged with numerous and appropriate caveats. The responsibility for making the initial decision as to his residence status is left to the taxpayer and his expert advisers who alone are in possession of all the facts – facts that the taxpayer will know but that HMRC does not.

20. As IR20 states, it contains guidelines (based on judicial decisions) setting out

> "the main factors that are taken into account but a final decision on your residence status can only be made on the facts in your particular case" (IR20 paragraph 1.1 [DJ/29/315]).

The facts are peculiarly within the taxpayer's and not HMRC's knowledge. Accordingly, the taxpayer may be expected to disclose the full facts to HMRC and to produce evidence to support the facts on which he or she relies. Whether a person is resident or ordinarily resident is a question of fact and

degree where a taxpayer's presentation of his view of the facts may differ from the way HMRC perceives them.

21. In considering the status and effect of IR20 it is necessary to have regard to the function performed by HMRC and its powers and duties in that regard. HMRC is a statutory body appointed "for the collection and management of inland revenue": s1(1) Inland Revenue Regulation Act 1890. The Commissioners

> "shall collect and cause to be collected every part of inland revenue": s13(1) of the 1890 Act.

"Inland revenue" means the revenue and taxes

> "placed under the care and management of the commissioners". s39 of the 1890 Act.

22. The Taxes Management Act 1970 (s1) places income tax under the care and management of the Commissioners and for that purpose confers upon them certain discretion in the exercise of their powers.

23. 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 [1982] AC 617, 636 (Lord Diplock)

However, wide as it is, the managerial discretion does not extend so wide as to permit the Revenue 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]). A managerial discretion in the collection of tax is not the same thing as the discretion to refrain from collecting tax that is due: see for example: 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).

24. Section 1 TMA cannot authorise HMRC to announce in its published guidance that it will deliberately refrain from collecting taxes that Parliament or the Courts have decreed or determined 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 paragraphs 45 and 46).

25. In the circumstances HMRC could not lawfully (and did not) represent to taxpayers in IR20 that it would "treat" taxpayers as non-resident irrespective of the taxpayer's residence status as a matter of law and/or irrespective of the facts found by the Special Commissioners on any appeal. But this does not mean that IR20 has no meaning or effect, as the Appellants assert at paragraph 4 of the Joint Skeleton.

26. Rather, (save where it refers to Extra Statutory Concessions) IR20 is based on the legal principles established by the case law and a correct application of the guidance contained in IR20 to the full facts of a taxpayer's life should therefore produce the same result as a full investigation by the Special Commissioners applying 'common law' principles of residence. It reflects (as the preface states) the law and practice at the time of writing, and is guidance on how the rules apply. But it is no more than guidance, and cannot be treated or regarded as applying *irrespective* of the findings made by the Special Commissioners, or the full facts.

27. IR20 is to be read as a whole and not piecemeal (as the Appellants seek to do). In addition to the general statements contained in the preface and paragraph 1.1 referred to above, IR20 provides as follows:

    (a) paragraph 1.4 deals with dual residence in both the UK and another country. The Appellants' Joint Skeleton ignores this important paragraph (which reflects the fundamental principle of residence law that a residence connection with another country is not sufficient to make a taxpayer non-resident in the UK). It provides:

> "It is possible to be resident (or ordinarily resident) in both the UK and some other country at the same time. If you are resident (or ordinarily resident) in another country this does not mean that you cannot also be resident (or ordinarily resident) in the UK. Where, however, you are resident both in the UK and a country with which the UK has a double taxation agreement, there may be special provisions in the agreement for treating you as a resident of only one of the countries for the purposes of the agreement..."

(b) Paragraph 1.5 sets out the strict legal position that a taxpayer is taxed as UK resident for the whole tax year if he is resident for any part of it; but that, *by concession*, split year treatment may be applied in his case if he leaves or comes to the UK part way through the tax year. [DJ/29/316]

28. Chapter 2 IR20 [DJ/29/318] deals with taxpayers who leave the UK, and is the Chapter relied on by the Appellants on this appeal. Again, it is to be read as a whole, and not on a piecemeal basis. Paragraph 2.1 deals with short absences abroad, whereas paragraphs 2.2 to 2.5 deal with working abroad; and paragraphs 2.7 to 2.10 with leaving the UK permanently or indefinitely.

29. The Appellants rely only on paragraphs 2.2, 2.7, 2.8 and 2.9 IR20 and maintain that these paragraphs are to be read alone and in isolation of the rest of the booklet: see paragraph 8.2 of the Joint Skeleton: ".... *read on their own*, these quoted paragraphs contain clear, categoric and unambiguous statements as to how a putative taxpayer will (not may) be treated by the revenue in the circumstances set out in these paragraphs". On this "isolated" basis, they assert that these paragraphs are devoid of relevant qualification (paragraph 6.2 Joint Skeleton); ignoring the relevant qualifications made in these paragraphs and elsewhere in IR20. They further assert (on this false premise) that although the preface states that whether the guidance in IR20 is appropriate in a particular case will depend on *all* the facts of that case, Chapter 2 nevertheless "limits the factual enquiry to specific matters" and does not permit HMRC to say that every fact is relevant (see, paragraph 11.5 of the Joint Skeleton). There is no warrant for such a blinkered approach to IR20; and no reason is advanced by the Appellants why paragraphs 2.2, 2.7, 2.8 and

2.9 should be read in isolation. The booklet must be read as a whole and these paragraphs (2.2 to 2.10) must be read as a whole and (at least) with paragraph 2.1 (and the preface, paragraphs 1.1, 1.4 and 1.5) in mind.

30. The Appellants contend wrongly that these paragraphs "treat" a taxpayer as non-resident irrespective of his true residence status, once he satisfies the "bright line tests" set out in them. IR20 is guidance, not drafted by Parliamentary draftsman nor scrutinised by both Houses. It is not to be construed like a statute. The Appellants' argument places a degree of weight on the word "treat" it was not intended to bear. "Treat" in the context of IR20 simply means "regarded as" or "is" and clearly does not bear the meaning that it is conferring (extra statutory) "concessionary treatment" or treatment "as a matter of practice irrespective of the legal position" as the Appellants suggest.

31. The question whether these paragraphs apply to the facts of a particular taxpayer's case is entirely fact sensitive, as IR20 repeatedly states. This is not a situation (like Preston) where any representation or promise was in fact made to the individual Appellants, still less any promise that they would be "treated" as non-resident irrespective of the true legal position.

32. The Appellants contend (wrongly) that HMRC and the Judges below have misinterpreted passages in IR20 related to "leaving the UK" (paragraph 9 Joint Skeleton, where HMRC's approach to this phrase is mis-described and that mis-description is then characterised as reducing IR20 to "irrelevant nonsense"). Chapter 2 IR20 deals with a taxpayer who "leaves the UK" but there are different ways in which a taxpayer might leave, (and it should be remembered that establishing residence in another country does not necessarily mean that a taxpayer has ceased to be resident in the UK: paragraph 1.4 IR20):

    (a) The taxpayer might usually live in the UK but leave for short periods on business trips abroad (paragraph 2.1). If so he remains resident and ordinarily resident in the UK. All three Appellants fall within this category of "leaving" on HMRC's current

understanding of the facts of their cases (and on the findings made by the Special Commissioners' in Mr Gaines-Cooper's case).

(b) But, if a taxpayer no longer usually lives here leaving only for short trips abroad, and "leaves the UK to work full-time abroad under a contract of employment", paragraphs 2.2 to 2.5 may be relevant to his case.

(c) Alternatively, if a taxpayer no longer usually lives here leaving only for short trips abroad, and "leaves the UK permanently or to live outside the UK for three years or more" paragraphs 2.7 to 2.9 may be relevant to his case.

33. Paragraph 2.1 provides no day count test at all. In determining whether the taxpayer falls within paragraph 2.1, where the taxpayer actually and usually lives, and the nature of his trips abroad must be considered. These are factors established as relevant by cases such as Levene, which made clear that in the case of a British citizen whose ordinary residence has been in the UK, nothing less than a distinct break with the UK will suffice to divest a person of that quality. Mr Levene's periods of residence abroad were not regarded as anything other than occasional residence abroad during the five year period prior to 1925 even though he had no fixed abode in the UK, and consistently spent the greater part of each year overseas, because he had not made the distinct break with the UK required to divest oneself of the strongly adhesive residence status attaching to a British citizen. The need to make such a distinct break will be the greater where home, family and other interests are retained in the UK and the taxpayer spends time *residing* in the UK; and to rebut the conclusion that the taxpayer has merely established dual residence. It is in the context of paragraph 2.1 that questions of the taxpayer's "settled or usual abode", "the pattern of his presence in the UK", "evidence of his lifestyle and habits" are all relevant.

34. If the taxpayer's departures from the UK fall within paragraph 2.1, there is no need to consider the remaining paragraphs of Chapter 2 – he is resident and ordinarily resident in the UK. If however, the taxpayer no longer usually lives in the UK and goes abroad for more than short business trips, the remaining

paragraphs fall to be considered. In each case, the word "leave" is used in its normal sense, but the nature of his departure will differ according to the facts of each case and will guide the taxpayer to the appropriate paragraph of Chapter 2 before any question of day-count arises.

35. In the case of paragraph 2.2, he must leave to work full-time abroad and his absence and employment abroad must last for a whole tax year. Paragraph 2.5 explains that the question whether employment abroad is "full-time" in a particular case will "depend on all the facts". Further, if the taxpayer has a main employment abroad and some occupation in the UK at the same time, whether the UK activities are consistent with the overseas employment being full-time will need to be considered by HMRC.

36. In the case of paragraphs 2.7 to 2.9, IR20 explains that to leave, the taxpayer must go abroad permanently or to live outside the UK for three years or more; and (at paragraph 2.8) a person claiming that he is no longer resident or ordinarily resident in the United Kingdom may be asked to provide some evidence that he has left the United Kingdom "permanently or to live outside the United Kingdom for three years". The evidence referred to includes, for example, having taken steps to acquire accommodation abroad to live in *as a permanent home*, and if the individual has retained property in the United Kingdom for their use, demonstrating that the reason is consistent with their stated aim of "*living abroad permanently or for three years or more*". This is precisely the sort of evidence taken into account in applying the common law principles of residence, which requires an evaluation in all the circumstances of the case (see judgment of Lloyd Jones J at [25(c)]).

37. The repeated use of the words "permanent or to live outside the UK for three years or more" in paragraph 2.8 of IR20 makes the contrast between usually living in the UK and leaving for short trips abroad (paragraph 2.1); and leaving the UK permanently (or to live abroad for three years or more). Contrary to the contention in paragraph 9.3 of the Joint Skeleton, these paragraphs do require the taxpayer to leave in a permanent sense, that is permanently or for at least three years, before the question of day-count arises.

This is further evident from the fact that paragraphs 2.7 to 2.10 of IR20 are headed "Leaving permanently". The remainder of the paragraphs are not, as the Appellants assert, rendered "irrelevant nonsense" but ensure that UK visits after a permanent departure are kept within a reasonable limit consistent with that departure. In this regard, paragraph 25 of Mr Gaines-Cooper's Skeleton Argument acknowledges (contrary to the position advanced at paragraph 9.3 of the Joint Skeleton) that the trigger requirement for paragraph 2.7 is "leaving the UK permanently". This is consistent with the concession to this effect made on his behalf before Lloyd Jones J below.

38. The Appellants' contention that IR20 establishes bright line tests in the form of a '91 day rule' for the purposes of ascertaining a person's residence in the UK irrespective of the full facts (see paragraphs 8 and 14 of the Joint Skeleton Argument and 27 of Mr Gaines-Cooper's Skeleton Argument) misunderstands the guidance in IR20:

    (a) It would represent a fundamental departure from the common law approach to questions of residence and ordinary residence, which are questions of fact and degree.

    (b) In any event, there is only one bright line test for residence purposes in IR20, and elsewhere the day-count tests do not establish such bright line tests. Paragraph 1.2 provides that if a person is present in the UK for 183 days or more in a tax year he or she will always be resident in the UK without exception (but the reverse is expressly not the case). This bright line test reflects and is consistent with the law: see s 336(1)(b) ICTA.

    (c) The day count provisions in Chapter 2 IR20 do not apply in isolation but are dependent on a precondition that the taxpayer has left the UK.

    (d) Finally, whilst visits to the UK (*after leaving to go abroad permanently or indefinitely*) averaging 91 days or more, will mean that HMRC regards the individual as remaining resident and ordinarily resident, the reverse is not the case. The mere fact that an individual visits the UK for less than 91 days a year (whether on an

averaged basis or not) does not of itself mean that the individual will be or be regarded as non-resident. On the contrary, if an individual has made visits to the UK averaging less than 91 days a year, he must nevertheless show (with evidence) that he has left the UK permanently or for three years or more; or that he has left the UK to go abroad for a settled purpose; or that he has left the UK for a full tax year for full time employment abroad.

39. Chapter 10, which deals with appeals, explains that if there is any dispute with HMRC about residence or ordinary residence and agreement cannot be reached there is a right to have one's case considered by an independent tribunal. It points out that an appeal lies from the Special Commissioners on a point of law to the High Court. As noted by Lloyd Jones J (at Judgment [21]) this also shows that IR20 is intended to reflect the legal principles established by the case-law and not to establish an independent body of practice followed by HMRC which is capable of leading to results inconsistent with the strict legal position.

Legitimate expectation and IR20

40. HMRC has a duty to act fairly towards taxpayers, and the court may properly review a decision of HMRC to exercise its statutory powers if the decision is so unfair as to amount to an abuse of power: R v Inland Revenue Commissioners, Ex parte Preston [1985] AC 835.

41. Unfairness amounting to an abuse of power can arise in circumstances in which HMRC has created a legitimate expectation in the mind of a taxpayer who has placed all his cards face up on the table, about how his affairs would be approached if, after he acted on that expectation, HMRC resiled from undertakings it had previously given.

42. The correct approach to "legitimate expectation" was explained in R v IRC, ex p MFK Underwriting [1990] 1 WLR 1545 by Judge J who said (at 1573):

> "The correct approach to "legitimate expectation" in any particular field of public law depends on the relevant legislation. In *Reg* v *Attorney-General, Ex parte Imperial Chemicals Industries Plc,* 60 TC 1 the legitimate expectation of the taxpayer was held to be payment of the taxes actually due. No legitimate expectation could arise from an ultra vires relaxation of the relevant statute by the body responsible for enforcing it. There is in addition the clearest possible authority that the revenue may not "dispense" with relevant statutory provisions: *Vestey* v *Inland Revenue Commissioners* [1980] AC 1148."

43. Consequently, the legitimacy of the expectation must be established before the court will determine whether the alleged breach was so unfair as to constitute an abuse of power. In considering whether an expectation was legitimate the court should take into account the fact that a public authority cannot validly act outside those powers: Al Fayed v Advocate General for Scotland [2004] STC 1703 at 1737.

44. In Davies & or v HMRC (CA, unreported, 10 July 2008) Hughes LJ said:

> "In short, it seems to me that Mr Goldberg's proposition that if the Special Commissioners are against the claimants, their legitimate expectation would have become illegitimate, raises a serious obstacle to the subsequent conduct of a judicial review claim."

45. In this regard, the guidance from Bingham LJ in MFK Underwriting (see above) at 1569 is important

> "...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.1, 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."

Robert Gaines-Cooper

Application of IR20 to the facts found by the Special Commissioners

46. Before addressing the application of IR20 to the facts found by the Special Commissioners, HMRC notes:

(a) that there is no evidence given by Mr Gaines-Cooper of reliance in fact, on any particular version of IR20, still less the particular versions in force before the tax years in question, beyond drawing up his day count schedules in accordance with the practice of excluding days of arrival and days of departure (see paragraphs 33 to 36 RGC witness statement at [**RGC/2/1/9**]). Further, Mr Vaines was not Mr Gaines-Cooper's tax adviser and was not involved in his case before 2004.

(b) HMRC has never (contrary to the assertion to this effect at paragraph 20(vi) of his Skeleton Argument) accepted that Mr Gaines-Cooper left the UK in 1976 for anything more than occasional residence abroad. Mr Gaines-Cooper sought no ruling from HMRC to this effect before 1980, and HMRC gave no ruling on his residence status.

47. As noted by Lloyd Jones J (Judgment [28]) the findings of the Special Commissioners in Mr Gaines-Cooper's appeal were arrived at after a hearing lasting ten days in which they heard evidence from Mr Gaines-Cooper and nine witnesses called on his behalf and in which the factual questions relevant to residence, ordinary residence and domicile were "comprehensively covered".

48. The question whether Mr Gaines-Cooper had left the United Kingdom permanently was central to the decision of the Special Commissioners. As Lloyd Jones J held (Judgment [33]) the Special Commissioners' findings demonstrate that either Mr Gaines-Cooper had never left the UK permanently or for three years or for a settled purpose or, if he had, that by the start of the period covered by the assessments he had returned on a permanent basis. Consequently, applying paragraph 2.1 of IR20 to the facts of Mr Gaines-Cooper's case produces the same conclusion as that reached by the Special Commissioners.

49. Of particular importance is the Special Commissioners' finding at paragraph 170, that it is section 334 ICTA rather than section 336 ICTA which governs

Mr Gaines-Cooper's case. That is because the Special Commissioners found that he was not a visitor to the UK for temporary purposes only, but rather was ordinarily resident in the UK throughout and only left the UK for occasional residence abroad (see paragraphs 179 and 190 of the Special Commissioners' Decision). As Lloyd Jones J accepted (Judgment [35]) it follows from this that the findings of the Special Commissioners are inconsistent with the matters Mr Gaines-Cooper must establish before he can rely on paragraph 2.8 or 2.9 of IR20.

50. Paragraphs 29 to 31 of Mr Gaines-Cooper's Skeleton Argument relies on paragraph 6 of the judgment of Lewison J in HMRC v Grace [2009] STC 213 to suggest (wrongly) that because HMRC contended that he fell within s334 ICTA it must accept that "he had left the UK for the purposes of IR20". However, whereas paragraphs 2.7 – 2.9 of IR20 are concerned with whether an individual has left *permanently*, section 334 applies "to a person who usually lives in the UK and leaves for the purposes *only of occasional residence abroad* (emphasis added)" (see to similar effect, paragraph 2.1 IR20). Such a person, who has left for the purposes only of occasional residence abroad cannot have left permanently or indefinitely.

51. As Lloyd Jones J held (Judgment [38]) what matters for present purposes is the finding of the Special Commissioners that at the start of the period covered by the assessments Mr Gaines-Cooper was not temporarily in the UK (so that s336 ICTA did not apply to his case). This means that he cannot bring himself within paragraphs 2.8 or 2.9 of IR20. On the contrary, as a person who usually lives in the UK he falls within paragraph 2.1 of IR20.

52. Paragraph 32 of the Grounds and 19 of Mr Gaines-Cooper's Skeleton both assert that on the facts set out in the Statement of Facts annexed to the Claim Form, Mr Gaines-Cooper should in accordance with the provisions of Chapter 2 of IR20 be treated by HMRC as having left the UK in 1976 either permanently, or indefinitely or for employment/business activities. However, the facts set out in the Statement of Facts are not agreed and are inconsistent with those found by the Special Commissioners. In particular, as noted above,

the assertion that Mr Gaines-Cooper left the UK permanently, or to live outside the UK for three years or more in 1976 was rejected by the Special Commissioners. Rather, they made important findings as follows which provide a fuller picture than that provided by Mr Gaines-Cooper's Statement of Facts (paragraph references are to their Decision):

(a) Mr Gaines-Cooper was born and resident in the UK before 1976. Between 1964 and 1976 he lived primarily at his home, Grove House, in Reading, but also stayed with friends in the UK. Between 1976 and 1980 Grove House was let on a furnished basis, and during this period, when Mr Gaines-Cooper was in the UK he stayed with friends (paragraph 25 Decision).

(b) In 1974 he set up a property development company in Canada. The business ran into difficulties and by 1977 he had considerable outstanding business loans in Canada. Accordingly he moved from Canada to San Jose in California in mid 1977 and established a successful residential property business there (paragraphs 19 and 30-31).

(c) In 1975 Mr Gaines-Cooper purchased a house called Bois Noir in the Seychelles. Because of financial difficulties (principally caused by his Canadian venture) he entered into an agreement with the British Government to let Bois Noir in 1976 to the British High Commissioner, who lived there until early 1979. During this period, when he visited the Seychelles he stayed with a friend (paragraph 25)

(d) In aggregate, since 1975, Mr Gaines-Cooper spent most of his time at places other than the Seychelles (although not all of it in the UK). This was not indicative of permanent and indefinite residence in the Seychelles (paragraphs 93-94 and 143).

(e) In 1979 exchange control was abolished in the UK and the restrictions on Mr Gaines-Cooper's UK assets were released. Some of the assets were sold, but Grove House and its contents, including paintings, wine, vintage motor cars and a valuable gun collection, were not sold (paragraph 33).

(f) Accordingly, in 1976, when he claims to have left the UK for the Seychelles, Mr Gaines-Cooper retained Grove House (and other valuable property) in England, and many and various ties and connections with a small area of England located in Berkshire and Oxfordshire, such that, he retained at all times a presence in England which had the quality of residence. Although he also had a residence in the Seychelles from 1976 and spent time there, his chief residence throughout was in England (paragraphs 139, 140, 145 and 146; and paragraph 167).

(g) England remained the centre of gravity of his life and his interests (paragraph 42). He never rejected England nor that small part of it located in Berkshire and Oxfordshire where he had so many ties and connections. Presence in England played a substantial and continuing part in his life (paragraph 146).

(h) Mrs Jane Gaines-Cooper, although a Seychellois by birth, chose to live in England since 1977; and Mr Gaines-Cooper was very attached to her and shared his life with her.

(i) There was accordingly, no distinct break with the UK in 1976, or indeed at any time after that date.

(j) During the relevant tax years the Special Commissioners found that Mr Gaines-Cooper had a settled abode at Old Place, Henley-on-Thames:

> " There he dwelt permanently and had dwelt in that locality for a considerable time. ...he spent more time in the United Kingdom each year (from 1992 to 2004) than in the Seychelles (or any other particular jurisdiction)." (paragraph 166).

(k) They found that the residence at Old Place was always available for his use following its acquisition in 1988. The property was extended and improved to make it a more comfortable place to live for Mr Gaines-Cooper and his family. Extensions were carried out to the Barn to create staff accommodation, and to the garages to make room for his valuable collection

of vintage cars (see paragraphs 70 and 71). Mr Gaines-Cooper's wife was resident and ordinarily resident in the UK in all of the years of assessment. From 1993 she lived at Old Place, and their son James was born and brought up there from 1998.

(l) Mr Gaines-Cooper was regularly and frequently in the UK during these years, for family, business and social reasons. From about 1988 he became involved with Orthofix and companies established for the purpose of exploiting the laryngeal mask invented by Dr Brain. These companies (with which Mr Gaines-Cooper was heavily involved) originally had offices at Cedar Court near Mr Gaines-Cooper's original home in Reading and then purchased and restored expensive business property at Northfield House in Henley (15 minutes from Mr Gaines-Cooper's new home, Old Place) where they had their offices (see paragraph 81 Decision). Mr Gaines-Cooper had an office at Cedar Court between 1991/92 to 1995 and after 1995 at Northfield House in the UK (see paragraph 104 Decision). The laryngeal mask company also had a factory in Kington. Mr Gaines-Cooper also had a UK contract of employment from 1992 to 1995.

Accordingly, the Special Commissioners' findings of fact establish that by the late 1980s at least, whatever the earlier position was, Mr Gaines-Cooper had a settled and permanent family and business life in England. He was not a visitor.

53. The question of Mr Gaines-Cooper's residence status has now been determined by a competent tribunal, at length and by reference to the full facts as found by the Special Commissioners on the evidence they heard. It would be detrimental to good administration and an abuse to allow him to challenge the residence decision through the avenue of judicial review. To do so by reference to an assumed set of facts that are inconsistent with those found by the competent tribunal, would constitute a serious abuse of process. (Mr Gaines-Cooper made a similar attempt to challenge the domicile decision on the basis of "a roving selection of evidence" which was rejected by Lewison J (see [66] and [64] which sets out a useful summary of the Special

Commissioners' findings about his continuing connections with England: Gaines-Cooper v HMRC [2008] STC 1665).

54. Further, since the Special Commissioners have determined that Mr Gaines-Cooper was resident in the UK any legitimate expectation he might have had (but which is denied) that he would have been treated as non-resident, will have become illegitimate.

55. Unlike Messrs Davies and James, Mr Gaines-Cooper is not seeking, in these judicial review proceedings, to challenge HMRC's original assessments, made in April 2005, which were the subject of his unsuccessful appeal to the Special Commissioners. He is seeking to challenge HMRC's refusal in January 2007 to accede to his request (made after the Special Commissioners' determination of his residence status) to treat him as non-resident. At that stage any expectation must necessarily have been illegitimate and HMRC cannot properly be said to have abused its power in refusing the request. In this regard, the position in January 2007 is analogous to that in Al Fayed where the Court of Session said:

> "In our opinion, a statutory authority that has entered into a contract which was ex-hypothesi outwith its powers, and later, during the currency of the agreement, acquires knowledge that it had no power to enter into the contract, cannot be said to have a discretion to continue to comply with its terms until the stipulated expiry date. If they did so, they would, as the Lord Ordinary observed (in para 146), be continuing in a state of non-compliance with their statutory duties...It is not difficult to envisage cases where a public authority is possessed of lawful powers which it misuses in an unfair manner...It is, in our opinion, more difficult to envisage a case where a public authority has acted unfairly in a situation where, having ascertained that it had been acting outside its powers, it refuses to continue to so."

56. In R (on the application of Lower Mill Estate Limited and Conservation Builders) v HMRC [2008] EWHC 2409 Blake J whilst expressing some reservations about the general application of the dicta of the Court of Appeal noted at [28]:

> "There is no dispute that the Commissioners can give tax rulings and issue general tax guidance. It may be that in Davies the issue was a little

> different from the case before me, because there was no express representation to the taxpayer by the tax authorities that on the particular circumstances of his, or their case (there being two taxpayers in that case) that a genuine pre-assessment was made upon proper disclosure that tax was not payable. There was power to give the general guidance, but it might be argued that once it transpired that the real issue was whether, indeed, the taxpayer was resident at the material time, the general guidance could not determine that issue and must have been known not to be capable of determining that issue. Therefore, there would be very little room left for a legitimate expectation once the true question had been decided upon its facts."

57. It cannot be said that HMRC abused its power in treating the Special Commissioners' decision on Mr Gaines-Cooper's residence (a question of fact) as final and binding. HMRC was in fact applying IR20. Far from promising the taxpayer that no enquiry will be made to discover the full facts, IR20 paragraph 10 deals with appeals and makes clear that where a taxpayer cannot reach agreement with HMRC about his residence or ordinary residence status, he has the right to have that dispute considered by an independent tribunal (the General or Special Commissioners). Paragraph 10.3 of IR20 makes clear that these independent tribunals' decisions on questions of fact are final, but an appeal lies to the High Court against their decisions on questions of law. Mr Gaines-Cooper exercised his right to appeal to the Commissioners and HMRC has treated their determination as final. In the circumstances, the claim that HMRC abused its power in January 2007 is misconceived.

Messrs Davies and James (referred to for ease as "the Appellants")
Application of IR20 to the facts of the Appellants' case

58. Unlike Mr Gaines-Cooper, the Appellants have chosen to seek permission to apply for judicial review before having the relevant facts (which are not agreed) found by the Special Commissioners. This is significant as Mr Gaines-Cooper's appeal vividly demonstrates why HMRC is entitled to question whether the facts presented by a taxpayer provide the full picture.

59. There is no warrant for the (irrelevant) assertion at paragraph 6.2 of the Appellants' Skeleton Argument that six judges who considered this matter, prior to Wilkie J, had each taken the view that there was an arguable case here.

None of the three judges who had considered the application for permission had given permission nor given any indication that he was minded to do so. Further, the significance of the factual dispute and the "significant obstacle" that this might present to the Appellants' claims was recognised by Hughes LJ (with whom Keene and Lloyd LJJ agreed):

> "20. For my part, I accept that it looks as if there is at least some dispute of primary fact. There appears to be some dispute at least as to the commencement of full-time employment. The existence of that dispute may or may not turn out to be a significant obstacle in the way of a successful application for judicial review. It might be, because a substantial part of the judicial review claim is that the Revenue is acting unfairly in accepting the facts but not applying IR20, whereas if the Revenue is taking a bona fide position on a question of fact, that argument may very well be undermined. That, however, goes to the merits of the judicial review application, not which set of proceedings should go first.
>
> 21. I ought to record that Mr Goldberg told us that he does not seek, in the course of the judicial review proceedings, any finding of fact nor any hearing of oral evidence. In saying that the judicial review application should, on the particular facts of this case, go first, I make it clear that I do not contemplate any determination of any issue of fact being appropriate to the proceedings in the Administrative Court. Nor, for obvious reasons, should I be taken to be giving any kind of preliminary indication as to whether permission ought to be granted or not: that is a question for the judge in the Administrative Court. On the face of it at least, an early decision may be required as to whether, even if IR20 is assumed - against the Revenue case – to be a general promise to the whole world that compliance with it will insulate a person against any claim for tax in the United Kingdom, this is a claim which can succeed if there is a dispute whether it has been complied with or not. But that again is a question for the judge in the Administrative Court and not for us here."

60. Hughes LJ clearly envisaged that it would be appropriate for the Administrative Court to consider at a permission hearing whether, leaving aside the dispute regarding the correct interpretation and effect of IR20, the judicial review application can succeed if there is a factual dispute as to whether, even on the Appellants' interpretation, the conditions set out in IR20 have been fulfilled by the Appellants or not.

61. Although the Appellants assert repeatedly that on the "undisputed facts" they have satisfied the tests set out in IR20 to be treated as non-resident, there is no

common ground as to whether the Appellants have in fact satisfied paragraph 2.2 (or the other paragraphs relied on in IR20). In relation to paragraph 2.2 in particular, HMRC are, on the contrary, not satisfied that paragraph 2.2 applies because they are not satisfied that:

(a) the Appellants left the UK for anything more than regular business trips (and holidays) abroad;

(b) that they left to work full-time abroad before 6 April 2001;

(c) that their absence abroad and their employment abroad lasted for the whole tax year 2001/2002.

62. A summary of the factual issues in dispute is set out at paragraphs 33 – 39 of the Summary Grounds of Defence [DJ/8/94].

63. With reference to paragraph 2.2 IR20, the Appellants have produced written contracts of employment with Beaufort House SA, but otherwise, have produced no documentary evidence that satisfies HMRC that they worked full time in Belgium for the whole of the tax year in question. Their asserted employment did not involve a standard pattern of hours and each of the Appellants was a principal shareholder and director of Beaufort House SA, and in a position of power and authority, without anybody else to monitor or supervise their activities. Until late 2001 they did not have business premises in Belgium and did not receive any payment from Beaufort House SA until September 2001 when salary and arrears of salary were paid.

64. At the same time as they contend that they were working full-time abroad, both Appellants:

(a) continued to receive monthly payments of employment income from their UK company, B J Holmes Limited;

(b) held non-executive directorships of at least three UK companies;

(c) and their attendance continued to be marked daily in the UK company, Liberty Property Holdings Limited, Attendance Record at Beaufort House in the UK, for the weeks commencing 2 April 2001 through to the end of the week commencing 12 November

2001, just as it had been prior to their asserted departure for full-time employment in Belgium.

(d) In addition, Mr Davies was the non-executive chairman of the Swansea Rugby Football Club and attended 11 meetings during the relevant tax year on visits to the UK, and was also a non-executive director and Vice-Chairman of the Lechyd Morgannwg Health Authority until September 2001 when he was appointed Chairman. He attended 6 Health Authority board meetings and 5 audit committee meetings during the year.

(e) In addition to his three non-executive directorships, Mr James was President of the Swansea Rugby Football Club.

65. The Appellants' retention of these ties in the UK is significant as paragraph 2.5 of IR20 makes clear that whether employment overseas is "full-time" is fact sensitive and will depend on all the facts especially where the job has no formal structure and the individual has some unconnected occupation in the UK at the same time which may be inconsistent with the overseas employment being "full-time".

66. Prior to making its determination, HMRC had extensive discussions with the Appellants' representatives with a view to establishing whether the Appellants fell within the relevant paragraphs of IR20 relied upon. On 28 September 2004, the Inspector wrote **[CB/23]**:

> "As I have indicated to you on the phone I will need further information from you before your clients claim to non-residence can be accepted. Residence depends on the facts of an individual's circumstances. The claim in both cases is that they left the UK to take up an overseas employment in Belgium, while retaining their homes in the UK, and I will need to see independent corroboration of the circumstances of that employment."

67. HMRC had a number of meetings and entered into correspondence with the Appellants' representatives to see whether the Appellants satisfied the guidance relied upon. Following a meeting with the Appellants' representatives, HMRC wrote on 17 January 2005 stating:

> "Again as I explained at our meeting with my use of an outline diary, the evidence presented thus far does not point to full time employment in Belgium commencing on 1 April 2001" **[CB/32]**.

Following further discussions and correspondence, HMRC remained unconvinced and on 23 February 2006, the Inspector wrote "Leaving aside, for the moment, the question of what constitutes "leaving the UK", for these purposes, I cannot agree that the "employment" was full time from 19 March". By letter dated 20 March 2006, the Inspector wrote "as I have repeatedly said I do not think your clients were working FT abroad from the claimed date of leaving" **[CB/66]** and **[CB/68]**.

68. In the decision letter dated 29 November 2006, HMRC stated

> "Based on the facts of the matter it has not been established that your clients employment was full time employment throughout the tax year to satisfy a claim to be non-resident under paragraph 2.2 of IR20 or that your clients left the UK permanently to be treated as not resident under any other part of the IR20 guidance" **[CB/72]**.

As can be seen, this was consistent with what HMRC had been telling the Appellants' representatives during their discussions and cannot have come as any surprise to the Appellants.

69. Contrary to the assertions in the Appellants' skeleton argument, it is clear from the correspondence that HMRC has properly considered paragraphs 2.8 and 2.9 and concluded that the Appellants do not satisfy these paragraphs as they retained substantial ties and connections with the UK inconsistent with leaving the UK whether permanently or for three years or for a settled purpose: see for example, HMRC letters, dated 14 March 2005 **[CB/49]**, 20 March 2006 **[CB/68]** and 29 November 2006 **[CB/72]**. That conclusion is plainly not irrational or otherwise *Wednesbury* unreasonable in circumstances where:

(i) Both Appellants retained substantial family homes in the UK, for use by them and their wives and to which they returned frequently and

regularly. Paragraph 2.8 of IR20 expressly warns the taxpayer that HMRC will look to see whether retention of a UK home is consistent with the stated aim of leaving permanently;

(ii) The Appellants rented fully furnished apartments in Belgium and did not remove furniture or substantial personal effects from the UK to Belgium;

(iii) Both stayed in their family homes on the majority of (if not all) visits to the UK;

(iv) Both Appellants continued to perform UK duties in their capacities as non-executive directors for which they received remuneration;

(v) Both had other strong ties with the UK which continued throughout 2001/2002. For example, Mr Davies is the non-executive Chairman of the Swansea Rugby Football Club and was also a non-executive director and Vice-Chairman of the Lechyd Morgannwg Health Authority until September 2001 when he was appointed Chairman. Mr James is President of the Swansea Rugby Football Club and also retained membership of a UK yacht club and the Cardiff & County Club and Langland Bay Golf Club.

70. Contrary to the assertion at paragraph 17 of the Appellants' Skeleton, on a fair reading of IR20 these facts are plainly relevant in considering paragraphs 2.2 to 2.9. In particular, they are relevant to both the issues of "full-time employment" and whether the Appellants had left "permanently".

71. To succeed on judicial review, the Appellants must show that HMRC's conclusion that it was not satisfied that these individuals either left the UK for the purposes of paragraphs 2.7-2.9 or left the UK for full-time employment in Belgium and that full-time employment and absence abroad lasted throughout the tax year ended 5 April 2002 was irrational or perverse or an abuse of power (and not just simply wrong).

72. HMRC contends that the claim cannot succeed in circumstances where the factual basis on which the Appellants claim non-residence status is in dispute. As acknowledged by the Court of Appeal and accepted by the Appellants

before Wilkie J, that factual dispute cannot be resolved in these proceedings. In effect, the Appellants are asking the Administrative Court to assume in their favour that the factual basis for the application of paragraphs 2.2, 2.8 and 2.9 of IR20 is made out and therefore to assume that the factual basis for the charge of irrationality is also made out. That is not permissible.

73. Further, it is not arguable that HMRC has abused its power or acted irrationally in not simply accepting their assertion that the Appellants satisfy the relevant paragraphs in IR20. The facts of his or her case are peculiarly within a taxpayer's and not HMRC's knowledge. Accordingly, the taxpayers may be expected to disclose the full facts to HMRC and to produce evidence to support the facts on which they rely. Whether a person is resident or ordinarily resident is a question of fact and degree where a taxpayer's presentation of his view of the facts may differ from the way HMRC perceives them. The fact that they differ does not mean that HMRC is acting irrationally or abusing its power.

74. IR20 itself envisages that agreement on the facts may not always be possible. Far from promising the taxpayer that he will be "treated as non-resident without anyone actually discovering whether he was in fact resident or not" as the Appellants suggested before Mummery LJ, IR20 paragraph 10 makes clear that where a taxpayer cannot reach agreement with HMRC about his residence or ordinary residence status, the Special Commissioners are the appropriate body to resolve that factual dispute. They do so by hearing the evidence and making their own findings of fact.

75. It is not arguable that HMRC has abused its power or refused to apply its published practice by suggesting that the disagreement be resolved through the very mechanism identified by IR20 on which the Appellants claim that they placed reliance. In the absence of established or agreed facts regarding, inter alia, the extent and duration of their overseas employment, the Appellants' assertion that HMRC has failed to apply its guidance and acted irrationally in not accepting their claims is unarguable.

76. Finally, there is no merit in the Appellants' assertions that HMRC was not genuinely attempting or seeking to apply IR20 or was ignoring IR20 (see paragraph 3.5(ii) of the Appellants' Skeleton). The chronological summary of the correspondence provided by the Appellants is no substitute for a review of the correspondence itself. Significantly, Wilkie J, having reviewed the correspondence, held (Judgment [55] and [56]):

> "However, in my judgment, it is clear from looking at the correspondence as a whole that, certainly from February 2006 the Inspector was wholeheartedly focused not just on paragraph 2.2 but also on the arguments put forward that the claimants fell within 2.7 to 2.9 and, as I have indicated from reading the decision letter, it is clear from its terms that the author of it had had regard to paragraphs other than 2.2 and, in my judgment, it can only be read on the basis that all the other relevant paragraphs of IR20 had been taken into account.
>
> Therefore, in my judgment, it is not arguable that the Commissioners acted unfairly by failing to consider the contentions put forward by the claimants under 2.7 to 2.9 nor did they in the end abandon consideration of IR20, but their determination was one which followed their conclusions on what IR20 meant and how the facts, as they saw them, applied to IR20".

77. It is clear that contrary to the assertion at paragraph 8.2 of the Appellants' skeleton, HMRC has not refused to apply IR20 to the facts of the Appellants' case. HMRC has applied IR20 and concluded that it is not satisfied that the Appellants fall within the paragraphs they rely on. In those circumstances, IR20 provides that the appropriate forum for resolution of the disagreement is the Special Commissioners.

Reliance

78. The Appellants now contend that properly construed it is sufficient to come within the terms of paragraph 2.2 of IR20 if they were employed full-time overseas in any whole tax year rather than the whole of the tax year in which the relevant gain was made. This construction is misconceived. The Appellant's skeleton argument does not even address why they argue that it is sufficient that they are resident for a whole tax year in <u>any</u> year of assessment rather than the relevant tax year.

79. As Wilkie J noted (Judgment [41]) it is not arguable that the relevant bullet point in paragraph 2.2 could be satisfied by reference to any tax year other than the one in question. If that were the case it would run counter to what is made explicit in paragraph 1.5 of the guidance, which by its terms are strict and which require a concession for it not to apply.

80. In any event, it is not arguable that the taxpayers relied on this novel construction. It was first raised in a letter, dated 20 December 2004, and it is clear from that letter that this new construction was an afterthought which cannot have been relied upon by the Appellants at the material time **[CB/30]**. Up to this point, the Appellants' representatives had been proceeding on the basis that they needed to establish that the Appellants had commenced full-time employment before 6 April 2001 which continued for the whole of the 2001/2002 tax year.

81. Further, the evidence of Glyn Davies (the Appellants' advisor) is that both Appellants confirmed to him that they were intending to rely on paragraphs 2.2. and 2.3 IR20: see paragraph 10 of his witness statement at page [Insert] of the Hearing Bundle. This evidence raises a real question as to the extent of any reliance by the Appellants on paragraphs 2.7 – 2.9 IR20. HMRC has requested disclosure of contemporaneous evidence to support the alleged reliance but this has not yet been provided.

Conclusion

82. *IR20 and legitimate expectation:* The Appellants' argument that IR20 is not merely a statement of and guide to the law of residence but is a binding promise that HMRC will treat any taxpayer who claims to fall within its terms as resident irrespective of the position in law and irrespective of any findings of fact that he is resident and ordinarily resident is misconceived. This is not what IR20 says expressly or otherwise. IR20 offers general guidance to taxpayers including, where appropriate, setting out the main factors that are taken into account but making clear that a decision in any particular case will depend on the facts of that particular case. This does not empty IR20 of

meaning and effect; it simply does not have the meaning and effect contended for by the Appellants.

83. In any event, the Appellants' arguments are based on the false premise that IR20 is inconsistent with or in some way is a relaxation of the strict legal position. If IR20 was intended to be a departure from the law it would have said so. Instead, as expressly stated in the preface and paragraph 1.1 (and as found by the Judges below) the principles set out in IR20 are based on the legal rules governing the determination of residence and ordinary residence. Whilst formulated in different terms, the provisions of IR20 are consistent with the statutory provisions and the common law. In the circumstances, neither Lloyd Jones nor Wilkie JJ made any error as to the meaning or effect of IR20.

84. *Gaines-Cooper:* The effect of the findings of the Special Commissioners is that IR20 does not assist Mr Gaines-Cooper in any event. IR20 properly interpreted and applied to the facts as found by the Special Commissioners produces the same result as that arrived at by the Special Commissioners.

85. *Davies and James:* The Appellants' claims are unarguable as there is a fundamental factual dispute between the parties which the Administrative Court cannot resolve (without hearing evidence and making findings of fact) in these judicial review proceedings. The Appellants seek to obscure the existence of this genuine factual dispute by allegations of gamesmanship that are not borne out by the correspondence. Further, there are real factual issues regarding the extent to which the Appellants relied on the paragraphs (including the interpretation of the paragraphs) now advanced.

86. The appeals should be dismissed with costs.

INGRID SIMLER QC

AKASH NAWBATT

22 May 2009

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