IN THE COURT OF APPEAL (CIVIL DIVISION) **C1/2008/2488**
C1/2008/2690

ON APPEAL FROM THE HIGH COURT
(QUEEN'S BENCH DIVISION)
THE HONOURABLE MR JUSTICE WILKIE and
THE HONOURABLE MR JUSTICE LLOYD JONES

BETWEEN:

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

Appellants

and

THE COMMISSIONERS FOR HM REVENUE & CUSTOMS

Respondents

THE QUEEN
(on the application of ROBERT GAINES-COOPER)

Appellant

and

THE COMMISSIONERS FOR HM REVENUE & CUSTOMS

Respondents

SUPPLEMENTARY SKELETON ARGUMENT FOR THE RESPONDENTS

Hearing Date: 3 to 6 November 2009 (3 days floating)
Estimated Reading Time: 1 day

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INTRODUCTION

1. This Supplementary Skeleton Argument is served by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") in response to the supplementary skeleton arguments and supplementary witness statements of the Appellants in Davies & James ("DJ") and Gaines-Cooper ("GC"). This skeleton should be read together with its Appendix. For ease of reference the Appellants' supplementary skeleton arguments will be referred to as:

   - Joint Supplementary Skeleton Argument for the Appellants on the Law of Residence: "Residence Skeleton"
   - Supplementary Skeleton Argument for the Appellant on HMRC's Evidence of 14 September 2009: "GC Supplementary Skeleton"
   - Note of submissions – principally those made orally on 30 June 2009 – together with points arising from the evidence filed by the Respondents: "DJ Note of Submissions"
   - Further submissions not yet made orally but developing arguments in the Appellants' skeleton: "DJ Further Submissions"
   - Note of New Submission: "DJ New Submission"
   - Chronology of Revenue Responses: "DJ Chronology of Revenue Responses"

2. The issues in this appeal remain:

   (i) Is HMRC's interpretation of chapter 2 IR20 unreasonable or irrational?

(ii) Did the Appellants have a legitimate expectation regarding HMRC's interpretation or application of IR20 that differed from its actual application?

(iii) Did HMRC act unreasonably, irrationally or unfairly in its application of IR20 to each of the Appellants?

3. In short summary, the answer to those issues is as follows:

(i) HMRC's interpretation of chapter 2 IR20 is consistent with its purpose as guidance that contains no bright line tests (save the single bright line test applied by statute). It sets out guidance in relation to the factual circumstances (for which a taxpayer must provide evidence to the satisfaction of HMRC) likely to be sufficient to establish NR/NOR treatment. The guidance is consistent with the case law on residence[1] and HMRC has not sought to depart from it.

(ii) HMRC's interpretation of chapter 2 IR20 has not changed. It has always placed importance on the requirement for a taxpayer to "leave" the UK so as to divest himself of UK residence, but chapter 2 IR20 recognises that there are different ways a taxpayer might leave and that his residence status will depend on the nature of his leaving: see paragraphs 1.4, 2.1, 2.2, and 2.7-2.9.

(iii) In each case, HMRC conducted a fair investigation. HMRC applied IR20 to the known circumstances of each case in accordance with the guidance in IR20. Had HMRC been satisfied that the factual requirements of any of paragraphs 2.2 or 2.7 to 2.9 applied, it would have treated the Appellants as not resident in the relevant tax years. HMRC was not so satisfied.

BRIGHT LINE TESTS

4. Underpinning the Appellants' arguments on all three issues, and therefore a point that will be dealt with first, is the contention that IR20 contains "bright line tests". This contention is wrong and inconsistent with the structure and purpose of IR20, which is to provide guidance by identifying the main factors relevant to residence status derived from the case law [see paragraphs 21 to 25

[1] The case law on residence is summarised in the Appendix to this skeleton argument

of the Judgment of Lloyd-Jones J and paragraphs 39, 40 and 49 of the Judgment of Wilkie J].

5. The Appellants portray IR20 as a simplification of the law of residence, containing "three specific scenarios", which a taxpayer can use in order to determine if he is non-resident [Residence Skeleton para 11; GC Supplementary Skeleton para 19]. IR20 presents the law in a simplified manner; it does not (and it is submitted HMRC would not have the power to) simplify the law.

6. By stating that residence is determined exclusively in accordance with chapter 2 [DJ Note of Submissions para 2] and ignoring the Preface and chapter 1 IR20, the Appellants ignore its purpose and the extent of the factual enquiry permitted. It is a document that "*has to be viewed whole and not piecemeal*" [Judgment of Wilkie J para 10]:

Preface

*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.

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.*

7. HMRC does not rely on the above as a basis for arguing that it is not bound to apply IR20 where the factual circumstances fall unequivocally within its

terms. That is not HMRC's case. However, the introductory paragraphs are important. They demonstrate that IR20 does not contain bright line tests that can be applied irrespective of, what in some cases will be, a detailed factual enquiry. IR20 provides guidance to taxpayers on the application of the law of residence [see Mrs Mclean-Tooke w/s paras 5 and 6] and cannot possibly cover every circumstance.

8. It is accepted by the Appellants that the case law provides a multi-factorial test of residence, by reference to all the facts of a case, and that IR20 is consistent with the law [Residence Skeleton paras 9 and 11]. Its purpose in setting out the "main factors" is that in the vast majority of cases these can be easily applied by taxpayers to the facts of their cases [see paragraph 9 of Mrs Mclean-Tooke w/s].

9. However, it is clear that IR20 does not limit HMRC in the facts that may be taken into account in any residence enquiry. Nowhere does it state that it contains the only factors that HMRC will take into account[2]. Whilst a detailed factual analysis of claims to be not-resident and not ordinarily resident ("NR/NOR") may in some cases be required, especially in difficult or marginal cases (such as those in issue in these proceedings), this does not diminish the usefulness of the guidance. If IR20 did set out bright line tests limiting HMRC's factual enquiry, this would be a fundamental departure from the common law approach [Judgment of Lloyd Jones J para 25(1)].

10. There is only one bright line test in IR20 that can be applied without any further factual enquiry. It is found in paragraph 1.2, namely that you will <u>always</u> be resident if you are present in the UK for 183 days or more in any one tax year. This bright line test is laid down by statute.

11. Paragraph 2.2 provides that if you leave the UK to work full-time abroad for the whole tax year and fulfil the day count test, you will be treated as

[2] Indeed, it is not even clear that the Appellants' witnesses go this far. Mr Glyn Davies 2nd w/s refers to "specific factors" and "pertinent" features (para 12) and "certain factors" (para 15) without stating that these are exclusive.

NR/NOR from the day after you leave the UK to pursue that full-time employment [further developed at para [26] below].

12. As is clear from paragraph 2.2, the basic requirement for the application of this paragraph is that the taxpayer leaves the UK to work full-time abroad for the whole tax year. The recognition that HMRC may legitimately examine the factual basis for an assertion of leaving for full-time employment that lasts for a full tax year is contained in paragraph 2.5. The establishment of employment full-time abroad throughout a complete tax year is a question of fact and degree and *not* a bright line test.

13. Paragraph 2.7 requires the taxpayer to have left "permanently". This is obviously a question of fact and degree and can not be classed as a "bright line".

14. Similarly, paragraphs 2.8 and 2.9 expressly require a factual analysis. They set out the type of evidence that HMRC may require in order to be satisfied that a taxpayer has left the UK permanently, or to live outside the UK for three years or more. The examples of evidence required are just that; they do not limit the factual enquiry. Mr Glyn Davies recognises that IR20 deals with the "quality" of links between the taxpayer and both the UK and the foreign country (2nd w/s paragraph 15). These are qualities of a factual nature and degree, *not* bright line tests.

15. It is a gross simplification of these factual requirements to argue that the only issue that arises in relation to a determination of residence in paragraphs 2.7 to 2.9 (provided absence is long enough) is the number of return visits to the UK under the day-count test [DJ Further Submissions paras 1.4(B), 3.12 and 3.13[3]]. This argument ignores the precondition that the taxpayer must have left the UK permanently or for at least three years [Judgment of Lloyd Jones J paras 25(3) and 27]. Compliance with the day count relates to return visits to

[3] This is also the erroneous basis of James Kessler QC's article exhibited in GJD2 under "Losing UK resident status". He does not refer to (and in his analysis ignores) the reference to necessary evidence contained within paragraph 2.8.

the UK but only once non-residence has been established. It does not of itself establish non-residence.

16. There is no automatic or any entitlement to NR/NOR status within IR20 if the taxpayer is not able to satisfy HMRC that the facts of his particular case fulfil all the requirements of either paragraph 2.2 or 2.7 to 2.9. HMRC is always entitled to investigate and challenge a taxpayer's interpretation and presentation of the facts; the primacy of facts is apparent throughout IR20 [Mrs Mclean-Tooke w/s para 38].

17. 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.

18. Once it is accepted that paragraphs 2.2 and 2.7 to 2.9 permit a factual enquiry, the basis for the Appellants' arguments is severely weakened. They have to satisfy the Court that in their particular cases, HMRC acted irrationally or unreasonably in conducting the enquiries and reaching the conclusions that the factual tests in IR20 were not satisfied. These conclusions were plainly open to HMRC on the facts of each case.

19. The taxpayer has a legitimate expectation that HMRC will apply the guidance in 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 indicating a certain residence treatment, will treat him accordingly [Mr Symonds w/s para 12 and Mrs Mclean-Tooke w/s para 37].

20. The decisions that Messrs Gaines-Cooper, Davies and James had not satisfied HMRC that they were no longer resident and ordinarily resident in the UK were decisions taken on the facts of each case and did not, as alleged, turn simply on HMRC's interpretation of IR20.

I HMRC's INTERPRETATION OF IR20

21. The focus of the Appellants' arguments is that HMRC acted unreasonably or irrationally in the interpretation placed on the wording of IR20, and in particular the reading in of a special meaning into the words "leave", "left" and "gone abroad".

22. HMRC's interpretation of each relevant paragraph of IR20 set out below is correct, in line with the purpose and context of the document and consistent with the case law (the latter point is now conceded by the Appellants [Residence Skeleton para 11]). In any event, the taxpayer and the Court are bound to accept HMRC's interpretation of its own guidance if it falls within the range of reasonable interpretations (*R v Monopolies and Mergers Commission exp South Yorkshire Transport Ltd* [1993] 1 WLR 23 at 32C-33A (Lord Mustill)]).

23. Before examining each paragraph in turn, it is important to note the context of chapter 2 of IR20 because this informs the meaning of the words used, as accepted by the Appellants in Davies & James [DJ Further Submissions para 3.8].

24. Chapter 2 deals with "Leaving the UK". A taxpayer may divest himself of UK residence status if he has left the UK for more than "occasional residence abroad" (section 334 ICTA) [see tabs 3 and 4 of the Authorities Bundle]. If he cannot show that he has done sufficient to divest himself of UK residence, he may come within the terms of paragraph 1.4, and be resident both in the UK and some other country (i.e. dual resident). The question is therefore not whether he has done enough to establish residence in another country (albeit the nature of links with the other country will be relevant) but whether he has

done enough to move beyond paragraphs 1.4 and 2.1 and divest himself of UK residence status altogether [see Mr Symonds w/s para 17(d); Mrs Mclean-Tooke w/s para 48].

25. The guidance contained in chapter 2 is based on the common law of residence and identifies the main factors considered sufficient in the case law to divest a taxpayer of residence status. IR20 provides only two broad means of doing this: leaving to work full-time abroad (paragraph 2.2), or leaving the UK permanently or indefinitely (paragraphs 2.7 to 2.9) [Mrs Mclean-Tooke w/s para 43].

Paragraph 2.2

26. The interpretation of paragraph 2.2 is relevant only to the Appellants in Davies & James. Mr Gaines-Cooper rightly places no reliance on it[4]. (But in fact, the real focus of the dispute in Davies & 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" in the relevant year.)

27. 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. This is consistent with the case law. In *Re Combe* (1932) 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. In this regard, leaving the UK to take up full-time employment abroad that lasts for a complete tax year is sufficient to establish a clear break with the UK for that tax year. If genuine full-time employment subsists throughout the tax year, that will be 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 Mclean-Tooke w/s para 61].

[4] Similarly, any alleged change of practice in relation to paragraph 2.2 is irrelevant to Mr Gaines-Cooper.

28. However, importantly paragraph 2.2 is predicated on the taxpayer leaving for and being 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 a determination under paragraph 2.2 and are expressly stated to be relevant in paragraph 2.5 [see HMRC's example 5 in SMT1 pg 37]. 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.

29. The heading for paragraph 2.2 is "Working Abroad". Paragraph 2.2 does not require the taxpayer to cut any further ties with the UK or take any other steps in addition to the requirements of paragraph 2.2 (although it is clear that the nature of ties retained with the UK and the frequency and length of return visits to the UK may impact on the question whether employment abroad is genuinely full-time and may legitimately be the subject of HMRC inquiry). 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 evidence that the taxpayer has "left" the UK so as to become non-resident [see Mr West w/s para 49].

30. "Leave" in the context of paragraph 2.3, is leave "in the 2.2 sense" because the leaving must be *in order* to pursue full time employment. This is supported by the first line of paragraph 2.2, "If you leave the UK to work ...". It is not sufficient that a taxpayer leaves to go on a year-long cruise and later takes up employment. Whilst he may have physically left the country (and may be NR/NOR under another paragraph of chapter 2), leaving in the context of 2.2 only occurs when he "leaves to work full time abroad" [see Mr West w/s para 42].

31. The hypothetical example presented by the Appellants of someone leaving the UK to take preparatory steps for working overseas [DJ Note of Submissions para 33] is not representative of the facts of any of the

Appellants' cases. The correct residence status of any individual who leaves to take preparatory steps for working full-time overseas will necessarily depend on the particular facts of that case and it will be a question of fact and degree whether the individual has "left to work full-time abroad" on the date of his departure.

32. More apposite to the facts of this case is the businessman who makes several journeys back and forth to another country, whilst still employed in the UK, before commencing full-time employment in that country. He would not be entitled to claim NR/NOR treatment by reference to paragraph 2.2 on the first occasion that he left the UK, but only on the occasion that he "left to work full-time abroad", provided it lasted a complete tax year. Similarly, if someone leaves to work in part-time employment, which later develops into full-time employment, he has only left for the purposes of paragraphs 2.2 and 2.3 when he commences his full-time employment abroad.

33. These examples explain why the alternative interpretation of paragraph 2.2 argued for by the Appellants in Davies & James is wrong. If it was open to HMRC to find that Messrs Davies and James were not in full-time employment in 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 they did not leave in the paragraph 2.2 sense.

34. If a taxpayer leaves mid-way through a tax year he may, by concession, receive split-year tax treatment for that tax year, but this will have no effect on any assessment to capital gains tax ("CGT"), which is charged on a full-year basis [see Mr West w/s para 21]. Therefore if the taxpayer did not leave to work full-time 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 liable to CGT. Full-time employment in subsequent years cannot affect the starting date for treatment as NR/NOR, which is determined by reference to the date that the taxpayer left to work full-time abroad (for paragraph 2.2 purposes). 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.

35. The Appellants contend for one interpretation of this aspect of paragraph 2.2; HMRC for another. The Appellants' interpretation is not "obviously correct" [DJ Note of Submissions para 41.1] and in any event is not the only possible interpretation, which it must be in order for them to succeed on this point. Mr Glyn Davies admits that his alternative interpretation was one that only occurred to him as an afterthought [2nd w/s para 57 and CB 30]. It was not a point that he pursued with any vigour. For example it did not feature in the "key areas of disagreement" in the 21 February 2006 letter [CB 60]. During the investigation, this never formed the crux of the Appellants' case, as it would have done if they considered it to be the only possible interpretation or obviously correct.

Paragraphs 2.7 to 2.9

36. In paragraphs 2.7 to 2.9, the words "go abroad", "leave" and "left" take their meaning from the context of those paragraphs, headed "Leaving the UK permanently or indefinitely". This is what the taxpayer must do in order to establish that he is NR/NOR. These paragraphs are to be contrasted with a taxpayer usually living in the UK and making short trips abroad (paragraph 2.1). Such a taxpayer has not left the UK permanently or indefinitely.

37. The guidance contained within paragraphs 2.7 to 2.9 corresponds with the common law of residence and does not represent any relaxation of the strict legal position. It is to be interpreted in that context. As stated by Mrs Mclean-Tooke, "*The adverbs "permanently" and "indefinitely" define the nature and extent of the leaving, and paragraphs 2.7 to 2.9 speak of the need to evidence the fact that the leaving is permanent or indefinite (not less than three years)*" [w/s para 62, see also para 43]. A taxpayer cannot be treated as NR/NOR by doing anything less than demonstrating (by reference to the facts of his case) that he is effecting an intention to leave permanently or indefinitely.

38. Paragraph 2.7 is self-explanatory and covers emigration from the UK. Clearly that will fulfil leaving permanently if proved.

39. Paragraph 2.8 makes clear that evidence is 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*". There is no difference in the nature or quality of separation from the UK required, but "indefinitely" can be proved by leaving for at least three years. Therefore it is wrong to suggest, as PWC did in Davies & James [CB 30] that 2.8 is applicable to those who "fall short" of the degree of separation in 2.7 [see Mr West w/s para 22].

40. Whether a taxpayer has left to live outside the UK for three years or more is a question of fact, which is made clear from the examples of potentially relevant evidence given in paragraph 2.8. Whilst these are simply examples, and not an exhaustive list, they demonstrate that HMRC 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*"). Further evidence relevant to prove an intention to leave permanently or indefinitely may legitimately include the "pattern of presence" within the UK.

41. It is therefore not sufficient for a taxpayer simply to intend to live overseas 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" because even strong ties overseas cannot be determinative of cutting ties in the UK [Mr West w/s para 60]. That "living abroad" must be of a certain nature and quality is clear from the fact that the nature of the foreign home and/or retention of a home in the UK can be inconsistent with the taxpayer's stated aim of living abroad permanently or indefinitely. If a taxpayer's ties with the UK, including family and social ties, are such that he is not "living abroad", he will not fulfil the requirements of paragraph 2.8 and will not be treated as NR/NOR, although he may be dual resident under paragraph 1.4.

42. 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 matter 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 getting on a plane and maintaining visits below the specified day count (as contended by the Appellants in DJ Further Submissions para 1.4(B)) does not satisfy this requirement.

Paragraph 2.9

43. As is now accepted by all the Appellants (contrary to the first witness statement of Mr Vaines para 21), paragraph 2.9 does not provide a separate or weaker test than paragraph 2.8 [Residence Skeleton para 11 footnote 6; GC Supplementary Skeleton para 19]. If it did, there would be no need of nor 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. The separation from the UK must be of the same nature and quality as required in paragraph 2.8. The purpose of paragraph 2.9 is to provide the taxpayer with a further evidential means of satisfying that test if he does not have the evidence when he leaves.

44. "Settled purpose" does have an established meaning, contrary to what is asserted by the Appellants in Davies & James [Residence Skeleton para 11 footnote 6]. Departure from the UK for a settled purpose is to be contrasted with departure for the purpose of occasional residence [*Reed v Clark* [1985] STC 323 at 345f[5] (Nicholls J)]. In the context of paragraph 2.9 the settled purpose must be consistent with permanent or indefinite leaving [Mrs Mclean-Tooke w/s para 43]. What constitutes a settled purpose is a question of fact and degree dependent on the circumstances of the particular case, and cannot be a bright line test. Moreover, HMRC is not bound to accept a taxpayer's

[5] It was material to the decision of Nicholls J [at 347f] that Mr Clark had made a "distinct break" in the pattern of his life in the UK.

contention that he has left indefinitely for a settled purpose, where this appears to be inconsistent with the facts (as HMRC understands them).

45. The requirement to refer back to case law regarding settled purpose does not in any way devalue the guidance in paragraph 2.9. The guidance will be sufficient for most individuals but cannot cover every eventuality, nor does it list exhaustively the potentially relevant facts [see Mrs Mclean-Tooke w/s para 42].

46. The second part of paragraph 2.9 states that a taxpayer's status can be reviewed, even if he has not gone abroad for a settled purpose, if he is absent for three years, or can produce evidence that he has left the UK permanently. The word "can" is used, rather than "will", because the taxpayer's absence must still be consistent with the overall requirement to show that he has left the UK permanently or indefinitely. He must take himself beyond paragraphs 1.4 and 2.1. The absence must therefore be of a quality that would satisfy HMRC under paragraph 2.8, if the evidence were available at the time of departure. If that review establishes that despite an absence for three years, the taxpayer's presence and retention of links with the UK are sufficient to call into question a claim that he has left permanently or indefinitely, HMRC may determine on the facts of the case that the taxpayer has not satisfied the guidance in paragraph 2.9 and remains R/OR.

Ultra Vires

47. If the guidance in paragraphs 2.7 to 2.9 means (as the Appellants contend it does: DJ Further Submissions paragraph 3.12) only that visits to the UK within the day count specified is sufficient to establish entitlement to NR/NOR treatment if the overall physical absence is long enough this would render paragraphs 1.4, 2.1, 2.2 and 2.7 otiose. It would ignore the factual circumstances a taxpayer must establish to show that he has left in the relevant sense. It would reduce the guidance to a series of bright line tests that Parliament has refrained from introducing. It would also be a significant divergence from the case law.

48. 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. 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).

49. 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).

50. 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); approved by Lord Hoffmann at [20-21].

51. As Wilkie J observed [Judgment para 50], it would be an "inevitable consequence" of the Appellants' interpretation of paragraphs 2.7 to 2.9 that HMRC had put out a document in excess of its management discretion. It would be tantamount to HMRC accepting that it will not collect taxes properly

due from those who, by law, would be resident in the UK. Such a fundamental departure would not be facilitating the collection of tax, but facilitating the failure to collect tax, and would therefore be *ultra vires*.

52. But this is not what HMRC has done. It has published a guidance booklet (IR20) based on the legal principles established by case law and entirely consistent with those principles. There is no divergence between IR20 and the law. Accordingly a correct application of the guidance in IR20 to the relevant facts of a taxpayer's life should produce the same result as a full investigation of such facts by the First Tier Tribunal applying "common law principles" of residence.

Summary

53. In summary, the guidance in paragraphs 2.2 and 2.7 to 2.9 does not (as the Appellants assert) restrict HMRC's legitimate enquiry. It covers specific (but common place) scenarios but within each, all relevant facts of an individual's case may be the subject of enquiry. IR20 provides guidance to assist taxpayers in interpreting and applying the case law. To comply with the guidance a taxpayer must establish to HMRC's satisfaction (with evidence as appropriate) the factual requirements in 2.2, 2.5, 2.8 and 2.9. There is no limit on the extent of the factual enquiry that might be appropriate or necessary. These appeals amount primarily to a disagreement between HMRC and the Appellants about whether the factual requirements to be treated as NR/NOR have been met.

54. The Appellants in Davies & James accept that there is a possibility that they may have been found to be resident under the case law [DJ Further Submissions para 2.10]. Mr Gaines-Cooper's residence status has already been determined by the Special Commissioners. All three now seek through this process of Judicial Review to circumvent these conclusions by drawing a dividing line between IR20 and the case law on residence that does not exist.

55. HMRC's interpretation of IR20 is neither unreasonable nor irrational. It accords with IR20 as guidance that is consistent with and reflects the case law.

A proper application of IR20 will produce the same result as a determination of residence status at common law.

II LEGITIMATE EXPECTATION

56. If the Court accepts, as HMRC contends it must, that HMRC's interpretation of IR20 as set out above was at least reasonable, the Appellants' argument that the wording of IR20 creates any legitimate expectation must fail as there are no bright line tests that lead to a determination of NR/NOR in any of their cases.

57. Further, it is clear from the paragraphs in the Preface and chapter 1 that decisions on residence status will be made on the facts of each particular case. The taxpayer can therefore have no legitimate expectation beyond the expectation that HMRC will fairly analyse the facts of an individual case and, if those facts satisfy HMRC that the guidance has been fulfilled, treat the taxpayer as NR/NOR. The taxpayer cannot have any expectation that the conclusion he draws from the facts will be accepted by HMRC.

58. In the circumstances, the Appellants rely on an alleged unannounced change of practice by HMRC in relation to the application of IR20.

59. To give rise to a legitimate expectation through statement or practice, there must be "a clear, unambiguous and unqualified representation" [*R v IRC, ex p MFK Underwriting* [1990] 1 WLR 1545 at 1569 (Bingham L.J)].

60. Further, a court may properly review a decision of HMRC 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. 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 sought to resile from undertakings it had previously given.

61. The correct approach to "legitimate expectation" in this area was explained in *R v IRC, ex p MFK Underwriting* (see above) 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."

62. 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.

63. 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."

Change of Practice

64. There are 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. Whilst none of these witnesses were employed in a relevant position before 2001 Mrs Mclean-

Tooke and Mr Symonds worked directly with colleagues who had worked in the relevant department before 2001 and are 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 para 10].

65. Further, the change of practice on which the Appellants rely allegedly took place between 2001 and 2005 [DJ Note of Submissions para 51][6]. These witnesses are therefore able to give direct evidence regarding that period and all are clear that there has 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].

66. The Appellants contend that HMRC has (contrary to past practice) placed a novel and unwarranted emphasis on the word "left" in chapter 2 of IR20. It is therefore alleged that a further hurdle is now placed in the way of taxpayers who would otherwise satisfy the requirements to be treated as NR/NOR. This is denied by the witnesses for HMRC.

67. The Appellants in Davies & James subject the exhibits in SMT1 to close forensic scrutiny (in much the same way as the correspondence between themselves and HMRC has been so subjected) [DJ Note of Submissions para 50]. They highlight the fact that no reference is made to the need for a taxpayer to cut his ties with the UK. A similar exercise is conducted in GC Supplementary Submissions.

68. An error underpinning the Appellants' analysis of the exhibits is a failure to distinguish between exhibits relating to paragraph 2.2 and those dealing with paragraphs 2.7 to 2.9. Put simply, the Appellants refer to exhibits dealing with paragraph 2.2 as showing that there is no reference to cutting ties or a clean or clear break[7] and seek to infer an unannounced policy change in

[6] Mr Glyn Davies [2nd w/s para 44] attributes the change to the transfer to the Centre for Non-Residents between August 2003 and May 2004.
[7] See GC Supplementary Skeleton [especially paragraphs 7 to 13] and Supplementary Note of Submissions pgs 26, 28, 29, 30, 31]

HMRC's approach to paragraphs 2.7-2.9 where cutting ties/distinct break are required. But that is entirely consistent with HMRC's position regarding paragraph 2.2 – provided the taxpayer has genuinely left to work abroad in full-time employment for a whole tax year there is no requirement to further evidence a break from the UK[8] because being in full-time employment abroad is likely to be sufficient evidence in itself of such a break with the UK.

69. The GC Supplementary Skeleton [paragraphs 7, 12 and 13] misrepresents Mrs Mclean-Tooke's evidence through references to a "clean break". Mrs Mclean-Tooke's evidence is clear that in relation to paragraph 2.2 the taxpayer is required to have genuinely left to work full-time abroad. This by itself is likely to satisfy the requirement to demonstrate a break with the UK [see Mrs Mclean-Tooke w/s paras 61 and 48 and para 27 above]. Under paragraph 2.2 therefore nothing more is required in this respect. There is no inconsistency between this position and the exhibits.

70. It is only in relation to paragraphs 2.7 to 2.9 that a taxpayer must demonstrate that he has left permanently or indefinitely, by producing evidence that he has cut his ties or made a distinct break with the UK. The Appellants have not identified any true inconsistency between the exhibits and HMRC's consistent position regarding paragraphs 2.7 to 2.9.

71. Further, even if these exhibits are capable of demonstrating a change of practice (which is not accepted), they are of limited relevance to the legitimate expectation of the Appellants in both cases, as they deal with paragraph 2.2. The basis of HMRC's decision on paragraph 2.2 in relation to the Appellants in Davies & James was not whether they had "left", but rather the fact that they had not left to work full-time abroad in the relevant tax year (see paragraphs 97 to 98 below)[9]. No decision was made at all regarding paragraph 2.2 in the case of Mr Gaines-Cooper because this paragraph was,

[8] Most of the exhibits deal with the cases of mobile workers. Such cases are difficult cases on the margins. They are not in any way analogous to the facts of the Appellants' cases.
[9] See also Ms Mclean Tooke w/s para 31; none of the exhibits call into question the requirement under paragraph 2.2 to have left the UK for full-time employment abroad.

correctly, not relied on by him. (In his case, he was in fact working under a contract of employment in the UK from 1992 to 1995).

72. HMRC does not accept the Appellants' analysis of the exhibits to witness statements in these proceedings and invites the following analysis of the relevant exhibits:

SMT1

3-4 HMRC letter from Mr Wilks to Mr Sawyer, 7 July1999.

This letter is dealing with an individual who leaves the UK permanently or indefinitely but cannot provide the evidence mentioned in paragraph 2.9. It has been construed to suggest that a spouse, a home and duties in the UK will be irrelevant to a claim for non-residence as long as 3 years have passed and the day count has been followed.

Insofar as this letter is read as suggesting that such an individual need do no more than live outside the UK and fulfil the day count to be non-resident under paragraph 2.9 it is incorrect. This is not and never has been HMRC's approach to or understanding of paragraph 2.9.

However, as Mrs Mclean-Tooke explains, she does not believe that is what Mr Wilks was saying: [w/s para 16]. Mr Wilks was discussing an individual who had already left the UK for permanent residence abroad and lived outside the UK, and although the letter may be ill-expressed, understood on this basis, Mr Wilks has not ignored the requirement to leave. It is also clear from further correspondence of Mr Wilks that he understood the importance of an individual having left the UK [see for example SMT1/24 to 25] and did not ignore this requirement in his dealings with taxpayers.

7-8 Exchange of correspondence between KPMG and HMRC letter, September 1999 (this exchange was copied to HMRC subsequently under cover of a letter dated 12 June 2001 SMT1/32-35).

The general advice given regarding long distance commuters seeking to rely on paragraph 2.2 is that a taxpayer will be treated as NR/NOR provided he "leaves the United Kingdom to undertake employment abroad" and fulfils the day count requirements.

Long distance lorry drivers were claiming to be NR/NOR in reliance on paragraph 2.2. Advice as to how such taxpayers would be treated therefore relates only to paragraph 2.2. Further, the primary issue in the mobile worker cases was whether they were living in the UK (and were therefore caught by paragraph 2.1) or whether they had genuinely left for full-time employment overseas.

The arguments presented by the Appellants [GC Supplementary skeleton para 8; DJ Note of Submissions pg 26] focus only on the day count and ignore the primary requirement to have left the UK for full-time employment abroad; a requirement being applied by HMRC in 1999.

17 Letter to Mr Wilks (HMRC) from David Shawyer of Frank Hirth & Co, 16 November 1999, regarding "mobile" lorry drivers.

He is aware of the importance HMRC places on the taxpayer having left the UK to fall within paragraph 2.2 rather than just relying on the day count:

> "The only problem I foresee is that there appear to be some drivers who regularly leave the UK one day and then return the next day or the day after. Have they left the UK?"

Such a person is unlikely to satisfy the fundamental requirement of having left to work "full-time" abroad through a whole tax year. None of the Appellants were mobile workers.

21 FICO Newsletter 6 which published a short statement by HMRC on "Residence status of people travelling abroad because of their work".

HMRC sets out guidance, primarily for mobile workers, repeating the conditions that a taxpayer must satisfy under paragraph 2.2, and importantly, the requirement to leave the UK to work full-time abroad as a pre-condition. The guidance states that (and gives examples of cases where) workers who live in the UK but travel abroad frequently as part of their job will continue to be resident.

The guidance is clear. The individual must "leave to work full-time abroad" before any question of compliance with the day count test becomes relevant. Day count is not by itself sufficient.

22 HMRC standard form letter regarding mobile workers and paragraph 2.2, 20 February 2000.

HMRC confirm the position that if you "usually live" in the UK you will generally remain UK resident; day count is not sufficient. This is consistent with paragraph 2.1 IR20 and the need to have left the UK for more than short or occasional trips abroad to establish NR/NOR.

However, temporary measures were put in place to deal with mobile workers improperly advised by HMRC in relation to paragraph 2.2 only. The letter makes clear that it has no application to those claiming NR/NOR in reliance on paragraphs 2.7 to 2.9.

The very fact that this problem (of incorrect advice on the application of the guidance) was investigated and addressed on the basis that misleading and incorrect advice had been given by some staff in 1999 in relation to paragraph 2.2 shows that the usual position is that a taxpayer must have "genuinely left to work full-time abroad" under paragraph 2.2.

24-25 HMRC letter from Mr Wilks to David Sawyer, 8 March 2000 responding to questions raised by Sawyer [SMT1/19-20] about the

residence status of pilots following publication of the FICO newsletter article.

Mr Wilks confirms that the FICO article [SMT1/21] was intended to clarifyn the position of those living in the UK and travelling abroad and did not set out any change of practice. Rather, it was further guidance on whether someone was still to be regarded as living in the UK and therefore falling within paragraph 2.1 (as this had been the main issue regarding mobile workers)

HMRC state that they will look at the full facts of a case to see whether the taxpayer has "in reality *left* the UK".

HMRC confirm that if a taxpayer has not *left*, he will remain resident "not because we are not applying paragraph 2.2 but because the individual doesn't satisfy the conditions attached to the practice."[10]

The need to have left the UK, in a sense more than simply getting on a plane out of the UK, in order to fall within paragraph 2.2 of IR20 is therefore clear.

26 HMRC statement regarding mobile workers published on the website in February 2001[11] (and republished in Tax Bulletin April 2001).

The guidance considered the application of IR20 to mobile workers, for whom the requirement of having left under paragraph 2.2 was critical.
Para 3 confirms that the facts of each case are paramount;
Para 4 confirms that the day counting test is not sufficient;

[10] The same argument can be made against the Appellants in these cases when they argue that HMRC has not applied IR20, when in fact HMRC is simply not satisfied that the facts presented satisfy the conditions required under IR20.

[11] As the most recent public statement of HMRC on the interpretation of IR20 available to Messrs Davies and James before they went to Belgium (and in any event widely published before they disposed of their share holdings) the only legitimate expectation that the Appellants could have had in relation to HMRC's application of paragraphs 2.7 to 2.9 of IR20 is that the full facts of a particular case would be considered and HMRC would require evidence that they had left permanently or to live outside the UK for three years or more.

Para 5 confirms the requirement to have "genuinely *left*". Whilst there is a reference to "clear break" in paragraph 2.2, the proceeding words show that within the context of 2.2 this can be satisfied by absence and employment abroad for a whole tax year. There is no further requirement;

Para 7 reaffirms, "these guidelines are **general**"

Para 8 [SMT1/31] contrasts the position under paragraphs 2.7 to 2.9, stated to cover the position where a taxpayer has "**left** the UK to live abroad permanently". It is stated that evidence may be required that the taxpayer has left the UK permanently, or to live outside the UK for three years or more [see also Mrs Mclean Tooke w/s para 24].

The guidance therefore confirmed the need to have left the UK to work full-time abroad in order to be considered NR/NOR under paragraph 2.2, as well as the requirement under 2.7 to 2.9 to provide evidence of having left permanently or indefinitely. It is consistent with HMRC's practice and treatment of the Appellants [see SMT1 pg 24; DHG1 pg 12].

32 KPMG letter to HMRC, 12 June 2001 (enclosing earlier correspondence at [33-34] and questioning whether the answers given previously remained correct in light of the Tax Bulletin article.

KPMG recognise the importance of having "left the UK" in order for the guidance set out in paragraph 2.2 of IR20 to apply and that this can give rise to borderline situations.

35 HMRC's response to KMPG letter, 23 October 2001.

HMRC confirm that paragraph 2.2 of IR20 is likely to qualify a taxpayer as non resident if he or she has "genuinely left" the UK and set up residence abroad for full time employment. The fact that the word "left" has not been further defined does not in any way weaken the clear emphasis that is placed on this word [cf. DJ Note of Submissions pg 30].

An example is given in the letter of a situation where paragraph 2.2 is likely to be satisfied: an individual assigned abroad on a two year contractual assignment where all duties are performed abroad with a sufficient degree of continuity and overseas accommodation is available throughout. This is materially different to the circumstances of the cases of Messrs Davies and James.

This is consistent with HMRC's position in these proceedings on the proper application and meaning of paragraph 2.2 [see also HMRC correspondence at SMT1/39].

36-38 Note of meeting held between HMRC and Arthur Andersen on 22 June 2001. The meeting dealt solely with paragraph 2.2.

HMRC state that lorry drivers' claims were often not valid because they had not "genuinely left the UK"; the lorry drivers were based in the UK. The examples [SMT1/37] all deal with a determination of residence under paragraph 2.2 and in particular the requirement to establish that employment abroad is full-time (see in particular example 5). If it is not full time the taxpayer cannot be considered NR/NOR under paragraph 2.2.

Arthur Andersen recognised [SMT1/37A] the difficulty of deciding if someone had "left" the UK under paragraph 2.2. They were clearly aware of the emphasis that HMRC placed on this word in the context of paragraph 2.2.

Further, Arthur Andersen recognised that reliance on paragraph 2.7 does require a view of the "wider factors" namely, "personal circumstances such as accommodation, family life etc."

39-41 HMRC letter to profession inviting comments on a proposed draft basket of indicators regarding paragraph 2.2.

The draft basket of indicators includes "settled domestic life" in UK. It suggests a more exacting test for "leaving" under paragraph 2.2.

Responses from those consulted within the accountancy profession regarding the basket of indicators, raised concerns including whether it *may* represent a change of HMRC's practice: see SMT1/42 to SMT1/60. However, the correspondence was part of a consultation process [Mrs Mclean Tooke w/s para 32]. The draft document was never implemented and it never became the policy of HMRC to apply these factors to determinations under paragraph 2.2[12]; there was no change of policy [Mr Symonds w/s para 38].

Further, the responses below demonstrated a clear understanding of the importance that HMRC placed on the taxpayer having genuinely left the UK to come with paragraph 2.2 [see also Mrs Mclean Tooke w/s para 32]:

> SMT1/48 – "*We agree that paragraph 2.2 of IR20 refers to "leaving the UK" and emphasis is correctly placed on this in the statement for Mobile Workers in the April Tax Bulletin*".
>
> SMT1/51 – "*Accordingly my preference would be for you not to expand on what you have already said in the April Tax Bulletin. I think it is clear from that article that the point you are seeking to make is that a person who leaves his family in the UK and continually travels back and forth from this county has not "left" this country*".

SS1

4 Arthur Andersen letter to a client, 22 October 1999.

Attached to the letter was a non exhaustive checklist of factors that HMRC may take into account in determining residence in an emigration

[12] As recognised by Mr Glyn Davies 2nd w/s para 20

case (i.e. falling within paragraphs 2.7 to 2.9 of IR20) [see Mrs Mclean-Tooke w/s para 33; Mr Symonds w/s para 47].

The letter is not, as alleged by the Appellants, dealing with domicile. Mr Glyn Davies [2nd w/s para 21] refers to the fact that the letter refers to inheritance tax. However, he ignores the previous references to "Belgian income tax" and "double taxation treaty". There is no double taxation treaty between the UK and Belgium in relation to inheritance tax, so the reference must be to income and gains. Further, the letter does not refer to the "17 out of 20" rule, which would be relevant to any discussion about inheritance tax. In addition, the checklist omits several factors that could well be relevant to a determination of domicile under the laws of the UK e.g. under "Entry into Belgium", any mention of the taxpayer's will, naturalisation or exercise of political rights.

9 Email of Jonathan Kendal (accountant) to a taxpayer, 18 December 2001.

Mr Kendal advises on the day count test on the assumption that HMRC will consider the taxpayer to be working full time abroad. He expresses his concern that the number of visits/days in the UK may lead HMRC to conclude that the taxpayer is not in full-time employment. He makes clear to the taxpayer that the work in Belgium must have "unassailable characteristics of full-time" employment.

This is entirely consistent with HMRC's interpretation of paragraphs 2.2 and 2.5 of IR20 (and is somewhat analogous to the case of Davies & James).

DHG1

6-7 Mr Hilton-Gee's record of conversation with Sheila Adey, 25 March 1993.

The conversations with Ms Adey were in the context of removal of the rule regarding available accommodation in 1993, concerned only paragraph 2.2 of IR20 and must be read in that context.

Ms Adey is recorded as saying that the performance of substantial duties in the UK does not, of itself, indicate an absence only for an occasional purpose, but may lead to a question whether the tax payer is performing full-time employment abroad.

This is consistent with HMRC's position that full-time employment is a question of fact and degree, but as long as the taxpayer has genuinely left to work full time, the continuance of duties in the UK will not affect the residence position under paragraph 2.2 (save to the extent that it affects the earlier question whether the employment abroad is in fact full-time. The less incidental the duties are in the UK, the more likely it is that they will jeopardise the claim to be working full-time abroad).

8 2 June 1993 record of conversation with Ms Adey.
Ms Adey states that going abroad in a full-time job for more than a complete tax year is sufficient to become non-resident; a UK home and UK duties are not material.

Again, Ms Adey's statement was predicated on the taxpayer satisfying the requirement of having left to work full-time abroad for a complete tax year. Again, this is consistent with HMRC's position that providing the taxpayer has left to work full-time abroad, and the employment and absence last a complete tax year, no further evidence of cutting ties with the UK is required under paragraph 2.2.

9 23 June 1994 record of conversation with Ms Adey.
Ms Adey describes the essential point for establishing residence status as the "90 day average test"; duties in the UK could be ignored.

But this whole conversation is (again) predicated upon the individual working full-time or wholly abroad (commuting back to the UK at weekends or performing incidental duties in the UK). (This same point is repeated in Ms Adey's note dated 22 July 1994 at DHG1 pg 10.)

In any event, Ms Adey's comments are surprising to Bernard White, a partner at Mr Hilton-Gee's firm [DHG1 pg9]:

> *"I am surprised by Miss Adey's comments, but I cannot really dispute them if that is what she said. I suppose caution would make me take the view that, although I might now expect an answer on these lines from the Revenue, in circumstances, I would advise specific reference in each case".*

Read in the context of paragraph 2.2 and the assumption that the taxpayer had left for full-time employment abroad, performing only incidental duties in the UK – see 95% working time on continent: 5% in UK working on UK operation, this advice is consistent with HMRC's approach to paragraph 2.2.

In any event, the Appellants rely on a change of practice between 2001 and 2005; the position of one adviser dealing with a hypothetical situation in telephone conversations and one letter in 1993/4 is of limited relevance to their case and cannot be enough to found a legitimate expectation.

12 Note of conversation between DHG and Doug Devine (HMRC) 8 May 2001, following the publication of the April 2001 Tax Bulletin.
Doug Devine confirms that the Tax Bulletin did not constitute a change of practice, but that there was a tendency to ask for more facts rather than take claims to non-residence at face value.

HMRC will look at all relevant factors to determine if somebody has genuinely left (within the context of paragraph 2.2).

It is clear from the fact that DHG placed the word "left" in inverted commas on DHG1/13 that he was aware that it had a meaning beyond simply getting on an aeroplane; and was aware of the importance that

HMRC placed on this requirement as the basis for a non-residence claim.

73. These exhibits evidence the consistency of HMRC's approach in requiring a taxpayer claiming to be non-resident under paragraph 2.2 of IR20 to demonstrate that he has genuinely left the UK to work full-time abroad. The need to have left the UK to work full-time abroad, and the emphasis placed upon it by HMRC is recognised by a number of practitioners. Given these references, Mr Gaines-Cooper's position that "leave" and "left" "*indicate nothing more than physical departure*" is unsustainable [GC Supplementary Skeleton para 31].

74. The draft basket of indicators that *may* have represented a change of HMRC's practice by requiring evidence of a more substantial break with the UK under paragraph 2.2 was never implemented.

75. The exhibits relate only briefly to paragraphs 2.7 to 2.9 of IR20. Where they do, there is evidence of HMRC's consistent approach to requiring evidence that the taxpayer has left permanently or indefinitely. There has been no change of practice whatever, whether as alleged by the Appellants or otherwise, regarding the evidence a taxpayer might be required to provide that he has left the UK permanently or indefinitely under these paragraphs.

76. HMRC has consistently maintained its position, in line with the Preface and chapter 1 of IR20, that it is entitled to look at all the facts of a particular case [see for example SMT1 pgs 3, 24, 26, 27, 36, 37, 39; DHG1 pg 12].

77. There is some acceptance among the Appellants' witnesses that HMRC has before 2005 investigated and disputed claims to be NR/NOR [Mr Hilton-Gee w/s para 15; Mr Warburton w/s para 14]. The challenge appears to be about an increased tendency to do so and a broader factual enquiry. It should be remembered that whilst IR20 could be applied in the vast majority of cases without difficulty [Mr Symonds w/s para 50; Mrs Mclean Tooke w/s para 36],

there have always been cases causing difficulty at the margins (e.g. *Reed v Clark* and the mobile worker cases).

78. To the extent that advisers have experienced an increased propensity by HMRC to investigate claims to be NR/NOR, this is explained in the witness statements of Ms Mclean-Tooke [paras 10 – 14, 39, 65 - 67], Mr Symonds [para 37] and Mr West [para 77] as being the result of the following statutory changes and changes in the practice of tax collection (and not the result of a different interpretation being placed on IR20):

- 1993: The removal of the available accommodation rule meant that accommodation in the UK could be disregarded for determining whether a taxpayer was in the UK for a temporary purpose only and not with a view or intent of establishing his residence in the UK;
- 1996: Self-assessment was introduced and alongside it the process of "file now, check later". With the removal of residence rulings in 1997, there was an increase in the number of tax payers claiming non-residence status and a consequential increase in the incidence of inspectors requiring evidence of asserted facts [Mrs Mclean-Tooke w/s paras 39 and 66; Mr Symonds w/s para 37];
- 1998/9: The abolition of the Foreign Earnings Deduction ("FED") meant that taxpayers were no longer able to rely on this deduction for earnings from employment carried out wholly or partly abroad, leading to a significant increase in claims to be non-resident by those with earnings in respect of duties carried out abroad who had until then never asserted non-residence;
- 2003: The move to CNR was a further step towards more efficient enforcement.

79. The fact that HMRC improved policing and enforcement of residence cases, even before the move to CNR, is supported by the comments of Doug Devine in May 2001 [DHG1 pg 12]. He is recorded as saying that claims will now be investigated, which might previously have been accepted at face value. Mrs Mclean-Tooke [w/s para 65] references the improved compliance systems and

more professional attitude of HMRC to compliance generally as possibly explaining tax advisers' perception of a change in approach from HMRC.

80. A closer scrutiny of taxpayers' claims to be NR/NOR is not, as alleged by the Appellants in Davies & James [DJ Note of Submission para 78.2] a reduced willingness to apply IR20. HMRC are entitled to look fairly at all the relevant facts of a particular case to determine whether a taxpayer satisfies the guidance to be NR/NOR in chapter 2. There is no inconsistency between applying IR20 and a reduced willingness to take taxpayers' claims at face value.

81. Pursuant to the guidance of the Court of Appeal in *R (on the application of Al-Sweady & Others) v Secretary of State for Defence* (2009) EWHC 2387 at paragraph 64, HMRC has considered whether the dispute about change of practice is one that requires cross-examination of witnesses in these Judicial Review proceedings. HMRC considers that the existence of a change of practice is not a hard-edged question of fact about which there could be no legitimate room for disagreement.

82. If the Court finds that in judicial review proceedings it is required to determine a factual dispute, namely about whether there was a change of practice, on the contradictory evidence of the Appellants' and HMRC's witnesses, the ordinary practice is to determine the dispute in favour of the defendant [see *Al-Sweady* at paragraph 17].

Summary

83. The exhibits and witness statements demonstrate that in fact there was no change of practice by HMRC in the evidence that it required to be satisfied that a taxpayer was NR/NOR under paragraphs 2.2 or 2.7 to 2.9. HMRC has consistently required the taxpayer to have left the UK before any claim to be non-resident can be made and to have required evidence of leaving to work full-time abroad under paragraph 2.2 or permanently or indefinitely under paragraphs 2.7 to 2.9. Whilst HMRC may now be more willing to challenge a

taxpayer's assertion that he is NR/NOR, this does not reflect a change in its interpretation of IR20.

84. In any event, to create a legitimate expectation, any previous practice of HMRC by reference to IR20 must be "a clear, unambiguous and unqualified representation" (*MFK Underwriting* per Bingham L.J. (see above)) that has been breached by HMRC's alleged change of practice. The alleged "change of practice" is so uncertain that it cannot qualify under this test. Further, 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 factual position.

85. Moreover, the alleged change of practice is irrelevant to the Appellants' claims. Messrs James and Davies' claims to be NR/NOR were not accepted because HMRC was not satisfied that they were full-time employed in Belgium; Mr Gaines-Cooper placed no reliance on paragraph 2.2.

86. The guidance issued by HMRC (see e.g. Tax Bulletin April 2000) consistently stressed that each case would turn on its facts. The only expectation of a taxpayer was therefore that he would be treated fairly and that IR20 would be applied to the relevant facts of his case, as those facts were understood by HMRC.

III APPLICATION OF IR20 TO APPELLANTS

87. HMRC must act fairly when dealing with taxpayers. In its application of IR20 to the Appellants it did not act unreasonably, irrationally or unfairly. HMRC has sought carefully to apply IR20 to the facts of their particular cases; the fact that the Appellants do not agree with HMRC's conclusions on those facts does not render HMRC's conclusions irrational.

Davies and James

88. The Appellants in Davies & James have sought to analyse the correspondence in a manner appropriate to the construction of a statute. This was correspondence written in the course of an investigation over a number of

years and naturally different points were pursued with differing levels of enthusiasm (by both HMRC and the Appellants) at different times. Further, it is not surprising that suggestions for certain lines of enquiry would come from the technical specialist (Mr Symonds). It was legitimate for HMRC to pursue the enquiry as it did, requesting from the taxpayers evidence to prove that they satisfied the guidance about non-residence in IR20 as alleged. The conclusion reached by HMRC was simply that the evidence provided was insufficient to do this.

89. The determinations that the Appellants were resident and ordinarily resident in the UK were attached to HMRC's letters (in each case) dated 29 November 2006 [CB 72]. The letter makes clear the reasons for the determinations as follows:

- HMRC was not satisfied that the Appellants were working full time abroad throughout the tax year 2001/2;
- The Appellants did not leave permanently or indefinitely to satisfy any of the other paragraphs within chapter 2 of IR20.

90. Contrary to the Appellants' submission [DJ Note of Submissions paras 62, 69, 78.2], HMRC had engaged in, and rejected, the claims of the Appellants under all the relevant paragraphs of IR20. Wilkie J [para 55] found that, certainly from February 2006, Mr West was "wholeheartedly focused" on the Appellants' arguments under paragraph 2.2 and 2.7 to 2.9.

91. The Appellants have identified three "flaws" in HMRC's reasoning [DJ Note of Submissions para 10], which are the same flaws that were argued before, and rejected by, Wilkie J below [Judgment paras 35, 42 and 51]. The first two are essentially complaints about HMRC's interpretation of IR20. If the Court finds that HMRC's interpretation of 2.2 and 2.7 to 2.9 was correct or at least within the range of reasonable interpretations (and assuming that Mr West applied those interpretations in reaching his conclusion) that is sufficient to dispose of those flaws.

92. The Appellants advance as flaw (i), the fact that HMRC did not address the argument regarding the interpretation of 2.2, that being employed full-time abroad in any tax year is sufficient. Mr West accepts in his witness statement that he did not respond to the Appellants on this point [w/s para 40]. He describes this as an "oversight" [w/s para 41]; it is relevant that this was not an argument pursued with any vigour by Mr Glyn Davies. However, Mr West is clear that he considers that this argument is wrong and he would have rejected it [Mr West w/s para 42; see also Mrs Mclean-Tooke para 63].

93. In any event, even if the Appellants are correct in their argument regarding the relevance of the indefinite article in 2.2, the argument only succeeds if it is the case that the Appellants left the UK for full time employment before the start of the tax year. Mr Glyn Davies now accepts that the conclusion that the Appellants were not employed full time abroad in April 2001 was one that was open to the Inspector [2nd w/s para 85]; there appears to be no challenge to the reasons underlying that decision, in particular the amount of time spent in the UK in April 2001 [see Mr West's w/s paras 73 to 74, detailing those reasons].

94. Mr West concluded that the Appellants did not leave in March 2001 for full-time employment; they were still working in the UK in April, as evidenced, amongst other things, by their continued inclusion and registration in the attendance records at Beaufort House in the UK, continued receipt of UK employment income, their continued non-executive directorships of three UK companies and their continued roles with Swansea RFC and the Lechyd Morgann Health Authority. On that basis, the Appellants did not leave in March 2001 to work full-time abroad, and their argument was and remains bound to fail.

95. Mr West did consider the possibility that the Appellants *may* have been employed full-time at a later date (contrary to DJ Note of Submissions para 43), but given that he was not satisfied that they had left to work full time abroad by 6 April 2001, he decided that it was not relevant to his determination of residence status [Mr West w/s para 21].

96. The Appellants' second complaint (flaw (ii)) is that HMRC misinterpreted the word "left". During the course of the investigation, Mr West did refer to the test of leaving in the residence sense when considering paragraph 2.2 [CB 43; CB 47]. In addition, he raised the question of whether "leaving" needed to be dealt with as a preliminary point before turning to IR20 [CB 54], but this was raised as a point for discussion only [see Mr West w/s para 50].

97. It is clear from subsequent correspondence [CB 66 and 69], the decision letter [CB 72] and Steve Symonds letter to Charles Hall [SS/14] that the ultimate decision on residence status under paragraph 2.2 was based not upon a failure to show that the Appellants had "left", but rather their failure to demonstrate leaving to work full-time from 6 April 2001. 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].

98. Further, the basis of the decision in relation to paragraph 2.2 was clearly set out in the decision letter, dated 29 November 2006, in which 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" [CB/72].

99. In rejecting the Appellants' submissions regarding paragraphs 2.8 and 2.9, Mr West applied the interpretation of those paragraphs set out in paragraphs 36 to 48 above. The focus on cutting ties in the UK is clear in the notes of the meeting of 7 September 2005 at [DW1 pg 14]. Mr West considered the Appellants' claims and did engage with them [CB 69]. However, he determined that as a matter of fact the Appellants did not qualify for NR/NOR under those paragraphs because their move to Belgium did not have the quality of leaving permanently or indefinitely [Mr West w/s para 34].

100. Whilst this is not a position accepted by the Appellants, it was a conclusion that was neither irrational nor unreasonable given the evidence with which HMRC was presented. Similarly, it was not unfair to the Appellants that it was decided they did not have a settled purpose consistent with their having left permanently or indefinitely, simply because they asserted that they did.

101. The Appellants' third complaint (flaw (iii)) is that HMRC based its decision on a selective consideration of the facts. As stated, Mr Glyn Davies, in his supplemental witness statement, now accepts that the decision regarding paragraph 2.2 was open to the Inspector and there can presumably be no complaint regarding that decision. The facts relevant to the determination about paragraphs 2.8 and 2.9 included the following:

- The Appellants did not claim to have left permanently or indefinitely (either in their tax returns or orally in meetings with Mr West [see Mr West w/s paras 18 and 26]);
- The Appellants continued to have strong domestic and family links in the UK;
- They had substantial residential properties in the UK (a factor specifically listed for consideration in paragraph 2.8) in which their spouses remained and to which they returned frequently and regularly;
- They both had business links in the UK;
- They had other social links with the UK (especially Swansea RFC);
- There were other links (e.g. Area Health Authority).

102. It is clear from the correspondence that Mr West did engage with the Appellants' arguments regarding paragraphs 2.8 and 2.9 [e.g. CB32, CB40, CB49, and CB68]. He sought to obtain and consider the relevant facts of the case (all of which he was entitled to take into account: IR20 para 1.1) and reached a conclusion ultimately that they had not left permanently or indefinitely, as required by IR20. Mr West therefore did not "slide off" or ignore the claim to fall within paragraphs 2.7 to 2.9, as alleged by the Appellants, but simply found that the facts presented did not satisfy the requirements of those paragraphs.

103. In relation to paragraph 2.9, Mr West applied the established meaning of settled purpose [CB 66 and 69] and concluded that whilst the company established in Belgium may itself have had a settled purpose, this did not mean that its directors (the Appellants) had a settled purpose in Belgium [see Mr West w/s para 68].

104. Mr West accepts [w/s para 59] that he did not challenge the veracity of the information provided by the Appellants regarding the commercial purpose of their business in Belgium (although the day count information was challenged where it contradicted the Swansea register [DW1 pg 14]). Although much is made of this point by the Appellants [DJ Further Submissions paras 1.2(ii), 1.8, 1.12; DJ Note of Submissions para 75], Mr West was not bound to reach the same conclusions as the Appellants from that evidence, simply because he accepted its truthfulness in some respects [see also Mrs Mclean-Tooke w/s paras 38 to 39]. Mr West repeatedly informed Mr Davies that he was not satisfied, on the information provided, that the Appellants had worked full-time from the date of departure nor was he satisfied the relevant factual requirements in paragraphs 2.7 – 2.9 had been established.

105. Mr West did consider himself bound to apply IR20 [CB 49 and w/s para 45[13]] and this statement was repeated to the Appellants by Steve Symonds: if they had satisfied the guidance to be treated as NR/NOR in IR20, they would have been treated as such [CB 64]. As Wilkie J observed [Judgment para 29], there was a series of disputes between the parties as to the basic facts or the inferences to be drawn from them. Mr West simply did not find that the facts had been established to his satisfaction in respect of the requirements of the relevant paragraphs of IR20; that was the crux of the dispute, not the interpretation of IR20 [Mr West w/s para 59 cf. Mr Glyn Davies 2nd w/s para 61].

Gaines-Cooper

106. Mr Gaines-Cooper's case is materially different from that of the Appellants in Davies & James as his claim followed a determination by the Special

[13] see also Ms Mclean-Tooke w/s para 37 on the general policy of HMRC

Commissioners that he was, as a matter of law, resident and ordinarily resident during the years 1992/3 to 2003/4. Mr Gaines-Cooper does not challenge the findings of the Special Commissioners and did not appeal their conclusion that he was resident and ordinarily resident in the UK from at least 1992/3.

107. The basis of Mr Gaines-Cooper's claim before Lloyd Jones J was an alleged distinction between the case law and IR20. Lloyd Jones J described this as "*an essential part of the Claimant's case*" [para 11]. IR20 was claimed to be a "*distinct and materially different body of principles promulgated by HMRC in its publications*", which entitled Mr Gaines-Cooper to be "*treated in a way inconsistent with the position arrived at by the application of the generally applicable legal principles*" [Judgment para 18].

108. Mr Gaines-Cooper's case is now that IR20 "*cannot be said to be inconsistent with* [the case law]" [Residence Skeleton para 11]. This concession is correctly made. This is expressly stated in the Preface and chapter 1 of IR20 and was the finding of Lloyd Jones J at para 24. A proper application of IR20 to the facts found by the Special Commissioners leads to the same conclusion that they reached by applying the common law; namely, that Mr Gaines-Cooper was resident and ordinarily resident in the UK during the relevant tax years [see Judgment of Lloyd Jones J para 42].

109. Mr Gaines-Cooper's case therefore proceeds on the narrow (and somewhat contradictory) basis that, whilst not inconsistent with the case law, IR20 is a simplification of that law which can lead to a different result from the strict legal position [GC Supplementary Skeleton paras 19, 29]. The simplification is argued on the basis that the bright line tests in IR20 create a legitimate expectation that they will be applied irrespective of the true legal position.

110. If the Court finds that IR20 does not contain bright line tests [paragraphs [4] to [20] above], the document itself cannot be construed as a binding promise that HMRC will ignore residence status in law [Judgment of Lloyd Jones J para 23]. This will be determinative of the claim to legitimate expectation

based upon the wording of IR20 and the only remaining basis of claim will be an alleged change of practice. For the reasons set out above [paragraphs [64] to [86]], there has been no change of practice.

111. A proper application of the facts as determined by the Special Commissioners to Chapter 2 of IR20 leads to the conclusion that Mr Gaines-Cooper would have been R/OR in the relevant tax years. As Lloyd Jones J held at paragraph 30 of his Judgment, IR20 does not assist Mr Gaines-Cooper on the facts of his case.

112. Mr Gaines-Cooper asserts that he became non-resident under IR20 when he left the UK in 1976[14] and, by retaining his day count below 91 days, never lost that non-resident status. This is despite his concession before the Special Commissioners [paragraph 3 of their decision] that he was resident in the UK for the tax year 1992/93 and the finding of the Special Commissioners that he was resident from that year onwards.

113. HMRC has never (contrary to the assertion to this effect at paragraph 20(vi) of his original Skeleton Argument) accepted that Mr Gaines-Cooper left the UK in 1976 for anything more than occasional residence abroad. Nor did the Special Commissioners make this finding. Mr Gaines-Cooper sought no ruling from HMRC to this effect before 1980, and HMRC gave no ruling on his residence status. Further, there was no evidence before the Special Commissioners (nor is there any such evidence before the Court in these proceedings) regarding Mr Gaines-Cooper's day-count between 1980 and 1992/3 [SC's Decision para 95]. The basis of Mr Gaines-Cooper's case is therefore an application of a selected set of facts to his own interpretation of IR20.

114. 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

[14] GC Supplementary Skeleton para 20

to residence, ordinary residence and domicile were "comprehensively covered".

115. 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.

116. 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.

117. Paragraphs 29 to 31 of Mr Gaines-Cooper's original 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.

118. 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.

119. Paragraph 32 of the Grounds and 19 of Mr Gaines-Cooper's original 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 which provide a fuller (and very different) picture than that provided by Mr Gaines-Cooper's Statement of Facts.

120. As a result of those findings of fact they concluded that 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). England remained the centre of gravity of his life and his interests (paragraph 42). There was accordingly, no distinct break with the UK in 1976, or indeed at any time after that date. 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).

121. They found that the residence at Old Place was always available for his use following its acquisition in 1988. Mr Gaines-Cooper was regularly and frequently in the UK during the relevant years, for family, business and social reasons. Mr Gaines-Cooper also had a UK contract of employment from 1992 to 1995, i.e. the beginning of the relevant tax years (paragraphs 73 and 91 of the Decision). In this regard, they also found that 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).

122. 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.

123. The same conclusion is reached by applying chapter 3 IR20. Mr Gaines-Cooper asserts that he became NR/NOR in 1976 and maintained his day count below 91 days, thereby never losing that status under IR20. However, even if Mr Gaines-Cooper became NR/NOR in 1976 (which is not accepted), an application of the Special Commissioners' findings of fact to chapter 3 IR20 would have resulted in him being treated as resident and ordinarily resident from at least 1992/3.

124. Paragraph 3.1 provides that a taxpayer is treated as R/OR if he comes to the UK to live permanently or for three years or more. Paragraph 3.2 divides visitors into short and long term visitors. By paragraph 3.7, a taxpayer is treated as resident,

"... *if you come to the UK for a purpose (for example employment) that will mean you remain here for at least two years. The same treatment will*

apply if you own or lease accommodation in the UK in the year you arrive here"

125. The Special Commissioners found that Mr Gaines-Cooper had a residence available for his use from 1980 which he continued to use from then until he bought a new house in 1988 which became his matrimonial home (paragraphs 49, 53 and 61). He also had a UK contract of employment from 1992 to 1995 (paragraphs 73 and 91 of the Decision). In the circumstances, if Mr Gaines-Cooper had ever achieved NR/NOR status he would have lost that status under chapter 3 IR20 from at least 1992. From this date, Mr Gaines-Cooper did not at any stage subsequently fall within the terms of chapter 2 IR20 to become NR/NOR again.

126. Alternatively, the same result follows from the application of paragraph 3.6 IR20. Mr Gaines-Cooper's expectation can only be that HMRC would apply the version of IR20 current at the start of the relevant tax years. Paragraph 3.6 of the October 1992 issue of IR20 [GC Appeal Bundle pg 326] read:

"*Those coming for employment*

You are treated as resident in the UK from the day you arrive to the day you depart (see paragraph 1.5) if you come to the UK to work for at least ***two years.*** *If you come to work for less than two years or do not know how long you will be here, you will* ***only*** *be treated as resident for the tax year if*

- *You spend 183 days or more in the UK in the tax year, or*
- *You have accommodation available for your use ..."*

127. From 31 March 1992, Mr Gaines-Cooper worked under a UK contract of employment that lasted until September 1995. The Special Commissioners found that from 1980 onwards he had a UK residence available for his use, and which he used. In the circumstances, if Mr Gaines-Cooper had ever achieved NR/NOR status he would have lost that status under chapter 3 IR20 from at least 1992. From this date, Mr Gaines-Cooper did not at any stage subsequently fall within the terms of chapter 2 IR20 to become NR/NOR again.

128. 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 by reference to an assumed set of facts that are inconsistent with those found by the competent tribunal. 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).

129. At paragraph 29 of GC Supplementary Skeleton it is asserted that Mr Gaines-Cooper requested, but was refused, a decision on the application of IR20 "until after the Special Commissioners' hearing". In this regard, he relies on a letter, dated 5 June 2006, from HMRC. That letter was written in the context of the parties' preparation for the hearing before the Special Commissioners and formed part of a chain of correspondence which started with Mr Gaines-Cooper's letter of 12 May 2006. In that letter he said:

"I would be grateful if you could confirm that H M Revenue & Customs considers itself bound by the terms of IR 20 in the determination of Mr Gaines-Cooper's residence for tax purposes. *You will understand that this obviously has an impact on our preparation for the hearing next month.* (emphasis added)"

He concluded that letter stating:

"Accordingly, in the interests of avoiding unnecessary costs it would be helpful if you were able to confirm the position regarding IR20"

130. In his subsequent letter of 24 May 2006, to which HMRC replied on 5 June 2006, he stated (again in the context of the imminent Special Commissioners' hearing):

"If HMRC does intend to diverge from the terms of IR 20 we should be grateful if you would let us know as soon as possible *as the skeleton arguments are now being prepared and the precise form and content will be influenced by your response* (emphasis added)"

131. Consequently, HMRC's letter of 6 June 2006 and the statement contained in that letter upon which Mr Gaines-Cooper relied in his letter of 11 December 2006 was not written on the basis that HMRC would make a fresh determination in respect of Mr Gaines-Cooper's residence status (or review its original decision) following the Special Commissioners' findings of fact. It was clearly written in the context of identifying the legal arguments and submissions that the parties were going to deploy before the Special Commissioners.

132. Consequently, Mr Gaines-Cooper's case is materially different from that of Messrs Davies and James. He did not issue judicial review proceedings or raise the issue of IR20 (otherwise than in the context of preparation of skeleton arguments) prior to the hearing before the Special Commissioners. Having been unsuccessful in his appeal before the Special Commissioners, by this proposed challenge Mr Gaines-Cooper seeks to re-litigate the residence issue on judicial review in circumstances where he has elected not to appeal the Special Commissioners' decision on the residence issue.

133. The fact that the judicial review claim follows the determination of the Special Commissioners is fatal to Mr Gaines-Cooper's claim to legitimate expectation. The only legitimate expectation a taxpayer can have is that he is taxed according to statute and not a wrong view of the law (*R v Attorney General ex p Imperial Chemical Industries PLC* (1986) 60 T.C. 1, 64G per Lord Oliver of Aylmerton; *MFK Underwriting Agents Limited* [1990] 1 WLR 1545 per Bingham L.J. at 1569).

134. In *Davies & James v H.M. Revenue and Customs* [2008] EWCA Civ 933, the Court of Appeal dealt with this argument. Hughes L.J. held at paragraph 18:

> "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".

Keene L.J. held, at paragraph 24:

> "It seems to me that there is some force in Mr Goldberg's submission that a decision on residence by the Special Commissioners might rule out a subsequent granting of judicial review because of those authorities which indicate that a legitimate expectation cannot operate where it would conflict with a statutory duty."

135. Once the Special Commissioners had determined Mr Gaines-Cooper's residence status, any expectation that he would be treated as NR/NOR 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."

136. 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."

HUMAN RIGHTS

137. The Appellants in Davies & James [DJ New Submission] seek to run an argument not run in the High Court below or at the start of this hearing, namely reliance on Article 8 of the European Convention on Human Rights as an aid to construction of IR20. It is argued that without the "clarificatory material" contained in IR20, UK law on residence and ordinary residence is so uncertain that it infringes a taxpayer's right to private life and in particular his decision to become non-resident. HMRC disagrees.

138. Article 8 is simply not engaged on the facts of or relevant to the issues in these appeals. This new submission (which appears only to be pursued in Davies & James) adds nothing to the Appellants' arguments on legitimate expectation. IR20 sets out the broad factual circumstances relevant to a taxpayer's residence or non-residence status, but whether those factual circumstances apply in his case, will depend on the way in which he conducts his life. IR20 does not contain the bright line tests contended for by the Appellants. This is not a matter of "some sort of parlour game for clever lawyers" but a straightforward reading of the text of IR20.

139. For the avoidance of doubt it is not accepted that without IR20 the law in relation to residence would be incompatible with the Convention or human rights legislation; nor that HMRC6 infringes human rights legislation as alleged by the Appellants.

CONCLUSION

140. 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 wrong. 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.

141. In any event, the Appellants' arguments are now based on the false premise that IR20, whilst not inconsistent with the law, is a simplification 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 common law principles 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.

142. There has been no change of practice within HMRC on the interpretation of IR20. If on a proper application of IR20 to the facts of a taxpayer's case, HMRC is satisfied that the taxpayer fulfils the conditions in paragraphs 2.2 or 2.7 to 2.9, HMRC will treat the taxpayer as NR/NOR. HMRC has not suggested otherwise.

143. To the extent that taxpayers perceive some change in HMRC's approach to IR20, the only change that has occurred is an increased tendency to investigate taxpayers' assertions that they are NR/NOR. This has been a result of the move to self-assessment and improved compliance and enforcement procedures. In any event no previous practice was sufficiently

clear, unambiguous, and devoid of relevant qualification to give rise to a legitimate expectation. In the circumstances of these claims, the alleged change of interpretation of paragraph 2.2 (which is not accepted) has not in any event, had any impact upon the treatment or determinations which the Appellants seek to challenge in these proceedings.

144. *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.

145. *Davies and James:* The Appellants' claim that HMRC's interpretation of its own guidance is not a reasonable interpretation is wrong. It was found by the Judges below to be the correct interpretation. There is a fundamental factual dispute between the parties which this Court cannot resolve (without hearing evidence and making findings of fact) in these judicial review proceedings. Mr Glyn Davies now accepts that the conclusion that the Appellants were not in full-time employment in April 2001 was one that was open to the Inspector. Further, the Inspector was entitled to conclude that the Appellants had not established to his satisfaction that their factual circumstances fell within paragraphs 2.7 to 2.9. The Appellants seek to obscure the existence of the genuine factual dispute between the parties by allegations of gamesmanship that are not borne out by the correspondence.

146. These applications for judicial review should be dismissed with costs.

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2 November 2009

APPENDIX 1 – LAW OF RESIDENCE

147. There is no statutory definition of the term "residence" or "ordinary residence" in the Taxes Acts and the courts have held that it is not possible to frame one: Levene v IRC (1928) 13 TC 486 at 497 (Lord Hanworth MR). The words are to be construed in their tax context as bearing their natural and ordinary meaning. Accordingly, whether a person is resident or not is a question of fact.

148. However, there are a number of statutory provisions that are or may be relevant to residence status.

149. First, s 334 ICTA provided:

> "Every Commonwealth citizen or citizen of the Republic of Ireland –
>
> – shall, if his ordinary residence has been in the United Kingdom, be assessed and charged to income tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad, and
>
> – shall be charged as a person actually residing in the United Kingdom upon the whole amount of his profits or gains, whether they arise from property in the United Kingdom or elsewhere, or from any allowance, annuity or stipend, or from any trade, profession, employment or vocation in the United Kingdom or elsewhere."

150. This provision makes clear how adhesive the quality of residence is in the case of a Commonwealth 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 as the case of Levene made clear (though it concerned the application of the predecessor of s 334 ICTA). In that case, Mr Levene's visits abroad for eight months each year for the sake of his health, to search for a house and to mitigate his liability to UK tax, were not regarded as anything other than occasional residence abroad within s334 ICTA (or its predecessor), in the absence of evidence of a distinct break with residence in the UK, even though during the five year period prior to 1925 he had no fixed abode in the UK. See also Combe 17 TC 405 at 411; and Reed v Clark 58 TC 528 at 546.

151. Section 335 ICTA deals with residence of people working abroad for income tax purposes. The section does not grant a full-time overseas worker non-resident status. It merely provides that his residence status is to be determined without regard to any place of abode he maintains in the UK.

152. Section 336 ICTA deals with "Temporary residents in the United Kingdom". The section applies to a limited class of individuals – those who are (i) present in the UK for a temporary purpose only and (ii) not present with any view or intention of establishing residence here. Both conditions must be satisfied, and if satisfied, the individual is charged to capital gains tax on chargeable gains accruing in any year of assessment if and only if the period for which he is resident in the UK in the year of assessment exceeds six months.

153. By s 336(3) ICTA (and s 9(4) TCGA) for the purposes of deciding whether a person is in the UK for a temporary purpose only and not with the intention of establishing his residence here, available living accommodation must be disregarded. Once it has been decided that an individual is not in the UK for a temporary purpose or with a view or intent of establishing residence in the UK (by reference to any relevant factors save the availability of living accommodation in the UK, which must be disregarded) the availability of accommodation in the UK remains a relevant factor in assisting in determining whether an individual is resident or ordinarily resident in the UK.

154. For these purposes, "temporary purpose" is to be contrasted with the "settled purpose" required for ordinary residence. A temporary purpose is a "non-settled purpose" or casual purpose which does not form part of the regular order of the individual's life. In Cooper v Cadwalader 5 TC at 109 the concept of "temporary purposes" was held to mean "casual purposes as distinguished from the case of a person who is here in the pursuance of his regular habits of life".

155. Residence or "to reside" means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place"

(Levene v IRC (1928) 13 TC 486). Having a house or home in the UK and occupying it for part of the year suggests residence here. Whether the duration of an individual's presence in the UK and the regularity and frequency of visits are significant depends on the surrounding facts and is generally a matter of fact for the Special Commissioners to decide. However, it is suggested that maintaining a family home and returning regularly and frequently each month to occupy the home and spend time with one's wife, friends and family is strongly suggestive of residence in the UK. There is no minimum duration prescribed by statute (save as expressly referred to above in the limited context of section 336 ICTA) nor do the authorities establish fixed margins of what is necessary as a minimum in terms of time spent in the UK.

156. The fact that an individual also has a home elsewhere is of no consequence in relation to UK residence status. A person may reside in two places, but if one of those places is the UK, he is chargeable to tax here. See Cooper v Cadwalader where the fact that the taxpayer's home was in New York did not affect the acquisition of residence in the UK by virtue of the fact that he took a lease of a hunting lodge in the UK which he used during the shooting season for about 4 weeks each year. In Levene (at p.505) Viscount Cave stated that "A man may reside in more than one place … he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country."

157. Birth, family, social and business ties in the UK may all be relevant factors in determining whether an individual has retained his UK residence status (Levene).