[2015] UKUT 0016 (TCC)

Appeal number: FTC/101/2013

Unapproved pension scheme - assessment raised on employee pursuant to s. 386 Income Tax (Earnings and Pensions) Act 2003 in respect of a contribution of assets by his employer – whether s.386 arguably to be construed as inapplicable by reason of rule of construction in s.3 Human Rights Act 1998, on basis that assessment would otherwise infringe Article 1 of Protocol 1 to the European Convention on Human Rights -no – whether decision of Court of Appeal in ***Irving v HMRC*** *[2008] EWCA Civ 6 was per incuriam – whether First-tier Tribunal entitled to strike out appeal under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 - yes: decision of First-tier Tribunal upheld*

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
ON APPEAL FROM THE FIRST TIER TRIBUNAL
(TAX CHAMBER)

MARK ALLAN **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: The Honourable Mr Justice Barling

Sitting in public in London on 21 and 22 July 2014

Michael Sherry instructed by Charterhouse (Accountants) LLP for the Appellant

James Rivett instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("FTT") dated 12 February 2013 to strike out the Appellant's appeal under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the 2009 Rules") against a discovery assessment, on the basis that the appeal had no real prospect of success. The discovery assessment was (following an amendment in 2010) in the sum of £193,661, which resulted in an additional liability on the Appellant of £77,464.53. The assessment was raised pursuant to s. 386 of the Income Tax (Earnings and Pensions) Act 2003 ("s.386 ITEPA") in respect of a contribution of assets by the Appellant's employer made during the tax year 2004/2005 to a retirement benefits scheme on behalf of the Appellant. The contribution, which had not been included within the Appellant's self-assessment tax return for that year, was made the subject of an assessment on the ground that by virtue of s.386 ITEPA it was taxable as employment income of the Appellant.
2. The FTT granted permission to appeal to the Upper Tribunal on 8 August 2013.

Background

3. The salient facts are not in dispute and can be briefly stated.
4. On 10th April 2002 Travco Limited, the Appellant's employer ("the Employer"), of which the Appellant is a shareholder and a director, established a pension scheme for the benefit of its employees ("the Scheme"). The Appellant, who is himself one of the trustees of the pension scheme, was formally notified of his membership of the Scheme on that date. The Scheme, which is not Revenue approved (and which is not required to be so approved) was set up on the same lines as a conventional small pension scheme, and provides for its members to be paid benefits, including a pension, on retirement (under rule 5), and death benefits (under rule 6).
5. The Appellant's retirement age was set at 60, although there is provision in the Scheme for the Employer and a member to agree a different retirement age between 50 and 85. The retirement age is the date at which "the Member's

Benefits will become payable." (Schedule, rule 1.1.) In the event that a member does not live to receive a pension, there is, as already noted, provision for a pension (or other benefits) to be paid to his widow and/or other dependants (rule 6).

6. On 27 October 2004 the Employer resolved to make a contribution to the Scheme in respect of the Appellant and another member. The contribution consisted of non-cash assets in the form of Treasury stock. The market value of the assets at the time of their transfer to the Scheme was £349,317, of which 55.44% was allocated for the Appellant and 44.56% for the other employee. It is common ground that if the Appellant is liable to tax on that part of the contribution allocated to him, then the additional liability would be £77,464 (55.44% x 40% x £349,317).
7. The Employer deducted the value of the assets in question from its own taxable income. The Appellant prepared his self assessment tax return for the year in question on the basis that the Employer's contribution to the Scheme on his behalf did not give rise to a charge to tax on the Appellant under s.386 ITEPA because it was a transfer of non-cash assets, and was therefore not "a sum paid" within the meaning of that section.
8. It is common ground that the Court of Appeal in *Irving v HMRC* [2008] EWCA Civ 6 has since determined that point of construction against the Appellant's interpretation, holding in respect of the corresponding predecessor provision (s.595 of the Income and Corporation Taxes Act 1988) that where an employer made such a contribution of non-cash assets it "pays a sum".

The legislation

9. Sections 386 - 396 ITEPA provide (so far as relevant) as follows:

> **s.386 Charge on payments to non-approved retirement benefits schemes**
>
> (1) A sum paid by an employer-
>
> (a) in accordance with a non-approved retirement benefits scheme, and
>
> (b) with a view to the provision of relevant benefits for or in respect of an employee of the employer,
>
> counts as employment income of the employee for the relevant tax year………
>
> (3) Subsection (1) does not apply if or to the extent that the sum is chargeable to income tax as the employee's income apart from this section.

………….

(7) Any liability to tax arising by virtue of this section is subject to the reliefs given under –

(a) section 392 (relief where no benefits are paid or payable)…

s.392 Relief where no benefits are paid or payable

(1) An application for relief may be made to the Inland Revenue if—

(a) a sum is charged to tax by virtue of section 386 in respect of the provision of any benefits,

(b) no payment in respect of, or in substitution for, the benefits has been made, and

(c) an event occurs by reason of which no such payment will be made.

(2) The application must be made within 6 years from the time when the event occurs.

(3) The application must be made by the employee or, if the employee has died, the employee's personal representatives.

(4) If the Inland Revenue are satisfied that the conditions in subsection (1) are met in relation to the whole sum, they must give relief in respect of tax on it by repayment or otherwise as appropriate, unless subsection (6) applies.

(5) If the Inland Revenue are satisfied that the conditions in subsection (1) are met in relation to part of the sum, they may give such relief in respect of tax on it as is just and reasonable, unless subsection (6) applies.

(6) This subsection applies if—

(a) the reason why no payment has been made in respect of, or in substitution for, the benefits, or

(b) the event by reason of which there will be no such payment,

is a reduction or cancellation of the employee's rights in respect of the benefits, or part of the benefits, as a consequence of a pension sharing order or provision….

s.393 Application of this Chapter

(1) This Chapter applies to any benefit provided under a non-approved retirement benefits scheme.

……….

s. 394 Charge on benefits to which this Chapter applies

(1) If a benefit to which this Chapter applies is received by an individual, the amount of the benefit counts as employment income of the individual for the relevant tax year.

……

s.395 Application of sections 396 and 397: general rules

(1) Section 394 is subject to—

(a) section 396 (which provides that certain lump sums are not taxed by virtue of section 394), and

(b) section 397 (which provides for the calculation of the amount taxed by virtue of section 394 in relation to certain lump sums).

(2) Section 396 applies in relation to a lump sum only if the condition in subsection (4) below is met.

……

(4) The condition mentioned in subsections (2) and (3)(a) is that—

(a) an employer has paid any sum or sums with a view to the provision of any relevant benefits under the scheme under which the lump sum is provided, and

(b) an employee has been assessed to tax in respect of the sum or sums so paid—

(i) by virtue of section 595(1) of ICTA, or

(ii) by virtue of the sum or sums counting as employment income of the employee under section 386(1) of this Act.

……..

s.396 Certain lump sums not taxed by virtue of section 394

(1) Section 394 does not apply to a lump sum if—

(a) all of the income and gains accruing to the scheme under which the lump sum is provided are brought into charge to tax, and

(b) the lump sum is provided to—

(i) the employee mentioned in section 395(4)(b),

(ii) a relative of that employee,

(iii) the personal representatives of that employee,

(iv) an ex-spouse of that employee, or

(v) any other individual designated by that employee.
…….

10. Section 3 of the Human Rights Act 1998 ("s.3 HRA") provides:

3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

11. Article 1 of Protocol 1 to the European Convention on Human Rights ("A1P1") provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

12. Rule 8(3)(c) of the 2009 Rules provides:

> "(3) The Tribunal may strike out the whole or a part of the proceedings if—
> ……..
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

The *Irving* case

13. As I have said, the *Irving* case concerned the predecessor provision of s.386 ITEPA, namely s.595 of the Taxes Act 1988, which so far as material provided:

> "(1) ….where, pursuant to a retirement benefits scheme, the employer in any year of assessment pays a sum with a view to the provision of any relevant benefits for any employee of that employer, then…… –
>
> (a) the sum paid, if not otherwise chargeable to income tax as income of the employee, shall be deemed for all purposes of the Income Tax Acts to be income of that employee for that year of assessment and assessable to tax under Schedule E…."

14. The facts were very similar to those of the present case. Mr Irving's employer, a company of which Mr Irving was a director, established an unapproved retirement benefits scheme, and Mr Irving was admitted to membership of it on the same day. He was also a trustee and administrator of the scheme. A few days later the employer's directors recommended a contribution into the scheme of £5,000 cash plus the transfer of shares in a number of quoted companies, valued at some £145,000. The recommended contribution was then made by the employer. The question arose whether Mr Irving was liable

under s.595 to income tax on the value of the contribution. It was argued on behalf of Mr Irving that the natural meaning of "pays a sum" in s.595(1) was to pay a sum of money and that those words did not embrace contributions in kind, such as a transfer of shares. Therefore, no tax charge under s.595(1) arose.

15. The Special Commissioners, and the High Court on appeal, found in favour of the Revenue, and the Court of Appeal dismissed a further appeal. Giving the main judgment, with which Maurice Kay and Sedley LJJ both agreed, Rimer LJ stated that the more natural meaning of the phrase "pays a sum" is "pays a sum of money". However,

> “the context in which the phrase is used may compel the conclusion that Parliament intended it to have a wider meaning, including the transfer of non-cash assets. That may be because the context is sufficient to show that, to limit the meaning of the phrase to its more natural sense, would lead to an absurdity in the operation of the legislation; or because, viewed objectively, the context of the legislation points towards the conclusion that the wider meaning must have been intended.”
>
> (See paragraph 39 of his judgment.)

16. Having considered other provisions of the legislation which he found to be pointing in favour of the Revenue’s interpretation, and having identified a number of practical difficulties which would result from Mr Irving’s narrow construction, Rimer LJ concluded that, objectively interpreted in its proper context, the phrase "pays a sum" in section 595(1) included not just the payment of money but also the transfer of non-cash assets.

> “It appears to me that the suggested distinction between these two funding methods is one that in practice makes no commercial sense and cannot reflect any legislative policy intended to underlie section 595(1).
>
> ….. The form of the funding can make no rational difference to the taxing policy underlying section 595(1). Further, if the distinction is in fact relevant, there could in some cases be a real uncertainty as to the side of the line on which the method of funding lay. In most cases the contribution proposed to be made by the employer for a particular year will be the subject of prior agreement with the scheme trustees. If, for example, an employer agrees to pay £100,000 and later agrees with the trustees that he will satisfy that commitment by transferring £100,000 worth of shares, will he be regarded as having "paid" £100,000 pursuant to his commitment? Or will he be regarded as having simply made a transfer of non-cash assets? Whatever the answer, why should Parliament be interpreted as having intended such an inquiry to be embarked upon? What possible difference can it or should it be regarded as making?”
>
> (See paragraphs 45 and 46.)

17. Neither A1P1 nor s.3 HRA was referred to or relied upon in *Irving*. Nor, it seems, were either of these provisions relied upon by Mr Irving when permission to appeal was sought and refused by the House of Lords.

The submissions

18. While accepting that *Irving* is binding on the FTT and on this Tribunal, Mr Michael Sherry, who appears for the Appellant, submits that the FTT was wrong to strike out the appeal by reference to Rule 8(3)(c) of the 2009 Rules, on the basis that there was "no reasonable prospect of the Appellant's case, or part of it, succeeding"; even if the reference there to "succeeding" was to success in the FTT, the FTT had a discretion under Rule 8(3)(c); where there was a reasonable prospect of *ultimate* success in the Court of Appeal or the Supreme Court, the proper course was not to strike out the appeal but to hear it in full and, if bound to dismiss the appeal as a result of *Irving*, to grant permission to appeal.
19. Mr Sherry submits that there is a real prospect of ultimate success in the Court of Appeal or the Supreme Court, on the ground that in construing the relevant provision in *Irving* the Court of Appeal did not take account of A1P1 or of the rule of construction in s.3 HRA. Taking these into account would, he submits, lead to the interpretation of s.386 ITEPA for which the Appellant contends, namely that that provision does not apply to contributions in the form of non-cash assets. *Irving* was therefore wrong and decided *per incuriam*, and the decision of the FTT to strike out the appeal should be set aside.
20. Mr Sherry stated that in order ultimately to succeed the Appellant would have to persuade the Court of Appeal that *Irving* was decided *per incuriam* s.3 HRA and A1P1 and that it should be reversed, and/or to win in the Supreme Court. He said that these amounted to the same thing, and he therefore confined his submissions to the likelihood that any further appeal to the Supreme Court would succeed.
21. In that regard he referred to the notes under 52.3.7 at p1852 of the White Book 2014 which deal with the criteria for granting permission to appeal:

> "In cases where the current appeal is hopeless because of binding authority, but a further appeal to the Supreme Court might succeed, then special considerations arise. The appellant has, ultimately, a real prospect of success. It may be appropriate for the Court of Appeal to grant permission but to dismiss the appeal immediately. This course spares the parties unnecessary costs and leaves it open to the appellant to seek permission to appeal to the Supreme Court. The Court of Appeal, in effect, took this course in *Beedell v West Ferry Printers Limited* [2001] EWCA Civ 400."

22. The judgment of Mummery LJ in *Beedell* (with which the other two members of the Court agreed) was not concerned with the degree of likelihood of success on appeal to the House of Lords/Supreme Court required for the grant of permission to appeal, but with a separate question, viz. whether in the circumstances of that case it would be unfair for the Court of Appeal to create what would be in effect an unappealable decision by setting aside permission to appeal, rather than simply dismissing the appeal. However, Mr Sherry drew attention to the words "*might succeed*" as representing what he submitted to be the appropriate test for the present purpose. In so submitting I do not understand him to be intending to differentiate that test from the more usual formulation of "a real prospect of success", which the Court of Appeal (and Mr Sherry) also used. He also submitted that in this regard I should also take account of the purpose of the HRA, namely that points arising from the Convention should where possible be aired and resolved in the UK national courts. He said that if the Appellant's appeal is struck out, the point raised here would have to be pursued before the European Court of Human Rights.

23. The Respondents ("HMRC"), represented by Mr James Rivett, accept that in the present appeal the correct approach is for me to consider whether the FTT was correct to decide that the Appellant's case has no real prospect of success. HMRC submit that the decision of the FTT was clearly correct, that the Appellant's case is devoid of merit and therefore has no such prospect of success even if an appeal were to proceed to the Supreme Court. Accordingly the present appeal should be dismissed. However, Mr Rivett submitted that if, contrary to HMRC's case, I considered that the Appellant's arguments had any merit, I should remit the case to the FTT for a full appeal hearing.

24. It is common ground that at the material time the effect of the legislation which I have set out above was as follows:

    (a) "any sum paid" to an unapproved retirement scheme was taxed under s.386 ITEPA as income of the employee in respect of which the contribution was made;

    (b) the employer making the contribution would at some point be able to deduct the value of the contribution against its own tax liability;

    (c) pensions paid out of the fund were taxed under ITEPA Part 9 as income of the retiree;

(d) other retirement benefits received from the scheme were taxed as income under ss.393, 394, 395 ITEPA;

(e) relief from the tax charged under s.386 was available by virtue of s.392, in the form of a refund or otherwise as appropriate, where HMRC are satisfied that no relevant benefit has been or will be received;

(f) there was an exemption from tax in respect of benefits paid out of the scheme in the form of lump sums where:

(i) the lump sum was attributable to sums paid into the scheme which had been taxed when contributed (s.395(4) ITEPA); and

(ii) the income and gains of the scheme had throughout been charged to tax (s.396 ITEPA).

Both sides accepted that in 2006 the legislation was amended for unapproved pension schemes so as, in effect, to remove the concept of an employee being taxed on his or her employer's contribution to the scheme.

25. It is common ground that if an employee had not in fact been taxed on the value of the contribution at the time it was made, he would not be entitled to the tax relief under s.395 ITEPA on a lump sum paid to him out of the fund. That would also be the effect of the interpretation for which the Appellant contends here, and Mr Sherry submits that it represents a more coherent regime than the one confirmed in *Irving*, and supported by HMRC in the present case.

26. The Appellant points to the fact that in *Irving*, the Court of Appeal recognised that there was a tenable, indeed "more natural", construction of the provision in question in favour of the taxpayer, but chose a competing and wider construction on contextual grounds. The two alternative constructions were that the words "pays a sum" in s.386 ITEPA were/were not wide enough to encompass an employer's contribution in the form of non-cash assets.

27. The Appellant submits that the consequence of the Court of Appeal's approach is that a tax charge is levied on the employee in respect of whom the contribution is made, and that this charge is penal in that the employee has to pay income tax even though he has received no income out of which he might pay the tax, and may never receive any income. All the employee receives is a

contingent right to retirement benefits; he submits that such a right is not income or earnings.

28. In the latter regard the Appellant referred to *Revenue & Customs Commrs v Forde & McHugh* [2014] UKSC 14; [2014] I WLR 810, where the Supreme Court was concerned with the question whether the payment of an employer's national insurance contribution to a funded unapproved retirement benefits scheme constituted "earnings" of the employee within the meaning of section 6(1) of the Social Security Contributions and Benefits Act 1992 (as substituted by section 73 of and paragraph 2 of Schedule 9 to the Welfare Reform and Pensions Act 1999). The Supreme Court held that it did not because, first, "earnings" in the context of national insurance contributions meant remuneration derived from employment; this pointed towards what the employee received from his employment, rather than to what payments had been made by the employer; secondly, the Supreme Court considered that to treat the payments into the trust as earnings failed to take into account the contingent nature of the employee's interest prior to receiving his pension.
29. The short point made by Mr Sherry is that by making someone pay income tax by virtue of a transaction between two other people this measure (as interpreted by the Court of Appeal and HMRC) is wholly disproportionate and, being confiscatory in its effect, is outside the admittedly wide margin of appreciation granted to national authorities by A1P1 in relation to the imposition and administration of taxes.
30. In these circumstances he submits that s.3 HRA requires the court to adopt the interpretation of s.386 ITEPA rejected by the Court of Appeal in *Irving* in respect of the predecessor provision, and to construe s.386 as not applying to contributions to pension schemes consisting of a transfer of assets.
31. Mr Sherry contends that, since that submission has a reasonable prospect of success in the Supreme Court (and in the Court of Appeal, if *Irving* was decided *per incuriam*), the FTT was wrong to strike out the appeal. Although the ratio of *Irving* is applicable to the Appellant's appeal and was binding on the FTT, Mr Sherry submits that there is a discretion whether or not to strike out an appeal under Rule 8(3)(c) of the 2009 Rules, and that in the light of the A1P1 argument, the FTT ought to have exercised this in favour of the

Appellant, regardless of whether the FTT was obliged to find against the Appellant on the substantive appeal.

Discussion and conclusions

An initial problem

32. The present case does not involve an application by the Appellant for a declaration of incompatibility pursuant to s. 4 HRA (which could not in any event be granted in the FTT or this Tribunal). The Appellant relies solely on the rule of construction in s.3 HRA.

33. Mr Sherry argues that, where there is a choice of interpretations, s.3 HRA requires the adoption of the interpretation which is compliant with the Convention (*in casu*, A1P1). The compliant interpretation, he argues, is not dependent on factors particular to the Appellant; the meaning of the legislation in question cannot depend on particular circumstances – the law is the law.

34. That is clearly correct. However, in my view there is a fundamental problem with the Appellant's case. The construction for which he contends would draw a distinction between contributions in cash and contributions in asset form. This distinction is arbitrary/absurd/irrational for the reasons given by the Court of Appeal in *Irving* (above). It is in my view very doubtful to say the least that such an interpretation, although permissible as a matter of ordinary language, could be said to be "possible" for the purposes and within the meaning of s.3 HRA. Similarly, it is extremely doubtful whether an interpretation is "possible" in that sense when it would admittedly leave untouched and (according to the Appellant's argument) non-ECHR compliant, the tax treatment of pension contributions made in *cash*.

35. Mr Sherry sought to meet the latter point by suggesting that such residual non-compliance did not militate against his reliance on the rule of construction in s.3 HRA in respect of contributions in asset form, because overall compliance would be ameliorated to some extent and it would always be open to those who remained affected to seek a declaration of incompatibility.

36. I am not convinced by that response. I find very unattractive the idea of the Tribunal being driven by s.3 HRA to adopt a construction of a legislative provision which would result in an absurd/irrational distinction, and which even then would not render the provision in question ECHR compliant, save in

respect of cases which happened to fall on one side of an admittedly arbitrary boundary line. I do not consider that s.3 HRA would require the court to adopt such a construction, even if s.386 ITEPA would otherwise be non-compliant where a pension contribution in asset form is in issue.

37. If I am right, then s.3 HRA cannot assist the Appellant even if there is some mileage in the A1P1 argument, to which I now turn.

A1P1

38. It is not disputed that where a national measure imposes tax on an individual A1P1 is engaged, in the sense that the measure constitutes an interference with the taxpayer's enjoyment of his possessions, namely his financial resources. According to well-established principles, if it is to comply with A1P1 such interference "must strike a 'fair balance' between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights." This means that "there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued." (See *National & Provincial Building Society and Others v United Kingdom* (1997) 25 EHRR 127, at paragraph 80.) The Appellant's argument here rests on this proportionality requirement.

39. In the paragraph cited above, the European Court of Human Rights continued:

> "Furthermore, in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys *a wide margin of appreciation* and the Court will respect the legislature's assessment in such matters *unless it is devoid of reasonable foundation*…."
> (My emphasis)

40. In the light of these principles the hurdle for those alleging infringement of A1P1, particularly in the context of taxation provisions, has understandably been described as 'very high' (see, for example, paragraph 60 of the recent judgment of Mrs Justice Andrews in *R (on the application of St. Matthews (West) Ltd and others) v HM Treasury and HMRC* [2014] EWHC 1848 (Admin)). Tax measures are seen as entitled to particular deference in the light of the second paragraph of A1P1 itself. Indeed counsel were only able to point to two decisions of the European Court of Human Rights in which the Court has held that the wide margin of appreciation in respect of such a measure has been exceeded so as to result in an infringement of A1P1. It is worth describing briefly the main features of these decisions.

41. In *R.Sz. v Hungary* [2013] ECHR 628, the applicant was paid benefits to which he was entitled on the termination of his employment, and was taxed on those benefits at the rate then applicable. Some time later, without any forewarning or transitional provisions, the applicable rate of tax was increased with retrospective effect to 98%, and an additional tax charge was imposed on the applicant. In holding that the measure entailed an "excessive and individual burden" the Court emphasised that it was targeted only at a specific group, namely those paid from the public purse, while all others – the majority – were exempt. Further, the applicant had received the benefits (less the then applicable tax) some time in advance of the relevant tax change and additional levy, which amounted to almost total deprivation. The lack of warning and of any transitional provision to enable him to adjust, were said to be liable to have caused considerable personal hardship.

42. *Hentrich v France* 18 E.H.R.R. 440 concerned a right of compulsory purchase of land by the state which, as the Court of Human Rights found, "operated arbitrarily, and selectively and was scarcely foreseeable, and …was not attended by the basic procedural safeguards." In effect, where any real estate had been purchased the state could exercise the power of pre-emption without the original purchaser having the right to make submissions to a court as to whether the price he or she had paid for the land was too low or as to whether he had bought it in good faith. The pre-emption right was applied rarely and arbitrarily "for the sole purpose of warning others against any temptation to evade taxes." As such the applicant "as a selected victim of the exercise of the right of pre-emption……"bore an individual and excessive burden" which could have been rendered legitimate only if she had had the possibility of challenging the measure taken against her…"

43. On any view these two cases involved extreme circumstances: in *Hungary* there was an unsignalled, retrospective, and discriminatory tax charge amounting to almost total deprivation of benefits designed to serve a social purpose, namely to protect an employee on the termination of his or her employment. In *Hentrich* the state had arbitrarily exercised a rarely-used right of pre-emption to deprive the applicant of land she had purchased, in circumstances where she had no effective recourse to legal challenge. It is interesting to note that notwithstanding the "individual and excessive burden"

which the applicant was held to have borne as a “selected victim of the exercise of the right of pre-emption”, the measure would still have been within the margin of discretion available to the state if the applicant had had an effective means of challenging it.

44. Mr Sherry pointed to the fact that in each case the victim was deprived of funds or property he/she had received or of which they were in possession, whereas under s.386 ITEPA tax is levied on the taxpayer although he has not received (and may never receive) anything. He submitted that the present case was therefore *a fortiori* those two decisions.

45. In my view the measures in those cases are so different in their nature and effect from s.386 ITEPA and its related provisions that any attempted comparison between them is not likely to be helpful, and certainly does not assist the Appellant. There is nothing in the legislation with which I am concerned which can properly be said to be arbitrary, retrospective or discriminatory – it is of equal application to all taxpayers and is also admittedly accompanied by relieving and exempting provisions (for example, s. 392 and s.396 ITEPA) as well as procedural safeguards, including effective means of challenge.

46. Mr Rivett relied upon a number of examples of what he described as a consistent line of authorities in which the domestic courts and the European Court of Human Rights have rejected challenges brought by taxpayers to UK tax measures by reference to A1P1. This, he argued, indicated the very considerable extent of the margin of appreciation afforded to the state in this regard.

47. *R v Dimsey* [2001] STC 1520 involved a challenge to the transfer of assets abroad legislation, on the ground that it had the effect of imposing double taxation and gave the Revenue a choice as to which party was to be made liable for payment of the tax in question, and was therefore inconsistent with A1P1. The House of Lords rejected the challenge. Lord Scott stated that the public interest in countering tax avoidance outweighed the taxpayer’s objections, and the provisions were “well within” the margin of appreciation allowed to states in respect of tax legislation (see page 1535).

48. In *R (on the application of Huitson) v HMRC* [2011] EWCA Civ 893 a challenge was brought by a taxpayer to tax legislation which, by deeming a

person to be a member of a partnership, had the effect of bringing retrospectively into charge sums which the taxpayer contended were not taxable prior to the introduction of the retrospective legislation. The Court of Appeal rejected the taxpayer's challenge, on the basis that the provisions were within the state's margin of appreciation (see paragraph 32).

49. *R (on the application of Professional Contractors Group Ltd and others) v IRC* [2001] STC 629 concerned a challenge to tax avoidance legislation relating to 'service companies' (typically, small one-man companies operating in the IT sector), the effect of which was to treat fees paid to the service company in respect of relevant assignments not as company revenue (upon which corporation tax would be payable after deduction of allowable expenses), but as deemed salary (on which the worker was subject to income tax and class 1 national insurance contributions). The tax and NI contributions were to be collected by the company. It was argued that the provisions breached A1P1 on the basis that the right to enjoy the benefit of a shareholding in a service company was a right of property, and the enjoyment of that right had been interfered with by being rendered more expensive due to the imposition of income tax and NI contributions on the notional remuneration and by the disallowance of expenses which would otherwise have been deductible for corporation tax purposes. Burton J rejected this argument, holding that, even if the full amount of a service company's earnings in a given year were caught by the provisions, that would not "even arguably" be so severe as to amount to a *de facto* confiscation of property or to a fundamental interference with their financial position (see paragraph 43 of the judgment). In so holding he referred to the width of the state's margin of appreciation, and to the following statement of the Commission in *Svenska Managementgruppen AB v Sweden* (1985) 45 DR 211:

> "…it is in the first place for the national authorities to decide what kind of taxes or contributions are to be collected. Furthermore the decisions in this area will commonly involve the appreciation of political, economic and social questions which the Convention leaves within the competence of the Contracting States. The power of appreciation of the Contracting States is therefore a wide one."

50. Finally, in *R (on the application of St. Matthews (West) Ltd and others) v HM Treasury and HMRC* (see above) the Administrative Court recently dismissed an argument that a charge to stamp duty land tax, which had been imposed

with retrospective effect as an anti-avoidance measure, was incompatible with A1P1.

51. Mr Sherry submits that none of the cases relied upon by HMRC is as extreme as s.386 ITEPA. He says that the nearest to it is *R v Dimsey* (above) but that there the tax was imposed upon the *transferor* of the assets in question rather than upon a third party, as here.

52. Again, I consider that comparisons with other cases and legislation – often very different in nature - provide only limited assistance. One factor, however, which does come across clearly from a consideration of the case law to which the parties referred, is that for a national tax measure to be rendered disproportionate so as to bring it outside the wide margin of appreciation allowed to the national authorities, the measure must represent an interference with an individual taxpayer's enjoyment of the fundamental right in question which is so burdensome, arbitrary, unfair or excessive, relative to any community or public interest, as to preclude its being regarded as reasonably founded. This was clearly what the FTT was seeking to encapsulate by the phrase "utterly egregious", which Mr Sherry criticises as being the wrong test. I do not consider that this criticism is justified. The FTT appears to be doing no more than looking to convey in shorthand form what the Court of Human Rights has characterised as "devoid of reasonable foundation" (see *National & Provincial Building Society and Others v United Kingdom* (above)).

53. Having regard to the guidance set out in the case law, there are in my view no grounds on which the legislation here can arguably be said to fall outside the UK legislature's wide margin of appreciation, so as to infringe A1P1. The measures impose a charge to tax on an employee in respect of a contribution made by his employer, on the employee's behalf, to an unapproved retirement benefits scheme. As already pointed out, the measures are not arbitrary, retrospective or discriminatory. They are of general application. S.392 ITEPA also makes express provision for relief from the tax (or where appropriate a refund) if all or part of the relevant benefit is not ultimately received or receivable by the employee. Mr Sherry submits that this relief is granted subject to overly stringent or limited conditions. However, the extent of and conditions for relief from a tax charge seems to me to be pre-eminently the kind of provision which falls fairly and squarely within the margin of

appreciation, absent some exceptional feature. The same applies to the exemption from tax on payments out of lump sums to the employee by virtue of s.396 ITEPA.

54. It is true, as Mr Sherry has emphasised, that s.386 ITEPA charges tax on the employee by virtue of a pension contribution by his or her employer, that absent relief under s.392 or use of the exemption for lump sum payments under s.396 there can be double taxation, and that the pension and other benefits under the scheme are contingent. However, in my view these features of the legislation do not come close to removing it from within the margin of appreciation.

55. Further, these aspects should be looked at in their context. The facts of the present case are very similar to those in *Irving*, and may very well be typical: at all material times the Appellant (the employee) was a director of the Employer and also the largest of three shareholders of the company. (In addition he appears to have held 100% of certain "“A” Ordinary shares" issued in February 2002.) Membership of the relevant pension scheme was voluntary – the Appellant accepted an invitation to join. He was also one of two trustees of the scheme – the other trustee being a professional trustee. Under its terms the Employer could, with the consent of the members of the scheme, remove a trustee without reason, and the scheme was able to operate with only one trustee.

56. It is also clear from correspondence between the Employer and the Appellant, and from internal documents of the Employer, that in 2002 (ie before the relevant asset contributions were made in 2004) the Appellant was aware of professional advice to the effect that contributions in cash or asset form by the Employer to the scheme would result in a tax assessment being raised on the Appellant. Mr Sherry submitted that too much weight should not be placed on this in terms of the Appellant's knowledge of his tax position; he informed me that an asset contribution into the scheme in 2002 (not the contribution with which this appeal is concerned) was disclosed to the Revenue on the Appellant's tax return as non-taxable and was not assessed to tax. Be that as it may, the professional advice available to the Appellant and the Employer in 2002 was clear.

57. Although theoretically it might be possible for an employer's contribution to be made to a scheme without the employee's knowledge and consent, this is certainly not the case here and is inherently unlikely. Mr Sherry did not suggest otherwise. In the unlikely event that this were to occur, the tax charge could always be avoided if the employee were to give up the right to any relevant benefit under the scheme, as Mr Rivett submitted.

58. Whilst the context discussed in paragraphs 55-7 above is not the basis for my conclusion that the Appellant's challenge under A1P1 would have no real prospect of success in the Supreme Court, it serves to reinforce that conclusion.

59. It follows that the FTT was in my view right in its assessment of the merits of the Appellant's challenge based on A1P1.

Per incuriam

60. As I indicated earlier, Mr Sherry accepts that if the Appellant cannot succeed in establishing a real prospect of success on the s.3 HRA/A1P1 argument, then his submission that *Irving* was decided by the Court of Appeal *per incuriam* those provisions is also doomed to failure. It is not therefore necessary for me to deal with it.

Conclusion on the appeal

61. In the light of my conclusions, the FTT was correct in finding that the Appellant's challenge based on s.3 HRA/A1P1 has no real prospect of success, and was entitled to strike out the appeal before it pursuant to Rule 8(3)(c) of the 2009 Rules. Accordingly this appeal fails.

The Honourable Mr Justice Barling

Judge of the Upper Tribunal

Release date: 23 January 2015