

Neutral Citation Number: [2006] EWCA Civ 89
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr Justice Hart
Chancery Division

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 23rd February 2006

Before :

LORD JUSTICE BUXTON
LORD JUSTICE CARNWATH
and
LORD JUSTICE LLOYD

Between :

Mohammed Siddiq KHAN

Appellant

- and -

HM Revenue and Customs

Respondent

Andrew Young (instructed by Vincent Curley & Co) for the Appellant
Christopher Vajda QC and **Nicola Shaw** (instructed by HM Customs & Excise) for the Respondent

Judgment

Lord Justice Carnwath:

Background

1. From 1991, Mr Khan owned and operated a dry cleaning business at 5 Greyhound Road, London W6 8NH, trading under the name “Greyhound Dry Cleaners”. The present dispute relates to 1997 and 1998, at a time when the threshold for VAT registration was £49,000. Mr Khan was not registered. Information obtained by Customs, followed by an investigation, led them to the view that his taxable supplies were above the threshold, and that he should therefore have been registered.
2. On 10th December 1998, with his accountant Mr Arifeen, he was interviewed by Customs officers. This was followed by a letter dated 16th December 1998, which gave the officers reasons for thinking there had been an evasion of VAT. Following further exchanges, on 23rd March 1999 a notice of compulsory registration was issued, with effect from 1st July 1997. There followed in June 1999 a notice of assessment to a penalty under section 60 of the 1994 Act. The amount of VAT evaded for the period 1st July 1997 to 31st December 1998 was assessed as £17,012, from which 25% was deducted on account of “disclosure and co-operation”, resulting in an assessed penalty of £12,759. On 23rd August 1999 Mr Arifeen gave notice of appeal on Mr Khan’s behalf expressed to be against the penalty and assessment, on the ground that he “disputed that he had crossed the VAT threshold”.
3. Customs’ letter of 23rd March 1999 had included a schedule of arrears “based on available information”, which, it was said, should be included in Mr Khan’s first VAT return. This was not done. On 14th October 1999 a “best of judgment” assessment to VAT for the period from 1st July 1997 to 30th April 1999 was issued in the amount of £20,793. (I understand that this was calculated on the same basis as the penalty assessment, the increase from £17,012 being attributable to the longer period.) The tribunal in due course proceeded on the basis that it had before it three appeals: in respect of the compulsory registration, the VAT assessment and the penalty (see tribunal decision para 1). Statements in accordance with the rules were exchanged in early 2000.
4. There then followed a delay of over two years before the appeals were heard. The delay resulted, at least initially, from the need to await the resolution of a question as to the status of the penalty proceedings for the purpose of the European Convention on Human Rights (“the Convention”). In a decision issued on 19th December 2000, the President of the Tribunal (Stephen Oliver QC) decided that civil penalty proceedings were to be regarded as “criminal” for the purpose of Article 6 of the Convention. In July 2001, this decision was upheld by the Court of Appeal. It is reported as *Customs and Excise Commissioners v. Han & Yau* [2001] 4 ALL ER 687; [2001] EWCA Civ 1040 (“*Han*”).
5. The hearing of Mr Khan’s appeal took place on 18th and 19th December 2002. Customs were represented by counsel (Miss Shaw). Mr Khan was represented by Mr Arifeen. The tribunal gave its decision on 10th February 2003. It upheld the registration, and confirmed the assessment to VAT and the penalty, but in reduced amounts. Mr Khan appealed to the High Court by notice of appeal lodged in his own name in April 2003. In January 2004, he obtained the services of Counsel, Mr Young, instructed under the Bar Council’s direct access scheme by Mr Curley, a specialist in

VAT and Duties appeals, and funded by legal aid. The appeal was heard by Hart J in April 2005, and was dismissed. Mr Khan now appeals to this court with permission given by Waller LJ.

The statutory provisions

6. The relevant statutory provisions are in the Value Added Tax Act 1994 (“the 1994 Act”).

Registration and Assessment

7. General provisions for “administration, collection and enforcement” are set out in Schedule 11 and regulations made under it. Obligations relating to the keeping of records and making of returns are imposed on “taxable persons”. A person is a taxable person “while he is, or is required to be, registered under this Act” (s 3(1)). Schedule 1 deals with registration. A person who makes taxable supplies becomes liable to be registered at the end of any month, if the value of his supplies in the preceding year exceeds the threshold figure. A person who becomes liable to be registered is required to notify Customs within a defined period; but Customs have a duty to register such a person whether or not so notified (Sch 1 para 5).
8. If a person fails to make a VAT return as required under the 1994 Act, Customs may assess the amount due “to the best of their judgment” and notify it to him (s 73(1)). Subject to the right of appeal, the amount so assessed and notified is –

“... deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.” (s 73(9))

Civil penalties

9. Hart J summarised the background of the civil penalty regime:

“The genesis of the code is to be found in the 1983 Keith Report. That had reported on the desirability of introducing into the VAT enforcement regime a civil penalty system akin to that available to the Inland Revenue in respect of other taxes. Attention was drawn inter alia to the difficulties and expense of obtaining proof of VAT offences to a criminal standard. It also gave support to the desirability of encouraging the co-operation of the taxpayer in the investigative process.” (para 43)

In *Han*, Potter LJ observed that the civil penalty regime provided –

“... a just balance between the legitimate interests of the Commissioners in improving the collection of tax in relation to which widespread evasion was prevalent and the interests of the taxpayer in avoiding the travails of a criminal prosecution and the stigma of a criminal offence of dishonesty in cases of deliberate evasion.” ([2001] STC 1188 para. [74]).

We were told that the regime is regarded by Customs as a cost effective use of resources for investigating all but the most serious cases of VAT evasion; and that in the five years to March 2004, approximately 2,500 civil evasion penalties were issued, compared with approximately 380 criminal prosecutions.

10. Provision for civil penalties is made by section 60 of the 1994 Act, headed “VAT evasion: conduct involving dishonesty”. Subsection (1) provides:

“(1) In any case where-

(a) for the purpose of evading VAT, a person does any act or omits to take any action, and

(b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct...”

Subsection (7) provides that on an appeal against an assessment to a penalty –

“... the burden of proof as to the matters specified in subsection (1) (a) and (b) above shall lie upon the Commissioners.”

Reference has also been made in argument to subsection (4). This provides (in summary) that, in any subsequent criminal or recovery proceedings, statements are not rendered inadmissible by the fact that they may have been encouraged by offers of the possibility of more lenient treatment under the civil penalties regime. The amount of the penalty may be reduced in limited circumstances by Customs or the tribunal (s 70).

11. Section 76(1) provides that where a person is liable to a penalty under section 60, Customs may assess the amount due and notify it to him. An assessment to a penalty may be combined in the same document as an assessment to tax under section 73(1) (s 76(5)).

Appeals

12. Section 83 provides for appeals to the tribunal in respect of a large list of decisions or actions by Customs. Relevant for present purposes are: (a) (appeal against registration); (n) (appeal against liability to a penalty under section 60); (p) (appeal against an assessment under s 73(1) or the amount of such an assessment); and (q) (the amount of any penalty specified in an assessment under section 76).
13. The procedure on appeals is governed by the Value Added Tax Tribunals Rules 1986. Special provisions apply to an “evasion penalty appeal” (rule 7). Unless otherwise directed by the tribunal, Customs are required to serve a “Statement of Case”, including the matters on which they rely for the ascertainment of the tax allegedly evaded, and full particulars of the alleged dishonesty. In response, the appellant is required to serve a “defence thereto”, setting out “the facts and matters on which he

relies for his defence”. There are also provisions for the exchange of witness statements (rule 8).

14. Section 84(5) gives the tribunal power to reduce (but not increase) the amount of the assessed tax. Section 84(6) provides that section 83(q) is not to be taken as conferring a power to vary the amount assessed by way of penalty –

“... except in so far as it is necessary to reduce it to the amount which is appropriate under section [60]”.

Notice 730

15. Notice 730, entitled “Civil evasion penalty investigation: Statement of Practice”, is used to explain the section 60 procedure to those affected. The version current in 1999 was given to Mr Khan before the interview. Having referred to section 60(1), it stated:

“The penalty which the law imposes is an amount equal to the VAT evaded, but the Commissioners or a VAT Tribunal, have the power to mitigate (lessen) the penalty as they think proper.

The Commissioners will not normally order criminal proceedings where a person has been invited to co-operate but, where applicable, they reserve the right to do so.”

16. The notice then described initial steps:

“What happens first?”

The investigating officer will

- Interview you;
- Explain the CEP procedure; and
- Ask you to co-operate in establishing your true VAT liability.

The officer will explain why it is felt that any underdeclaration arises from dishonest conduct on your part, but will listen to any explanations that you, or your adviser, wish to give. If you have a satisfactory explanation for the discrepancy, a CEP will not apply.”

It also explained the benefits of co-operation –

“You can reduce the penalty significantly by promptly disclosing full details of your true VAT liability and by the extent to which you co-operate over the whole enquiry.”

Details were given of the percentage mitigation normally expected for different levels of co-operation.

17. The form in use at the time of the interview did not contain any specific affirmation of the taxpayer's right not to respond. We were told that in December 2000 there was added an express statement that the interview was being conducted only with a view to the imposition of a civil penalty and not with a view to criminal prosecution, and that the trader was not obliged to co-operate. The current version (since September 2004) contains a further refinement. Paragraph 2.2 states that "the investigation is not being conducted with a criminal prosecution in mind", and adds that the Commissioners –

“... may prosecute in the event of a false disclosure being made to the investigating officers, but will not use the information gathered in a civil investigation in a criminal prosecution of the same offence.”

The case before the tribunal

18. The case against Mr Khan was based on inferences from such evidence as was available as to the numbers of cleaning tickets used in the relevant period, and the average price per ticket. It was common ground that the tickets used came from books each of which contained 500 tickets numbered sequentially. Analysis of the two used ticket books obtained by Customs showed average ticket prices of respectively £8.23 and £7.17. Customs had also obtained two books kept for customers who had lost their tickets, in which they were asked to record the date, the items cleaned and the ticket number. Analysis of the dates and numbers in the lost ticket books led Customs to infer that in the period from 26th November 1996 to 20th October 1998 at least 47 ticket books had been used (or about two per month). This figure was consistent with other evidence that Mr Khan had in the period 5th February 1997 to 11th February 1998 ordered and received 57 books, which had lasted him until January 1999.
19. Customs' calculations were therefore based on an average ticket price of £7.70 (i.e. the average of £8.23 and £7.17) and the use of 47 books during the period 26th November 1996 to 20th October 1998. This equated to a monthly turnover of £7,932.92. This monthly figure was used to calculate the annual taxable supplies for the purpose of comparing with the registration threshold, and to calculate VAT assumed to be due for the period of the assessments.
20. Mr Khan's evidence as to the number of books used varied. In response to the initial inquiries, and at the interview in December 1998, he maintained that he used only about one book per month. In subsequent correspondence, through Mr Arifeen, he put forward the figure of 35 to 36 books for the period taken by Customs, as opposed to the 47 books alleged by them. Before the tribunal, neither Mr Khan nor Mr Arifeen gave evidence. However, Mr Arifeen tendered a series of ticket books (17 in number) covering the 12 months from 1st January 1999 which showed an average ticket price £5.99 and a total turnover of £50,954.90.
21. The tribunal accepted Customs' analysis of the lost ticket books as showing that 47 books had been used in the 23 month period. It accepted that the average prices of £7.17 and £8.23 used by Customs were supported by the material available to them, and that the assessment of £20,793 was justified at the time it was notified in 1999. However, it also took account of the new evidence showing an average price of £5.99 in the later period:

“79. ... the tribunal accepted that it was a mean figure assessed by analysis of 17 books. The price should therefore be taken into account as well as the figure of £7.70 being the average of the figures taken from the two books obtained by Customs Officers from the business premises.

80. Therefore we take the view that it is fair and equitable to base the assessment on an average ticket price of £6.84 (£5.99 + £7.70 = £13.69 ÷ 2 = £6.84). This will have the effect of reducing the assessment and the subsequent penalty.”

22. As has been seen, in order to confirm a penalty under section 60 of the 1994 Act, it was necessary for the tribunal to find an intention to evade VAT and conduct involving dishonesty, the burden of proof being on Customs. Having observed that, in a family business of which he was the sole proprietor, Mr Khan would have been “perfectly aware of the true takings”, the tribunal continued:

“87. No explanation at all has been offered for the suppression of sales. Neither Mr Khan nor his accountant gave evidence at the Tribunal. The Appellant has refused to accept the calculations produced by Customs’ Officers. However, we do note that Mr Khan has changed his story since his initial interview. He now maintains that approximately 18.5 ticket books are used per year and that the average ticket price is £5.99. Such a change can only be regarded as a deliberate attempt to mislead the Officers.

88. We find Mr Khan’s dishonesty can readily be inferred from his conduct. His actions were obviously dishonest and he must have known that the ordinary person would have so regarded them.”

Issues on the appeal

23. The appeal raises, in summary, four groups of issues, which can be considered under the following headings:
- i) Unfairness at the interview;
 - ii) Breach of Article 6 at the hearing;
 - iii) Burden and standard of proof;
 - iv) Irrationality.

Unfairness at the interview

24. Mr Young submits that the interview should have been conducted under Code C of the Codes of Practice issued under the Police and Criminal Evidence Act 1984 (PACE). For the application of the Code, he relies on section 67(9) of PACE, which provides:

“(9) Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of ... a code.”

In particular he relies on the failure to give a formal caution in the form specified in paragraph 10.4 of PACE namely:

“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.”

25. Although it is clear that section 60 does not itself create a criminal offence for the purposes of domestic law, it does not follow that PACE has no application. Any persons “charged with the duty of investigating offences” are required “in the discharge of that duty” to have regard to any relevant provision of the Code. Mr Young accordingly submits that even though the imposition of the civil penalty may not be an “offence” for the purposes of PACE, the conduct being investigated would, if capable of being proved to the criminal standard, amount to an offence. Since the officers were investigating such conduct, and the Notice 730 then in use reserved the right to prosecute, section 67(9) of PACE applied.

26. Mr Khan had apparently read and understood Notice 730 before the interview, but it was common ground that no formal caution was given. The tribunal, which had before it a full transcript of the interview, said:

“32. He was not formally cautioned but was told that Customs had reason to believe that there may have been an evasion of VAT. It was also mentioned that it was a civil matter and not a criminal investigation and he was at liberty to leave at any time.”

27. In *Han* (see above) it was held in this court that proceedings under section 60 involve a “criminal charge” for the purposes of Article 6 of the European Convention on Human Rights. However, as Potter LJ explained:

“ [84] It by no means follows from a conclusion that Article 6 applies that civil penalty proceedings are, for other domestic purposes, to be regarded as criminal and, therefore, subject to those provisions of PACE and/or the codes produced thereunder, which relate to the investigation of crime and the conduct of criminal proceedings as defined by English law....”

28. Mr Young also relied on the decision of the Criminal Court of Appeal in *R v. Gill* [2004] 1 WLR 469. That case concerned an investigation by special compliance officers of the Inland Revenue, which had included an interview with the defendants under the so-called “Hansard” procedure. Under that procedure the defendants were told that, although the Revenue was not carrying out a criminal investigation, it reserved the right to do so in future. The defendants were subsequently charged with various counts of cheating the Revenue, and sought at their trial to have excluded,

under section 78 of PACE, a number of statements made in the course of the Hansard interview. The Court of Appeal held that section 67(9) of PACE did apply, but, on the facts of the case, it found that the evidence had been properly admitted.

29. Hart J held that *Gill* was distinguishable as to the application of PACE:

“...*Gill* does not compel the conclusion that the officers conducting the interview were “charged with the duty of investigating offences”. They were charged with the duty of investigating whether the appellant’s VAT affairs were being conducted in accordance with the law and, if of the view they were not, of investigating whether a civil penalty should be exacted....” (para 58)

In any event, there was nothing in *Gill* to support the view that failure to comply with the Code, even if applicable, would have rendered the evidence inadmissible in the VAT proceedings. Finally, Mr Young had failed to identify any particular aspect of the interview which could be categorised as unfair.

30. With respect to Mr Young’s arguments, I do not find it necessary to deal with this issue in greater detail, since I would merely be repeating the judge’s conclusions, with which I am in full agreement. I also agree with the observations on this issue to be made in Buxton LJ’s judgment, which I have read.

31. I would accordingly dismiss the first ground of appeal.

Breach of Article 6 at the hearing

The issue before the judge

32. The complaint under this head has had a confused procedural history, and varying formulations. The Notice of Appeal to the High Court, which was filed in April 2003 in the name of Mr Khan in person, contained no criticism of the hearing as such. There was an indication that, on the grant of legal aid, he hoped to instruct counsel, and that the grounds would be “more fully particularised” thereafter. Although Mr Curley was authorised to instruct Mr Young under the BarDIRECT scheme in January 2004, there seems not to have been any formal application to amend or expand the grounds before the hearing of the appeal in April 2005.

33. Hart J (para [14]) noted that Mr Young’s skeleton argument before him had included the following contention:

“(a) (the tribunal) ought to have considered the gravity of the charges against Mr Khan and made inquiry as to whether Mr Khan’s rights to a fair hearing would be infringed”

I infer that this was treated without objection as an additional ground of appeal.

34. In his discussion of this issue, Hart J summarised Mr Young’s arguments under this head as follows:

“Mr Young’s submission was, in essence, that the appellant had been incompetently represented before the tribunal by Mr Arifeen, that the tribunal ought to have been alert to his incompetence, and that it ought to have ensured that Mr Khan was aware of his right to be legally represented if he so chose. ”

Mr Young relied on three specific points, which he said should have alerted the tribunal to Mr Arifeen’s inadequacy. First was Mr Arifeen’s use of the description “Statement of Case” to describe the document submitted by him, rather than “Defence”, which is the term used by the rules. Second was the fact that he was willing to represent Mr Khan, in spite of being a potential witness himself. Third was Mr Arifeen’s failure to call Mr Khan as a witness.

35. Mr Young had also apparently raised another new point, not reflected in the notice of appeal, relating to legal aid; as noted by the judge, he submitted that the tribunal should have taken action -

“[to tell] Mr Khan that if he were unable to afford legal representation, the Legal Services Commission did make aid available for the provision of legal representation at penalty appeals before the Tribunal. Only after providing this information for Mr Khan’s consideration should the tribunal have determined to carry on with hearing the appeal.”

Evidence

36. Unfortunately, this procedural and conceptual confusion is reflected in the state of the evidence before us. Indeed, the case is a good illustration of how things can go wrong if the grounds of appeal are not precisely formulated at the outset. For guidance in future cases, it may be helpful first to explain what should happen, and then to compare it with what did happen, before attempting to summarise the factual basis on which we have to consider the issue.
37. In an appeal confined (as in this case) to issues of law, new evidence is not normally relevant or admissible, since the alleged error of law should be apparent from the terms of the decision. However, where the basis of the appeal is misconduct or unfairness at the hearing, further evidence may be necessary to show the relevant circumstances. It may also be necessary to refer to a transcript of the hearing (if there is one), or to the judge’s notes. The relevant Practice Direction (CPR52PD para 5.15-16) provides:

“When the evidence is relevant to the appeal an official transcript of the relevant evidence must be obtained...

If evidence relevant to the appeal was not officially recorded, a typed version of the judge’s notes of evidence must be obtained.”

Those provisions are primarily directed to grounds of appeal, which require review of the actual evidence before the lower court or tribunal. In principle they may also be relevant to allegations relating to the conduct of the proceedings, in so far as the

procedural steps have been recorded or noted. In either case, the tribunal is only required to provide its notes so far as they are relevant to a ground of appeal.

38. If the relevant circumstances do not sufficiently appear from the transcript or notes, there may also need to be direct evidence from witnesses who were present at the hearing to show what happened. This should be strictly limited to what is required to establish the alleged unfairness. If possible, the facts of what happened should be agreed, so that the issue before the appeal court is limited to their legal interpretation. In any event, where the complaint is of actions or omissions by the tribunal itself, it is essential that the complaint be precisely formulated in the notice of appeal, or as soon as possible thereafter. That is necessary, not only as a matter of ordinary fairness to the tribunal and the other parties, but also to ensure that they are able to provide the court with the material necessary to deal with the issue, while keeping any new evidence within tight limits.
39. In his skeleton argument before the judge, Mr Young asserted that requests for the tribunal's notes "had met with a refusal on the part of the tribunal". The judge did not find it necessary to explore this complaint. From information supplied to us since the appeal hearing, it seems that in January 2004, when Mr Curley was first involved, a letter was sent to the tribunal in Mr Khan's name indicating that he was "currently in the process of appealing... to the High Court", and requesting "a copy of the Chairman's notes made during the hearing...". The letter gave no particulars of the grounds to which the notes might be relevant. The tribunal replied that "in accordance with the normal practice", the notes would not be released "at this stage"; but that a copy of the notes could be sent "once a notice of appeal has been lodged in the High Court." A further letter from Mr Khan, written by return, informed the tribunal that the appeal had in fact been lodged in April 2003, and repeated the request. It seems that the tribunal failed to respond to this letter, and to three further letters, the last being dated 26th May 2004, by which time the appeal was in the warned list.
40. On its face, the tribunal's failure to respond to the later letters seems surprising and unfortunate, and the reasons should be investigated. In the context of the appeal I would make two comments. First, although a notice of appeal had been lodged, it did not at this stage contain any complaint about the conduct of the hearing. That emerged later in Mr Young's skeleton. In the absence of any other indication of the purpose of seeking the notes, the tribunal would have been fully entitled to refuse to supply them on the ground that they were not relevant to the appeal. Secondly, nothing seems to have been done on Mr Khan's side between the sending of the letter at the end of May 2004, and the hearing before Hart J almost a year later. If the notes were still thought relevant, once the grounds of appeal had been finalised, and the tribunal still failed to respond, an application could and should have been made to the court for an order requiring their disclosure.
41. Before Hart J, Mr Young relied partly on that refusal to justify the introduction of fresh evidence, in the form of witness statements from Mr Arifeen (dated May 2004), and Mr Khan (dated February 2005), both of whom had been present at the hearing; and also a statement from Mr Curley (also dated February 2005), who had not been present at the hearing, but was by this time advising Mr Khan. Mr Curley's statement contains a detailed criticism of Customs' case as presented to and accepted by the tribunal. Hart J accepted it as "a convenient encapsulation of submissions" to be made

by Mr Young. That was perhaps a generous description of what was largely an attempt to re-argue the case on the facts. As to the other statements he commented:

“... they went partly to the question of the fairness of the hearing before the Tribunal and partly sought to introduce evidence which could have been, but was not, adduced by the appellant below. I admitted those statements so far as they related to the former question and allowed them to be read in relation to the latter. This was on the footing that they could not be relied on as evidence in this appeal so as directly to contradict the Tribunal’s findings of fact. My purpose in allowing them to be read at all was to enable me to form a view as to whether, if persuaded that there was any question of the appellant’s Article 6 rights having been infringed, the outcome of the proceedings before the Tribunal might have been materially affected thereby.”

Again, that was a generous, but (in the absence of any sustained objection by Customs) understandably pragmatic, approach. Strictly, the bulk of the evidence was inadmissible.

42. The only points arguably relevant to the question of unfairness seem to me to be the following. Of the decision not to call him as a witness, Mr Khan says:

“I did not give evidence at the appeal, although I would have been willing to do so. Mr Arifeen decided that it was not necessary to call me. He based his case on the analysis he carried out. If his analysis was accepted, this would have meant that the takings for the period concerned, would have been under the threshold for registration, and ended the matter.”

On the question of representation, he says:

“I did not know that I could have been granted legal aid for my appeal in the tribunal. If I had known I could have received legal aid then I would have wanted a lawyer or specialist to represent me in the Tribunal.”

43. Mr Arifeen himself does not comment on either point, nor make any complaint about the hearing as such. Nor does he admit to any lack of understanding of the issues or the procedure before the tribunal. He mentions certain “quite significant” points which he put to the tribunal, but which “have not been mentioned in the decision”. There is, however, no challenge to the adequacy of the tribunal’s reasoning.
44. Mr Curley outlines his own experience of penalty appeals, including the fact that he is authorised by the Legal Services Commission to represent legally aided appellants in such proceedings. He contrasts Mr Arifeen’s lack of experience:

“I have spoken to Mr Arifeen and he confirmed to me that he had not previously represented anyone in an appeal before the

tribunal. He also said that he had never previously represented a taxpayer at a tape-recorded interview under the Notice 730 procedures.

I note that Mr Arifeen does not appear to have understood the rules of evidence in relation to Tribunal appeals as he did not call any evidence at the hearing.”

He does not explain further what evidence should have been called.

45. On the question of legal aid, it was common ground before the judge that legal aid was in principle available for such proceedings at the relevant time. This policy had been foreshadowed by an announcement by the Lord Chancellor in February 2001 (apparently in response to the tribunal’s decision in the *Han* case); and was given effect by a direction made on 2nd April 2001. It also seems to have been assumed that Mr Khan would have qualified for legal aid, although as the judge noted there was no specific evidence to that effect.
46. Mr Khan’s statement that he was not aware of his right to legal aid was not challenged by Customs. This seems to have been an oversight. Mr Vajda told us, on instructions, that the practice was and is for the tribunal to write to prospective appellants in civil penalty cases, drawing their attention to the availability of legal aid. We were shown the form of letter. We were also told that the tribunal’s records showed that such a letter had been sent to Mr Arifeen, although this was not conceded by Mr Young. Mr Vajda did not offer any explanation as to why this point had not been taken up before the judge, nor did he ask for permission to rectify the omission by adducing formal evidence of the sending of the letter. Again, it is unfortunate that the significance of this point was not highlighted in the grounds of appeal to the High Court. If it had been, either the tribunal or Customs might have been alerted to the point at an earlier stage, and a point might have been taken on the letter, so that Mr Arifeen could have responded to it.
47. As it is, we seem to have no choice but to proceed on the probably artificial basis that the letter was either not sent, or at least was not passed on to Mr Khan; and that he was not made aware of his right to legal aid, either in advance of or at the hearing. Apart from that, we have no direct evidence of what took place at the hearing. In particular, we have no useful evidence of how Mr Arifeen conducted the case on the day, or of what if anything the tribunal did to redress any perceived imbalance between the parties. Nor, apart from Mr Curley’s later inferences, and what we can discern from the written submissions, do we have any direct evidence to support the allegations of Mr Arifeen’s alleged incompetence.

The issues on the appeal

48. Confusion as to the precise nature of the issue has persisted into this court. In the notice of appeal, the complaint was put as follows:

“The learned judge erred in law in that ... although a lawyer at the hearing of the VAT tribunal did not represent me when Counsel represented Customs and Excise, I nevertheless had a

fair hearing notwithstanding my rights under Article 6 of the convention on human rights.”

However, in granting permission to appeal, following an oral hearing at which Mr Young appeared, Waller LJ summarised the issue as being –

“... the extent to which Article 6 should have obliged the Tribunal to take an active role in scrutinising the quality of the representation that Mr Khan had.”

They are distinct points. The first is a general point about equality of arms, and the lack of legal representation. The second is a specific point about the relative incompetence of Mr Arifeen. I shall attempt to deal with both.

49. Article 6 of the Convention confirms a right to a “fair” hearing in both civil and criminal proceedings (Art 6(1)). In addition, it contains special protections for those subject to proceedings deemed criminal under the Convention. They include the presumption of innocence (6(2)), the right to be informed “in detail of the nature and cause of the accusation” (6(3)(a)) and the right:

“to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” (6(3)(c))

50. In applying Article 6, the fairness of the proceedings must be judged in context. The circumstances of the present case were unusual. The exchange of statements under the rules took place in the first part of 2000. There was then a delay of more than two years before the hearing. By that time there had been an important development in the law, in that it was established that the penalty aspect of the proceedings was to be regarded for Convention purposes as criminal in nature. The significance of this, particularly in relation to the different aspects of the appeals, might not have been obvious to a non-specialist. So much was acknowledged by the Lord Chancellor in early 2001, when the legal aid rules were altered to extend to such proceedings. The form of standard letter sensibly adopted by the tribunal implicitly recognised the importance of the change.
51. Lack of *legal* representation as such is not the real issue in the present case, in my view. This was not a case where deprivation of liberty was at stake (as in *Benham v UK* (1996) 22 EHRR 293). It is common for taxpayers to be represented by accountants before the tribunal. In most cases, there is no need for particular legal skills. I note that Mr Curley, who is an Associate of the Institute of Indirect Taxes, but not (as I understand) a lawyer, is himself approved by the Legal Services Commission as competent to represent legally aided appellants in penalty proceedings. Mr Khan’s own statement refers to his wish for a lawyer “or specialist”, in which term I assume he intended to include a non-lawyer such as Mr Curley who has particular expertise in this field.
52. We were referred to one comparable case (*Dula Miah v HMRC* (2004) VDTR 19084) in which the tribunal, of its own motion, directed that legal assistance should be sought by the appellant. However, there were special considerations. One of Customs’

witnesses was a former employee of the appellant's take-away business, who according to her evidence had been instructed by the appellant to write spurious "meal bills" to match figures provided by him. The tribunal was understandably concerned that this statement, in effect admitting to being party to a criminal conspiracy, had been taken from her without any caution and without any adviser present, and that the advice of a lawyer was needed. There was no complication of that kind in the present case.

53. Accordingly, the mere fact that Mr Khan was represented by an accountant, rather than a lawyer, was not enough in itself to put the tribunal on notice that the representation might not be competent or effective. Similarly, although it was unfortunate that (as we must assume) the legal aid letter had not been sent, or was not drawn to Mr Khan's attention, that is not the issue. Unless the tribunal had some other reason to doubt Mr Arifeen's competence, they would have had no business to inquire into the background of his choice of representative, or his knowledge of the availability of legal aid.
54. As to consequences of Mr Arifeen's alleged failings, Mr Young relied on *Kamasinski v. Austria* A/76 (1991) 13 EHRR 36. That case concerned complaints made by the applicant about the conduct of criminal proceedings against him, including the performance of the lawyer appointed by the court to act for him. At paragraph 65 the Court said:

"Certainly, in itself the appointment of legal aid defence counsel does not necessarily settle the issue of compliance with the requirements of Article 6(3)(c). As the Court stated in its ARTICO judgment:

'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [M]ere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.'

Nevertheless, 'a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes.' It follows from the independence of the legal profession of the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6(3)(c) to intervene *only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.*" (emphasis added)

Mr Young submits that it should have been “manifest” to the tribunal that the appellant was not being effectively represented by Mr Arifeen, and that it should have taken steps to ensure that he was able to defend himself effectively.

55. As already noted, he relied on three specific points, which might have put the tribunal on notice. The first two points (the title of the submission, and a possible conflict with Mr Arifeen’s position as a potential witness) seem to me trivial in themselves, except possibly as symptomatic of a lack of familiarity with the procedure in general. As I think Mr Young accepted, the main focus of his argument was on the third: Mr Arifeen’s failure to call Mr Khan to give evidence in his defence.
56. The judge rejected the complaint under Article 6. Following *Kamasinski*, he asked himself whether it should have been “manifest to, or otherwise brought to the attention of, the tribunal” that Mr Khan was being inadequately represented. He thought not. He inferred that Mr Arifeen’s “strategy” had been to rely on “such favourable inferences as he could persuade the tribunal to draw” from the 1999 records:

“Provided that the analysis for the 1999 period could be got before the Tribunal, that strategy could be implemented without having to call the appellant himself, and exposing him to cross-examination. The appellant’s difficulty was that, apart from his own DGT records, there was no accounting material on which he could rely in respect of the relevant period apart from that being relied on by Customs. His further difficulty was that he had given inconsistent accounts of the numbers of books used by him in the relevant period, and had been unable to provide an explanation for the discrepancy adverted to in Officer Heuston’s letter of 18th January 1999 (referred to at paragraphs 37 and 38 of the Tribunal Decision). Mr Arifeen may have taken the view (and may have had good reason to take it) that exposing the appellant to cross-examination was unlikely to improve his position.”

That strategy had been partly successful in securing a reduction of the assessment and the penalty. In any event there was nothing in this point, which should have warned the tribunal that “some egregious mistake” was being made in the appellant’s representation (para [37]-[38]).

57. With hindsight, I would need some persuasion that Mr Arifeen’s strategic thinking was as sophisticated as the judge felt able to infer. There is certainly no mention in his witness statement, nor in that of Mr Khan, of a concern to protect Mr Khan from cross-examination. Both proceed on the basis of his innocence. However, that is not the question. What matters is how his decision would have been perceived by the tribunal, which had no knowledge of the exchanges between Mr Arifeen and his client, and was in no position to assess Mr Khan’s likely vulnerability in the witness box.
58. Instead of taking a rather technical point about the title of Mr Arifeen’s pre-hearing submission, Mr Young might have drawn attention to the contents of the submission, which arguably showed limited understanding of how the issues would be addressed

by the tribunal. The document (dated May 2000 - over two years before the hearing) correctly identified the subject-matter of the appeal as being the penalty notice, the assessment and the compulsory registration. Having set out various criticisms of Customs' procedures and calculations, and after reference to several pages of tables and calculations, taking account of the additional 1999 books of tickets, the submission concluded that:

“... given the inconclusive evidence (Customs) for the numbers of ticket books used per year and the inadequate method used to derive the average ticket price, the case against him by (Customs) has not been proved.”

59. Standing by itself, this might be said to demonstrate a striking lack of appreciation of the two distinct elements of the case. First, on the appeal against registration and the VAT assessment, he was quite wrong to imply that “the case against him... (had to be) proved”; it was for Mr Khan to show that the assessment was wrong. Secondly, on the penalty appeal, the burden was indeed on Customs; but, given that his client was faced with a serious charge of dishonesty, one would have expected to find at least an express assertion of his innocence. In fairness to Mr Arifeen, I note that Customs' Statement of Case (at least in the version before us, dated 26th January 2000) did not contain an express allegation of dishonesty, in spite of the requirement of the rules that it should include “full particulars of the alleged dishonesty”.
60. Although these points were not in fact relied on by Mr Young, they give me some concern - and might have given an alert tribunal some concern - about the quality of the advice being given to Mr Khan. In order to make an informed decision as to whether or not to give evidence, he needed to understand its potential significance to the different issues in the case. In relation to the figures, as the person running the business he was in the best position to explain the practical working of the cleaning ticket system, and to rebut Customs' interpretation. If he failed on that, then his only hope in practice was to satisfy the tribunal that any shortfall was the result of inadequate procedures, rather than deliberate dishonesty. There may, as the judge inferred, have been good reasons for not exposing him to cross-examination, but he needed to be aware that on each of these issues, for different reasons, silence was a high risk strategy, if he genuinely believed in his case.
61. However, such concerns fall far short of a case under Article 6. As the Convention case-law recognises, the conduct of the case is essentially a matter between a party and his chosen representative, and the tribunal must respect that choice. The tribunal might have been alerted to the need for special care in explaining the issues to the parties, possibly to the extent of warning Mr Khan of the risks of not giving evidence. Unfortunately, we have no specific evidence as to whether that was done or not. I am certainly not prepared to assume without evidence that an experienced tribunal ignored its duty to ensure, as far as possible, that the playing field was level and that the parties understood the issues. I would add that any uncertainty about the burden of proof should have been resolved by Miss Shaw's skeleton argument, which I assume was produced at or shortly before the hearing, and which contained a succinct and accurate summary of the position:

“The burden of proof is on the Appellant to show that his turnover did not exceed the threshold and that the assessment

was not made to best judgment. The burden of proof is upon the Respondents to show that the Appellant dishonestly evaded tax.”

62. On that basis, although I acknowledge the need for special care bearing in mind that this is a criminal matter for Convention purposes, I conclude that this ground of appeal has not been made out.

Burden of proof

The issue between the parties

63. Before Hart J, there was no dispute that the tribunal had correctly placed on Customs the burden of proving (under section 60(1)(a) and (b)) that the appellant had acted or omitted to act “for the purpose of evading VAT”, and that his conduct involved “dishonesty”. However, Mr Young submitted that the tribunal failed to appreciate that the burden was also on Customs to show both that the VAT threshold had been exceeded and, for the purposes of the penalty calculation, that the best of judgment assessment (by reference to which the penalty was calculated) was correct.

64. Hart J accepted that the burden lay on Customs to show that the VAT threshold had been exceeded. However, he regarded the point as academic. He said:

“That analysis may, in some other case, present the Tribunal with a difficulty where the probabilities on the evidence are seen as at all finely balanced. In the present case, however, where the appellant chose not to adduce evidence himself, the analysis is entirely academic. In practice Customs both assumed and discharged the burden of showing that the appellant had been trading above the threshold during the relevant period. The Tribunal did not approach this question simply by asking themselves whether the decision by Customs to register the appellant compulsorily had been made to Customs’ best judgment on the material before it at the time, but approached the issue as one of fact on the evidence before it.” (para [69])

65. He found more difficult the question whether the burden is also on Customs to show the amount of the VAT evaded, for the purposes of establishing the amount of the penalty; but again he regarded the point as academic:

“The tribunal had to consider whether the section 73(1) assessment had been made to the best judgment of Customs and correctly approached that task in the light of the guidance given by the authorities to which it was referred. It then proceeded, again in accordance with those authorities, to focus on whether the amount of the assessment should be sustained in the light of the material available before it. It therefore had directly to consider for itself what the amount of the assessment should be. Given the nature of the material before it, I find it difficult to see how the potentially differing burdens of proof on the

questions of the amount of the assessment on the one hand and the question of the amount of VAT evaded on the other could as a practical matter produce different results.” (para [70])

66. In submissions to us, Mr Young relied on the presumption of innocence under Article 6(2) of the European Convention, which he rightly said was applicable to what, in Convention law, was to be treated as a criminal proceeding. The effect of that, he submitted, was that the burden was on Customs to prove both that Mr Khan’s taxable supplies exceeded the threshold, and that the assessment was correct. This was particularly important where the assessed amount was used, as here, to support an inference that a person must have been dishonest. Absurd consequences might otherwise follow:

“For instance, an Appellant charged with a civil penalty as a named officer under s61 would be unable to challenge the quantum of the assessment against his company without his company agreeing to enter an appeal against the assessment. It should be noted that s61 is often used where a company is insolvent and there is little or no possibility of appeal.”

Furthermore, in suggesting that the point was academic on the facts of this case, the judge had failed to take into account that there was more than one plausible approach to the assessments of the amount of tax, and that Mr Khan’s approach was supported by the original observations of the Customs officers.

67. Counsel for Customs conceded that the burden of proof lay on them, not only to show that the Appellant had exceeded the VAT registration threshold, but also to establish the quantum of tax evaded; but they submitted that, for the reasons given by the judge, they had discharged the burden in respect of both. They also agreed with Hart J (para 70) that –

“... in a case such as this, where the tribunal is also considering the quantum of the assessment to which the penalty is referable, the effect of that burden is likely to be academic.”

Discussion

68. In spite of the common ground, which thus emerges from the judgment below and the submissions of the parties, I find some difficulty with this analysis. In view of the potential importance of this issue for other cases, I am reluctant to allow this judgment to rest simply on concessions, although I acknowledge that understandably the issues may not have been fully explored in argument. I will summarise my own understanding of the principles derived from the relevant statutory provisions and case-law.
69. There is no problem so far as concerns the appeal against the VAT assessment. The position on an appeal against a “best of judgment” assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:

"The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as

the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right." (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC per Lord Lowry).

That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509; [2004] EWCA Civ 1015. We also cautioned against allowing such an appeal routinely to become an investigation of the *bona fides* or rationality of the "best of judgment" assessment made by Customs:

"The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." (para 38(i))

It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. *Brady v Group Lotus Car Companies plc* [1987] STC 635, 642 per Mustill LJ).

70. The other rights of appeal under section 83 have not been given such detailed examination by the courts. However, the general principle, in my view, is that, where a statute gives a right of appeal against enforcement action taken by a public authority, the burden of establishing the grounds of appeal lies on the person appealing.
71. That principle is well-established in other statutory contexts, particularly where the relevant facts are peculiarly within the knowledge of the person appealing. For example, a local planning authority may serve an enforcement notice if it "appears" that there has been a breach of planning control. The owner can appeal against the notice on various grounds, which may, for example, include a denial of the acts complained of, or a claim that permission is not required. It has long been clear law that the burden of proof rests on the appellant. That was confirmed recently in this court in *Hill v Secretary of State for Transport* [2003] EWCA Civ 1904. Buxton LJ said:

"The appellant accepted that there is a longstanding decision in planning law, *Nelsovil Ltd v Minister of Housing and Local Government* [1962] 1 WLR 404, which has been generally regarded as placing the burden of proof on the appellant in an enforcement notice appeal. That view was developed in the leading judgment of Widgery J and pungently summarised by Slade J at page 409 of the report:

"It is a novel proposition to me that an appellant does not have to prove his case."

... The general principle that the appellant must prove his case seems to be unassailable..." (paras 43-44)

72. It is true that both *Nelsovil* and *Hill* were planning cases, but the statements in the former were expressed quite generally. There may of course be something in the nature of the appeal, or the statutory context, which requires a different approach. For example, under the jurisdiction of the Transport Tribunal, it was held that, whereas on appeal against refusal of a licence the burden lay on the appellant, that was reversed on an appeal against revocation of a licence (see *Muck It Ltd v Secretary of State* [2005] EWCA Civ 1124). That decision turned on the construction of the particular regulations and the European Directive on which they were based.
73. The ordinary presumption, therefore, is that it is for the appellant to prove his case. That approach seems to me to be the correct starting-point in relation to the other categories of appeals with which we are concerned under section 83, including the appeal against a civil penalty. The burden rests with the appellant except where the statute has expressly or impliedly provided otherwise. Thus, the burden of proof clearly rests on Customs to prove intention to evade VAT and dishonesty. In addition, in most cases proof of *intention* to evade is likely to depend partly on proof of the *fact* of evasion, and for that purpose Customs will need to satisfy at least the tribunal that the threshold has been exceeded. But, as to the precise calculation of the amount of tax due, in my view, the burden rests on the appellant for all purposes.
74. This view is reinforced by a number of considerations:
 - i) It is the appellant who knows, or ought to know, the true facts.
 - ii) Section 60(7) makes *express* provision placing the burden on Customs in relation to specified matters. This suggests that the draftsman saw it as an exception to the ordinary rule, and seems inconsistent with an *implied* burden on Customs in respect of other matters.
 - iii) The distinction is also readily defensible as a matter of principle. Mr Young relied on "the presumption of innocence" under Article 6 of the Convention, but he was unable to refer us to any directly relevant authority. The presumption clearly justifies placing the burden of proof on Customs in respect of tax evasion and dishonesty; but once that burden has been satisfied, a different approach may properly be applied (compare *R v Rezvi* [2003] 1 AC 1099; [2002] UKHL1, in relation to confiscation orders in criminal proceedings).
 - iv) In relation to the calculation of tax due the subject-matter of the assessment and penalty appeals is identical. This link is given specific recognition by section 76(5) (allowing combination in one assessment). It would be surprising if the Act required different rules to be applied in each case.
 - v) Section 73(9) provides that the assessed amount, subject to any appeal, is "deemed to be an amount of VAT due..." In a case where either there was no

appeal against the assessment, or the penalty proceedings followed the conclusion of any such appeal, this provision would appear to preclude any attempt to reopen the assessment for the purpose of assessing the penalty. The subsection does not apply directly where, as here, the penalty appeal is combined with an appeal against the assessment, and the assessment has not therefore become final, but it indicates another link between the two procedures. (I do not see the provision as necessarily confined to enforcement, as Mr Young argues. Nor in the present context do I need to spend time on his argument that this interpretation could cause unfairness in proceedings against a third party under section 61, although I note that under that provision there appears to be a general power to mitigate the penalty.)

- vi) To reverse the burden of proof would make the penalty regime unworkable in many cases. In a case such as the present, a “best of judgment” assessment is needed precisely because the potential taxpayer has failed to keep proper records, so that positive proof in the sense required in the ordinary civil courts is not possible. The assessment may be no more than an exercise in informed guesswork. Indeed to put the burden on Customs would tend to favour those who have kept no records at all, as against those who have kept records, which are merely inadequate, but may be enough to give rise to an inference on the balance of probabilities.

- 75. We were referred in this connection to *Hindle v Customs and Excise Commissioners* [2004] STC 412; [2003] EWHC 1665(Ch), a decision of Neuberger J given shortly after the tribunal decision in this case. That case also concerned a small trader who had failed to make VAT returns, and was subject to compulsory registration, followed by a “best of judgment” assessment and an assessment to a civil penalty, all of which were upheld on appeal to the tribunal. The appeal to the High Court failed on the facts (para [34]). However, Neuberger J had earlier made some observations on the statutory criteria. It had been argued on behalf of the trader that different approaches were required in considering, on the one hand whether the statutory threshold for registration was exceeded, and, on the other, whether the “best of judgment” assessment should be upheld. The judge agreed:

“[29] ... As a matter of ordinary language, it seems clear to me that Section 73(1) involves two issues where they are both being fought, as here. The first is to determine whether the person concerned has failed to make any returns required under this Act, which in this case involves the Tribunal satisfying itself on the evidence before it whether or not the trader's turnover would or was reasonably expected to exceed £55,000. If so satisfied, the Tribunal would then go on to consider the assessment by reference to determining whether the Commissioners had indeed made the assessment to the best of their judgment.

[30] The point is reinforced when one considers a case where the Commissioners have simply registered a trader for VAT and he appeals against that decision, without there being any assessments against which he has appealed. In those circumstances, Miss Shaw, I think realistically, concedes that

the Tribunal would make its own assessment, based on the evidence before it and the balance of probabilities, as to whether or not there has been a failure to make returns "as required under this Act", i.e. in a case such as this, whether, on the evidence before it, the Tribunal considers that the trader's turnover exceeds or is reasonably likely to exceed £55,000. It would be very odd if the proper approach to determining whether or not there has been a failure to make returns required under this Act depended on whether or not there happened to be a challenged assessment at the same time.

[31] Miss Shaw makes the point that, in a case such as this, if the argument which I favour is correct, then there is a slightly odd double requirement of the Tribunal: first, to decide on the evidence before it and the balance of probabilities whether, in this case, the turnover of the appellant exceeded or is likely to exceed £55,000; secondly, on a more familiar reviewing *Wednesbury* type approach, whether the Commissioners' assessment was to the best of their judgment.

[32] I think there is something in that point, but I do not find it particularly powerful. In each case the tribunal is being asked to look at different things. The first is whether the turnover exceeds, or is likely to exceed, a particular figure on the evidence before it. The second is whether, on the evidence before them, the actual figure for turnover, which resulted in the VAT assessment of the Commissioners, was one arrived at to the best of their judgment. If slightly different questions involve slightly different approaches to the burden of proof or other matters, it is not that surprising. Certainly there is nothing so surprising in the result that it justifies what seems to be to be a re-wording of Section 73(1), which is what the Commissioners' argument involves."

76. I make two comments on that passage. First, it was concerned with a different issue from the present: that is, the basis of calculation for the appeal against compulsory registration. No argument appears to have been addressed to the question of calculation for the purposes of the penalty assessment. Secondly, I think the judge was presented with a false dichotomy. As has now, I hope, been made clear by this court in *Pegasus Birds*, a "*Wednesbury* type approach" to a VAT assessment is the exception not the norm. In an ordinary case there is no reason for different approaches to the two forms of appeal. Whenever an appeal raises an issue of the correct calculation of turnover for the purposes of VAT, the primary task of the tribunal is, as we said in *Pegasus*, "to find the correct amount of tax, so far as possible on the material properly available to it", and, in the absence of any provision to the contrary, the burden of proof lies on the appellant. (In fairness to Miss Shaw, I note as already mentioned that she had summarised the position accurately in her skeleton argument before the tribunal in the present case, a few months before *Hindle*.)

The present case

77. If this is the correct approach, I agree with the judge that the tribunal's decision is unimpeachable. There was ample material to support a prima facie case that there had been evasion of tax, and that this had been intentional and dishonest. In the absence of evidence from Mr Khan to the contrary, the tribunal was clearly entitled to reach its conclusion. As to the precise amount of tax evaded, I do not see how it was possible in the absence of better records for Customs to do more than they did. Whether or not this would have been sufficient if the burden of proof had truly been on them, on the view I take of the law it was enough to support the tribunal's conclusion. For these reasons I would dismiss this ground of appeal.

Standard of proof

78. Mr Young had a separate point on the standard of proof, the practical effect of which was not entirely clear to me, and which I can deal with shortly. As I understood him, he accepted that the correct standard was the civil standard of proof "on the balance of probabilities", rather than the criminal standard of proof "beyond reasonable doubt". He submitted, however, that the tribunal had failed to direct itself that, in applying the civil standard to a charge of dishonesty, a high degree of probability was required.
79. It has long been accepted that, even where the civil standard of proof is applicable, special care is needed before finding someone guilty of fraud or dishonesty. This concept has been expressed in different ways at different times in the authorities. As Hart J correctly observed, the most recent statement of high authority is that of Lord Nicholls in *Re H* [1996] AC 563 at 586-587. He made clear that in applying the civil standard of proof account must be taken of the seriousness of the allegation:

"... When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence..."

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established..." (p 586E-H).

80. Mr Young resisted the application of *H* on the intriguing ground that "it could never be said that it was an improbable event that a cash business would have undeclared sales". I am afraid I cannot accept that there is one law for cash businesses, and another for everyone else. In any event, such subtle distinctions are academic in this case. Although the tribunal did not refer in terms to the authorities, they clearly did

not regard this as a finely balanced case. They found that Mr Khan's actions were "obviously dishonest" and that he must have been aware of that. However the precise test is formulated, I can see no error of law in that conclusion.

Irrationality

81. Before us, the irrationality argument came down to one point, which Hart J described as follows:

"This was that (the tribunal's) reduction of the assessment to take account of the average price of £5.99 indicated by Mr Arifeen's analysis proceeded on a methodologically unsound basis. That £5.99 figure had been based on a total of 8,500 tickets whereas (or so the submission assumed) the £8.23 and the £7.70 averages had each been based on books of 500 tickets. To find the true average one should divide the total turnover by the total number of tickets. If one did that then the average price was closer to £6.16 than the £6.84 arrived at by the Tribunal. The Tribunal had made the mistake of averaging the averages without taking account of the number of tickets involved in each calculation."

82. Hart J accepted the force of this point as a matter of strict logic, but did not see it as a sufficient reason to interfere with the decision. In the absence of detailed records, the tribunal was merely seeking to make some allowance for the possibility that the two books used by Customs were "out of kilter with the norm" for the period in question:

"Using the £5.99 figure to take account of that possibility was not wholly irrational. For want of anything more solid, it was one way of acknowledging the possibly untypical nature of the two random samples. To have accorded it the weight given to it by Mr Young's submission would, however, have tended towards the irrational in light of the Tribunal's other findings, since it would have treated the 1999 figures as a whole as being typical of those likely to have applied for the period in question. The tribunal plainly did not think that they were."

83. I agree with the judge. In the absence of proper records, and in the absence of direct evidence from Mr Khan, the tribunal had to do its best, in a rough and ready way, to take account of the limited material available. The result is not open to challenge on legal grounds.

Conclusion

84. For these reasons, I would dismiss the appeal.

Lord Justice Lloyd:

85. I agree with Carnwath LJ and Buxton LJ for the reasons they give, that the appeal should be dismissed.

Lord Justice Buxton:

86. I gratefully adopt the account of this case given by Carnwath LJ, and with his conclusion that the appeal must fail. In particular, I would respectfully endorse what my Lord has said about the issue of burden of proof. In this judgment I venture to say a little more about two questions arising under the ECHR. Those questions are quite different in nature. The first of them concerns the general implications in English domestic law of the characterisation of proceedings before the VAT Tribunal as “criminal” in Convention terms. The second of them argues that on the particular facts of this case the tribunal was in breach of its duty under Article 6 by not intervening in the proceedings before it to draw Mr Khan’s attention to the potential availability to him of professional legal assistance. I address those questions in turn.

The application of the Police and Criminal Evidence Act 1984 [PACE] to the VAT evasion regime

87. Section 60 of the Value Added Tax Act 1994 [VATA] introduces a regime for the imposition of a penalty where a person has acted dishonestly for the purpose of evading VAT. The interviews of which complaint is made in this case were conducted under that regime. In *Commissioners of Customs and Excise v Han* [2001] STC 1188 this court held that the characteristics of that regime rendered proceedings under it criminal for the purposes of Article 6 of the ECHR. On that basis Mr Young argued that the Convention therefore required that there should be applied to the VAT evasion regime all the rules applying to a criminal process in English domestic law. In particular, at the interview with the Customs officials Mr Khan should have been cautioned in the terms required by § 10.4 of PACE Code C. Failure to do so meant that he was “denied the constitutional protections of [PACE]”.
88. This argument, if correct, would have marked a very striking departure from the usual understanding of Convention jurisprudence. While the Convention will require the exclusion of some categories of evidence obtained by serious misconduct (e.g. torture, *Montgomery v HM Advocate* [2003] 1 AC at 649D, per Lord Hoffmann; or entrapment, *Allan v UK* (2003) 36 EHRR 12) the Convention’s characteristic mission is to determine whether proceedings viewed as a whole have been fairly conducted, without mandating specific general rules of evidence or procedure for the law of the member state: see the ECtHR in *Schenk v Switzerland* (1988) 13 EHRR 242[46]:

While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.

89. Convention jurisprudence could not, therefore, require the use of PACE procedures in the VAT evasion regime even though the latter is, in Convention terms, a criminal process. All that it could do is to control the general fairness of the whole of a particular set of proceedings. PACE can only be brought into the case by the further step of arguing that the decision in *Han* caused the VAT evasion process to be criminal in domestic as well as in Convention terms, and therefore the whole of the domestic regime of criminal process must be applied to it: it would seem as a matter of English domestic, not of Convention, law.

90. The premise behind that argument is clearly wrong. In *Han* this court continued, to cite from §88 of the judgment of Mance LJ (as he then was):

“The classification of a case as criminal for the purposes of art 6(3) of the Convention, using the tests established by the Strasbourg jurisprudence, is a classification for the purposes of the ECHR only. It entitles the defendant to the safeguards provided expressly or by implication by that article. It does not make the case criminal for all domestic purposes. In particular, it does not, necessarily, engage protections such as those provided by the Police and Criminal Evidence Act 1984”

That, with respect, must be so. It is trite law that the Convention operates an autonomous regime of classification, and that the criteria under that regime for determining whether proceedings are criminal are to be found in the jurisprudence of the ECtHR, dating from *Engel v Netherlands* (1979-80) 1 EHRR 647. Those criteria are the domestic classification of the proceedings; the nature of the offence; and the severity of the penalty to which the subject is at risk. Of these, the first, the domestic classification, is only a starting point: *Benham v UK* (1996) 22 EHRR 293[56]. If the domestic law does classify the proceedings as criminal, then that will conclude the issue under the Convention. But, as *Han* itself demonstrated, even if the domestic regime is specifically distinguished from domestic criminal proceedings, as the VAT evasion regime is so distinguished by section 60(6) of VATA, it may still be found to be “criminal” in nature under the Convention. As the ECtHR said in *Engel*, at its §81, “the autonomy of the concept of ‘criminal’ operates, as it were, one way only”. Accordingly, although proceedings can be classified as criminal under the Convention when they are not so classified in domestic law, such a Convention decision cannot affect, and is recognised in the jurisprudence cited above as being quite different from, the classification of proceedings in domestic law.

91. That suffices to dispose of the argument based upon *Han*, but it is important to note that the appeal to PACE is inept for a different, and purely domestic, reason. It was accepted that in order to appeal to PACE the proceedings had to be shown to be criminal in domestic terms because, as both its short and its long title indicate, PACE is concerned with *criminal* evidence: that is, with the admissibility of evidence in criminal proceedings. In the present case, as I understand the argument, Mr Young does not assert that any particular part of the evidence put before the tribunal was inadmissible, but rather complains more generally that Mr Khan was entitled to a PACE caution. Had he been cautioned in the strong terms there found, he or his representative would have had a better chance of appreciating the gravity of his position. That submission however misunderstands the function of the Codes of Practice introduced by sections 66 and 67 of PACE. Although section 67(11) provides that a Code is admissible in any proceedings criminal or civil; and can be taken into account in any such proceedings; the practical role of the Codes is to give guidance as to the performance of the functions with which PACE itself is concerned: see on that point *Archbold (2006)* § 15-8, where also the illuminating foreword to the original Codes is reprinted. The Codes therefore come into operation, and guide the court, when it is applying other provisions of PACE. Of those, the obligation to which Code C is most clearly relevant is the duty of the court to exclude unfairly obtained evidence under section 78 of PACE. It is conspicuous that all the cases of

which we are aware in which the application of Code C has been discussed, and certainly all the cases put before the court in this appeal, were attempts in criminal trials to exclude evidence under section 78. But by section 82(1) of PACE, section 78 only applies to criminal proceedings: so the VAT tribunal could not in any event be under an obligation to exclude evidence just because it was obtained in breach of Code C.

92. I therefore conclude that the provisions of Code C cannot be relied on in proceedings that in domestic terms are not criminal proceedings. That conclusion is reinforced by the difficulty in any event of applying the terms of the PACE regime to the present case. Code C only applies to police officers and to those who are “charged with the duty of investigating offences”. In its context, “offences” must clearly mean infractions of the criminal law. In *Gill* [2004] 1 WLR 469 the Criminal Division of this court held that, when evidence was sought to be excluded in a criminal trial, the provisions of Code C applied to interviews conducted by the Inland Revenue’s Special Compliance Office, “which is the revenue’s investigating branch charged with the investigation of serious fraud” ([2004] 1 WLR at §12). This court explained the position at its §37:

“The statement of the Chancellor of the Exchequer ...made it quite clear that, while in cases of tax fraud the revenue will be influenced by a full confession in deciding whether to accept a money settlement...it gives no undertaking to do so or to refrain from instituting criminal proceedings. Tax fraud involves the commission of a criminal offence or offences, so that it is in our view evident that the role of the SCO investigating tax fraud involves the investigation of a criminal offence.”

The present case is quite different. Far from the Commissioners conducting the interview in order to uncover material for a subsequent prosecution, the purpose and background of the interview, as set out in detail by the judge in §58 of his judgment, was to investigate whether a *civil* penalty should be imposed: and it is that penalty, and no other, that has been imposed on Mr Khan. No doubt, as the judge also observed, if the Commissioners were to bring a prosecution, and seek to rely on the contents of the interview, then it might be held, in those criminal proceedings, and in the light of the manner of their prosecution, that the role of the investigators had to be reviewed. But that is not this case.

Breach of Article 6 at the hearing

93. Carnwath LJ has set out the history of the issue, and the submissions that we received on it. We were not shown Convention jurisprudence directly on this point, and a modest judicial search has not revealed any. Mr Young was, however, content to rely on the approach of the ECtHR in *Kamasinski*, set out in §54 above, that the national authorities are required to intervene in the conduct of a case only if a failure by counsel to provide effective representation is “manifest”. In that context, I would venture the following observations.
94. First, I respectfully agree with Carnwath LJ, in his §51, that lack of specifically legal representation is not the issue, in circumstances where representation by accountants

is common. There would be nothing in that alone to put the tribunal on notice in the *Kamasinski* sense. Second, the ECtHR, in formulating the test under review, emphasised, in §65 of its judgment, that the conduct of the defence is essentially a matter between the defendant and his counsel, which, it may legitimately be inferred, the national legal aid authorities, and perhaps *a fortiori* a court, should enter only with caution. Third, I respectfully agree with Carnwath LJ, in his §55, that the only realistic candidate for matters that should have put the tribunal on notice was the failure to call Mr Khan as a witness. Did that failure therefore make it manifest to the tribunal, so that they should have realised, that Mr Khan was suffering from representation of a degree of incompetence that infringed his Article 6 rights? That is largely or entirely a matter of judgement, on which I respectfully agree with the view of Carnwath LJ.

95. In reaching that conclusion I am strongly impressed by the note of caution sounded by the ECtHR and already referred to. The judge, in his §37, has surmised as to the reason, apart from incompetence, why Mr Khan may not have been called: to protect him from cross-examination. I would respectfully agree with Carnwath LJ, in his §57, that there is no evidence that that was so, and that the judge may have attributed an unwarranted degree of tactical sophistication to Mr Arifeen. That, however, is not conclusive. The question is whether it should have been manifest to the *tribunal* that Mr Arifeen was simply incompetent, to a high degree. The tribunal had identified, and sets out in §§ 84-85 of its decision, matters producing profound difficulty for Mr Khan, in particular his previous experience of running a VAT registered business, and the fact that he was the sole proprietor of, and in effect the only moving force in, the present business. As the tribunal said, Mr Khan would have been perfectly aware of the true takings. And the tribunal well knew, from the efforts before them to reconstruct what those true takings were, that Mr Khan had, or at least had not produced, any proper records of the business, to the extent that Mr Arifeen had not been able to provide him with a set of audited accounts. In those circumstances, when Mr Khan did not volunteer to give evidence, and thus to be cross-examined, it is difficult to think that the tribunal should have realised, that it was manifest to it, that that was because he was badly advised, rather than for the reason assumed by Hart J.
96. There are two further reasons for caution before applying the *Kamasinski* jurisprudence to this case. First, this was not a case where the adviser simply went missing, as in *Artico* (1981) 3 EHRR 1, cited in *Kamasinski* at its §65; nor was it a case where the taxpayer had no representation at all, as was originally the case in *Dula Miah*, cited in §52 above. Mr Khan was represented throughout by an accredited member of a profession that holds itself out as competent to act before VAT tribunals. The tribunal, bearing in mind the stress laid on autonomy in *Kamasinski*, would need to tread carefully before giving the taxpayer advice on the basis, not that he had no representation, but that his professional representation was incompetent. That is particularly so when the tribunal might thereby appear to be descending into the arena of what are, it should be remembered, adversary proceedings.
97. Second, we can only speculate about what a lawyer, if instructed, would have advised Mr Khan to do. It is by no means self-evident that Mr Khan would have been advised to give evidence. If he were so advised, he might have been told in effect to throw himself on the tribunal's mercy and attribute the shortfall, if any, to muddle rather

than dishonesty. It is far from clear that that advice would have been accepted. Mr Khan swore an affidavit in the proceedings before Hart J, at a time when he was in receipt of specialist legal advice, in which he made no such claim, but continued to insist that the records on which he drew were reliable, and demonstrated that his business had indeed fallen below the VAT threshold.

98. These latter points merely demonstrate the delicate and difficult nature of the *Artico* and *Kamasinski* jurisprudence. Like Carnwath LJ, I would not extend that jurisprudence to find a breach of Article 6 in this case.
99. In reaching that conclusion I have deliberately put out of my mind what we were told about the practice of the tribunal of sending out letters drawing attention to the availability of legal assistance, and the claim that such a letter was despatched in this case: see the account in §46 above. None of that was proved or admitted. I would however comment that in future cases that raise questions similar to that in issue here the Customs would do well to establish the existence of such a practice and its implementation in the particular case. Even where the recipient did not receive such a letter, the understanding of the tribunal that it was operating within a system in which the availability of legal assistance had already been notified to the applicant would be a significant factor in determining whether it was manifest to the tribunal that the applicant was ignorant of that fact.