

Neutral Citation Number: [2005] EWHC 653 (CH)

Case No: CH/2003/0236

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Before:

THE HONOURABLE MR. JUSTICE HART

Between:

MOHAMMED SIDDIQ KHAN

Appellant

- and -

-

**THE COMMISSIONERS OF CUSTOMS
& EXCISE**

Respondents

Mr Andrew Young (instructed by **Vincent Curley & Co.**) for the Appellant.

Miss Nicola Shaw (instructed by **The Solicitor for HM Customs & Excise**) for the Respondents.

Hearing dates: 6th & 7th April 2005

Judgment date: 19 April 2005

Mr. Justice Hart :

1. This is an appeal against a decision of the VAT and Duties Tribunal (Mr Huggins, Mr Grice and Mr Kippest) dated 10th February 2003 following a hearing on 18th and 19th December 2002. The proceedings before the Tribunal consisted of an appeal by the appellant against a decision by the Commissioners to register him compulsorily to VAT with effect from 1st July 1997 giving rise to an assessment of £20,793. The appellant challenged that assessment and further challenged a further assessment to a civil evasion penalty notified by letter dated 1st June 1999 for a total amount of £17,012 which had been mitigated by the Commissioners by 25% to £12,759.
2. The background to the matter was that the appellant had owned and operated a dry cleaning business at 5 Greyhound Road, London W6 8NH of which he was the sole proprietor trading under the name of Greyhound Dry Cleaners. He had commenced his trade in 1992. He was not registered for VAT, and was not in the year 1997-1998 liable so to register unless his turnover was over £49,000. As a result of an investigation by Customs officers in 1998, Customs came to the conclusion that there was a likelihood that he was liable to register for VAT and had been deliberately suppressing sales. On 10th December 1998 he attended for interview under the Notice 730 procedure to which I refer in more detail below. He was accompanied at that interview by Mr Arifeen, his accountant. Following that interview, Customs wrote to Mr Arifeen setting out the reasons why they believed that there had been an evasion of VAT and Mr Arifeen in response sought to give explanations as to why the points made by Customs did not support the conclusions which they had reached. The upshot was that in March 1999, Customs issued the appellant with a notice of compulsory registration for VAT effective as from 1st July 1997. No VAT Return was submitted by the appellant for the period 04/99, and on 26th August 1999 Customs wrote to the appellant setting out the calculations supporting Customs' best judgement assessment of the VAT due in respect of the period from 1st July 1997 to 30th April 1999 in the sum of £20,793. On 1st June 1999 a notice of assessment under section 76 of the 1994 Act to a penalty under section 60 of the 1994 Act was issued which calculated the amount liable to penalty in respect of the period 1st July 1997 to 31st December 1998 as £17,012 and gave a mitigation of 25% to reflect the level of cooperation, producing a penalty of £12,759.
3. The appellant appealed to the Tribunal by a notice dated 23rd August 1999. Pursuant to the provisions of Rule 7 of the Value Added Tax Tribunals Rules 1986 Customs served a statement of case dated 26th January 2000. Rule 7(b) required the appellant within 42 days of the date of notification of the statement of case to serve "a defence thereto setting out the matters and facts on which he relies for his defence". On 5th May 2000 Mr Arifeen submitted such a document albeit intitling it as a "Statement of Case", to which was annexed the material on which he subsequently relied at the hearing. The appeal was then heard over two days on 18th and 19th December 2002.
4. The case for the Customs (which was conducted by Miss Shaw of Counsel instructed by the Solicitors for the Customs) was based upon two pillars. The first pillar related to the number of tickets issued per annum by the appellant in respect of items delivered for cleaning. It was common ground that the tickets used came from books each of which contained 500 tickets numbered sequentially. The second pillar consisted of the average price per ticket in the relevant period. The suspicions of Customs had first been aroused as a result of a visit incognito by Customs officers in March and April 1998 in which they had delivered and collected items of clothing for

dry cleaning. Analysis of the numbers of the tickets provided and the cost of cleaning the various pieces of clothing had suggested to the officers that it was likely that the appellant was liable to register for VAT. The subsequent investigations had turned up only two used ticket books. Analysis of these showed that, in one case, the average ticket price was £8.23 and the other (supplied at a later stage in the investigation) showed an average price of £7.17. So far as the number of ticket books used per annum were concerned, the principal evidence relied on by Customs consisted of two books recording lost tickets. These were books kept in respect of customers who had lost their tickets. Such customers were asked to sign in the lost ticket book a record of the date, the item or items cleaned and the ticket number. Based on an analysis of the dates and numbers in the lost ticket books Customs asserted that in the period from 26th November 1996 to 20th October 1998 at least 47 ticket books (and possibly as many as 60) had been used. In addition to that evidence Customs relied on the fact that the appellant had in the period 5th February 1997 to 11th February 1998 ordered and received 57 books and had not ordered any further books until January 1999 by which time he had run out of books. This was broadly supportive of the figure of 47 books used in the early period of 26th November 1996 to 20th October 1998. 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 usage of 47 books during the period 26th November 1996 to 20th October 1998. This equated to a monthly turnover of £7,932.92. It was on this basis that the best judgement assessment and the civil penalty assessment had been made.

5. The appellant had at no stage accepted that the figure of 47 ticket books revealed by the analysis of the lost ticket books was correct. On initial inquiry in October 1998 he had informed Customs officers that he used approximately one book per month. He had maintained that position at the interview on 10th December 1998, saying on that occasion that a book lasted on average 4 weeks. In the subsequent correspondence between Customs and Mr Arifeen, Mr Arifeen asserted that on Mr Khan's analysis of the lost ticket books approximately 35 to 36 books had been used in the relevant period as opposed to the 47 books alleged by Customs. Customs had responded to that by pointing out that if the weekly takings were, as asserted by the appellant, approximately £850 then on the usage of ticket books then relied on by Mr Khan each book should total around £2,367, whereas the two books in fact showed an average of £3,851.55. No explanation of this apparent discrepancy was given to Customs or to the Tribunal.
6. Mr Arifeen conducted the appeal before the Tribunal on behalf of the appellant. He did not call the appellant to give evidence nor did he give evidence himself. He did however tender 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. He is recorded by the Tribunal as in addition having made the following points:

“47. Mr Arifeen on behalf of the Appellant pointed out that his client was not aware until the interview on 10 December 1998 of the importance of the ticket books. He subsequently provided an analysis of 17 such books which indicated an average price per ticket of £5.99. These books related to the year 1999.

48. The Officers of Customs and Excise had first relied upon the analysis of one ticket book which they had collected initially on 22 October 1998. They reached the conclusion that during the period 26 November 1996 to 20 October 1998 (some 23 months) between 47 to 60 ticket books may have been used. They relied upon this by checking the sequential numbering of the tickets in the lost ticket book. Mr Khan believed that those books were not used sequentially in the order of numbers and some of the tickets in the book were very old.

49. At the interview on 10 December 1998 the atmosphere and the behaviour of the Officers were found by Mr Khan to be intimidating.

50. After the interview, another ticket book had been obtained from Mr Khan which showed an average item price of £7.17. Based on the two prices of £8.13 (ascertained from the first investigation) and £7.17, an average ticket price of £7.70 had been derived for the calculation of the assessment and for requisition purposes. Mr Khan maintained that it was misleading to estimate the average ticket price based on only two books.

51. Officer Waldron in her report prepared on 23 November 1998 had allowed an arbitrary figure of 5% of turnover for uncollected garments which should have been taken into account; likewise no provision was made for 'bounced' cheques nor monies returned to unsatisfied customers.

52. It was submitted that Customs and Excise had not used best judgement in making the assessment as an inadequate method was used to derive the average ticket price and the calculation of the number of ticket books used in the assessment period (47) was excessive and not in accordance with the annual gross turnover figure in Mr Khan's accounts for the year ending 30 November 1997."

Those submissions reflect in summary the points made in the defence document.

7. The Tribunal identified the four issues before it as being:
- i) Did the Appellant exceed the registration threshold of £49,000 with effect from 1 July 1997?
 - ii) Was the assessment made to the best judgement of the Respondents and should it be reduced?
 - iii) Was the civil penalty validly raised?
 - iv) Should the penalty be further reduced or increased?

8. The Tribunal then dealt with each of those issues separately, recording at paragraph 59:

“The Tribunal considers that the burden of proof in both the issues i) and ii) referred to in the last paragraph lies on the Appellant and the question to be determined in iii) lies on the Respondents.”

9. In considering the first issue of registration the Tribunal accepted the Customs’ analysis of the lost ticket books as showing that 47 books had been used in the 23 month period. It accepted the average prices of £7.17 and £8.23 revealed by the ticket books obtained by Customs during the course of the investigation. It also accepted that the average ticket price during the calendar year 1999 was £5.99. The Customs’ average figure of £7.70 applied to the 47 books used during the 23 month period produced an annualised turnover of £94,408 a year. The equivalent figure using the average of £5.99 produced an annualised turnover of £73,442. On that basis the Tribunal found that the appellant was above the threshold figure for the relevant period.
10. The Tribunal then addressed the question of whether the assessment was made to the best judgement of Customs and Excise within the meaning of section 73(1) of the 1994 Act. It reminded itself of the principles established in *Van Boeckle v. Customs and Excise Commissioners* [1981] STC 290 and *Rahman v. Customs and Excise Commissioners* (No.1.) [1998] STC 826. Having done so it concluded that there was material before the officers who made the assessment on which they could base their judgement.
11. It then addressed the question of whether the amount of the assessment should be reduced. It concluded that the assessment of £20,793 was calculated correctly at the time it was notified by the letter dated 26th August 1999. However it concluded that the £5.99 average figure subsequently produced by the appellant should also be taken into account. The way in which account was taken was expressed in paragraphs 80 and 81 of the Tribunal’s Decision in the following way:

“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.

81. We reduce the assessment under the power given to us by section 83(p) of the 1992 [sic]Act”

12. Then, in relation to the civil evasion penalty the Tribunal’s reasoning and conclusion ran as follows:

“82. The third issue in the appeal is whether Mr Khan had done any acts, or omitted to take any action, for the purpose of evading tax, and whether his conduct involved dishonesty within the meaning of section 70 [sic] of the 1992 [sic] Act.

83. For Customs and Excise, Miss Shaw argued and we accept that the standard of proof of dishonesty was the civil standard of proof on the balance of probabilities. The test of dishonesty is subjective.

We apply the *dicta* of Lord Lane CJ in *R v. Gosh* [1982] 2 All ER 689 ‘it is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest even if he asserts or genuinely believes that he is morally justified in acting as he did.’

84. Miss Shaw submitted on behalf of Customs and Excise that the Appellant intended to evade VAT by suppressing the true level of his supplies so as to appear to fall beneath the threshold of VAT. It is clear from his interview that Mr Khan was aware of the limit and the requirements to register. Indeed, he had previously run a VAT registered dry cleaning business.

85. Mr Khan ran the business as a sole proprietor. He was responsible for the day to day running of the business. The only involvement of others in the business was one part-time worker and the Appellant’s wife and son. It was very much a family business and Mr Khan would have been perfectly aware of the true takings.

86. Customs and Excise asserted that the deliberate suppression of takings so as to evade a liability to account for VAT would be regarded as dishonest by ordinary people and that the Appellant would have been only too aware that his actions would be regarded as dishonest.

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.

89. Taking all the above into account and considering all the evidence, we find that no explanation other than deliberate suppression is possible. The Respondents have used best judgement and have discharged the burden on them of proving dishonesty.”

13. Finally, they addressed the question of whether the penalty should be further reduced or increased. They concluded that the 25% reduction to reflect the minimum degree of cooperation provided by the appellant was appropriate.
14. The formal grounds of appeal were limited to the proposition that the Tribunal had erred in law and misdirected itself as to the proper standard of proof and that the Tribunal had misdirected itself by admitting evidence of what the appellant had said in the interview on 10th December 1998. However the appeal notice intimated that the grounds of appeal would be more fully particularised in a skeleton argument to be produced by counsel. That skeleton argument contended that the Tribunal:
 - i) ought to have considered the gravity of the charges against Mr Khan and made inquiry as to whether the appellant's rights to a fair hearing would be infringed;
 - ii) misdirected itself as to law in respect of the admissibility and/or weight of evidence which had been obtained unfairly to such an extent that it rendered the Tribunal's Decision unsafe;
 - iii) misdirected itself as to law in respect of the standard and burden of proof it ought to apply when considering an appeal against the imposition of a penalty under section 60 of the Value Added Tax Act 1994;
 - iv) reached a conclusion that was irrational.
15. The first three of those submissions are founded on the proposition established by the majority decision of the Court of Appeal in *Customs & Excise Commissioners v. Han and another* [2001] EWCA Civ 1040, [2001] STC 1188 ("*Han*") that proceedings under section 60 of VATA involve a "criminal charge" for the purposes of Articles 6(1) (2) and (3) of the European Convention on Human Rights. It was not, as I understood the submissions, suggested that the appeal against the compulsory registration or against the best judgement assessment involved such a criminal charge. These three grounds accordingly relate only to the Tribunal's decision to uphold the penalty under section 60(1) in the amount which it did.

The statutory provisions

16. The statutory provisions relevant to this appeal are the following provisions of the 1994 Act:
17. Section 73(1) of the 1994 Act provides:

"Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgement and notify it to him."

Section 60 of the 1994 Act is headed “VAT evasion: conduct involving dishonesty”. It provides so far as material:

“(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...

“(3) The reference in subsection (1) above to the amount of the VAT evaded or sought to be evaded by a person’s conduct shall be construed—

(a) in relation to VAT itself or a VAT credit as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated; and

(4) Statements made or documents produced by or on behalf of a person shall not be inadmissible in any such proceedings as are mentioned in subsection (5) below by reason only that it has been drawn to his attention—

(a) that, in relation to VAT, the Commissioners may assess an amount due by way of a civil penalty instead of instituting criminal proceedings and, though no undertaking can be given as to whether the Commissioners will make such an assessment in the case of any person, it is their practice to be influenced by the fact that a person has made a full confession of any dishonest conduct to which he has been a party and has given full facilities for investigation, and

(b) that the Commissioners or, on appeal, a tribunal have power under section 70 to reduce a penalty under this section,

and that he was or may have been induced thereby to make the statements or produce the documents.

(5) The proceedings mentioned in subsection (4) above are—

(a) any criminal proceedings against the person concerned in respect of any offence in connection with or in relation to VAT, and

(b) any proceedings against him for the recovery of any sum due from him in connection with or in relation to VAT.

(6) Where, by reason of conduct falling within subsection (1) above, a person is convicted of an offence (whether under this Act or otherwise), that conduct shall not also give rise to liability to a penalty under this section.

(7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners.

Section 72 is headed “Offences” and reads:

“ (1) If any person is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by him or any other person, he shall be liable—

(a) on summary conviction, to a penalty of the statutory maximum or of three times the amount of the VAT, whichever is the greater, or to imprisonment for a term not exceeding 6 months or to both; or

(b) on conviction on indictment, to a penalty of any amount or to imprisonment for a term not exceeding 7 years or to both.”

Fresh evidence

18. The appellant sought to introduce fresh evidence on the hearing of this appeal in the form of witness statements from the appellant (dated 7th February 2005), from Mr Arifeen (dated 12th May 2004) and from a Mr Curley (dated 8th February 2005). Mr Curley is a principal in the firm of Vincent Curley & Co, specialists in VAT and Duties appeals. He is funded by the Legal Services Commission to assist the appellant in his appeal to this court, and in that connection to instruct Mr Young who appeared on behalf of the appellant without an instructing solicitor under an arrangement licensed by the Bar Council on the footing (if I understood it correctly which it is possible that I did not) that as between the appellant and Mr Curley the appellant was acting in person in the appeal. Mr Curley’s witness statement contained a critique of the evidence which had been presented to, and accepted by, the Tribunal. I permitted that witness statement to be used as a convenient encapsulation of submissions which would otherwise have had to be made at greater length by Mr Young.
19. So far as the other two witness statements were concerned, 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.

20. For completeness I should add that Mr Arifeen did invoke the appellant's human rights before the Tribunal. The extent to which he did so was recorded by the Tribunal at paragraphs 93 to 96 of its Decision, as follows:

“93. Mr Arifeen inferred during the hearing that his client's human rights had been infringed as a result of the investigation and particularly when the interview took place. He did not elaborate further or give specific submissions in this respect.

94. Miss Shaw referred the tribunal to the lead decision of the Court of Appeal in *Customs and Excise Commissioners v. Han & Yau and other appeals* [2001] 4 All ER 687 and particularly the judgment of Potter LJ at paragraphs 83 and 84 on pages 1213 and 1214. He held that the effect of certain ECHR decisions was that the penalties had to be regarded as involving a 'criminal charge' for the purposes of Article 6 of the European Convention on Human Rights. He observed that '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 the Police and Criminal Evidence Act 1984 and/or the codes produced thereunder, which relate to the investigation of crime and the conduct of criminal proceedings as defined by English law.'

95. He continued 'if matters are made clear to the taxpayer... at the time when the nature and effect of the inducement procedure are also made clear to him (whether by VAT Notice 730 or otherwise), it is difficult to see that there would be any breach of Article 6...' the hearing, but photocopies of the entries were made available at a much earlier date.

96. Mr Khan was made fully aware of the contents of VAT Notice 730 and we are satisfied from the evidence before us that there was no breach of Article 6 in the investigation and interview. In our view, he has received a fair and public hearing and his rights have not been infringed in connection herewith. It is regrettable that the two test ticket books taken by Customs Officers were not returned as promised until the first day of the hearing, but photocopies of the entries were made available at a much earlier date.”

The first submission

21. Mr Young's first 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 the incompetence, and that the Tribunal ought to have ensured that the appellant was aware of his right to be legally represented if he so chose.

22. Article 6(3)(c) of the Convention provides, as one of the minimum rights which a person “charged with a criminal offence” has, the right:

“(c) 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.”

23. Mr Young prefaced his detailed submissions on this issue with a submission that the engagement of Article 6 in the present context should be seen primarily as a matter of Community, rather than domestic, law. In that connection he took me to a number of decisions of the ECJ (including in particular *International Handelsgesellschaft v. Einfuhr-und Vowetsstelle Getreide* [1970] ECR 1125 and *Johnston v. Chief Constable of the RUC* [1986] ECR 1651). He also sought to develop an argument that Article 47 of the Charter of Fundamental Rights of the European Union, although not legally binding, re-affirms a right already enshrined in Community law and is thus directly applicable in the implementation of the VAT Directive. In that connection he referred me to the opinion of Advocate General Tizzono in *R. v. Secretary of State for Trade and Industry, ex parte BECTU* Case C-173/99, 8th February 2001 at paragraphs 26-28.
24. It does not seem to me necessary to embark on an investigation of the correctness of this submission for the purposes of this appeal. Article 47 of the Charter adds nothing material for present purposes to Article 6 of the Convention. Customs accepts that, as a result of the decision in *Han*, Article 6 applies to the section 60 penalty proceedings. It is, therefore, Article 6(3)(c) which has to be applied in this context.
25. In support of his submission that the appellant’s rights under Article 6(3)(c) had been infringed Mr Young referred me to two decisions of the European Court of Human Rights. The first was *Kamasinski v. Austria* A/76 (1991) 13 EHRR 36. That case concerned complaints made by the applicant about many aspects of criminal proceedings which had been brought against him in Austria, including complaints about the adequacy of the steps taken by the lawyer appointed by the court to act for him in those proceedings. The relevant statement of principle can be found in paragraph 65 of the Court’s judgment where it 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.”

26. The second case relied on was *Benham v. UK* A/631 (1996) 22 EHRR 293. In that case Mr Benham complained about his imprisonment for failure to pay the community charge. He had not been represented or assisted by a lawyer, although he was eligible for “Green Form” legal advice and assistance before the hearing and the magistrates could have made an order for Assistance by way of representation if they had thought it necessary under Regulation 7(1)(b) of the Legal Advice and Assistance (Scope) Regulations 1989. The court rejected the UK’s submission that the proceedings were properly to be classified as “civil” rather than “criminal”, and went on to hold (at paragraph 61) that:

“The Court agrees with the Commission that where deprivation of liberty is at stake the interests of justice in principle called for legal representation.”

27. Mr Young’s submission on the facts of the present case was that it should have been apparent to the Tribunal that the appellant was not being effectively or competently represented by Mr Arifeen for essentially three reasons.
28. First it was said that the intitlement of the defence document as a “Statement of Case” should have alerted the Tribunal to Mr Arifeen’s unfamiliarity with the procedures of the Tribunal. Secondly it was said that the Tribunal should not have allowed Mr Arifeen to represent the appellant (or should at least have questioned the appropriateness of his doing so) given that he was potentially a witness of fact before it. He had been present at the Notice 730 meeting and had himself on that occasion had questions addressed to him by the officers conducting the interview. Thirdly it was submitted that Mr Arifeen’s failure to object to certain of the witness statements tendered by Customs but more particularly his failure to call the appellant to give evidence indicated such a failure on the part of Mr Arifeen to understand the nature of the proceedings as should have alerted the Tribunal to the need for it to take action to protect the appellant.
29. The action which it is said that the Tribunal should have taken was (and I quote from Mr Young’s written submissions):

“[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."

30. So far as legal aid is concerned it was common ground that such legal aid was available at the date of the hearing: see the LCD Press release 78/01 dated 27th February 2001. There was no evidence before me that the appellant would in fact have been eligible for it.
31. The appellant's witness statement before me explained his failure to give evidence before the Tribunal in the following terms;

"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."

He added at the end of his witness statement:

"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."

32. Mr Arifeen's witness statement contains no express explanation of why he did not call the appellant to give evidence. It complains that the Tribunal, while accepting that his analysis of the 1999 ticket books showed an average price per ticket of £5.99, did not also accept that that analysis (which showed a turnover for that period of £50,954.90) indicated that the turnover for the period being considered by the Tribunal must have been below the threshold for registration. Nothing in Mr Arifeen's witness statement contains any admission or suggestion that he was unfamiliar with the procedures of the Tribunal or that he was incompetent to represent the appellant before it.
33. Miss Shaw, on behalf of Customs, submitted to me that Article 6(3)(c) does not prescribe that a person facing a "criminal charge" be represented by a lawyer, but affords the individual a choice of whether to represent himself or be legally represented. If he chooses to be legally represented he is entitled to his choice of legal representative and to be financially assisted for that purpose if the interests of justice so require. In the present case the choice he made was to be represented by his accountant Mr Arifeen, as is permitted. That choice should be respected. In many cases, she submitted, representation by an accountant in an appeal against a tax assessment and penalty might be just as good, if not better than, the representation which a lawyer might provide. The *Benham* case was authority for no more than that legal representation was in principle appropriate where loss of liberty was at stake, and that the "criminal charge" in the present case not only did not put the appellant's liberty at stake, but did not involve the stigma involved in a criminal conviction in the domestic sense. The decision in *Benham* supported the view that the degree of protection required to be afforded depended on the complexity of the case and the severity of the penalty. She submitted that the appellant's real complaint was that his

representation was not as good as it might have been. If that was the case, which she did not accept, it was not something for which the Tribunal should be held responsible.

34. I accept those submissions. The central question, as it appears to me, is whether it was or should have been manifest to, or otherwise brought to the attention of, the Tribunal that the appellant's interests were not being effectively represented before it at some relevant stage: see the formulation in *Kamasinski* quoted at paragraph 25 above. At the outset it seems to me that a tribunal should respect the autonomy of the individual before it as to the way in which he has chosen to be represented. In the present case I have not been persuaded that anything occurred which should have alerted the Tribunal to a need to interfere with the choice which the appellant had made. The inept intitlement of the defence document was scarcely such a matter. Nor can I see that there was anything in the point that Mr Arifeen's potential to be a witness of fact impaired his ability to represent the Appellant. Mr Arifeen's connection with the business was limited to a compilation of accounts which were based, so far as sales were concerned, on the records kept by the appellant of his daily gross takings. These were the very records which Customs contended were inaccurate. His only potential as a witness of fact arose out of the fact that he had been present at the Notice 730 interview.
35. Mr Arifeen did not, however, choose to give formal evidence in respect of that interview, although it is clear that he did advance some general submissions about the unfairness of the interview, presumably reflecting the passage in his "Statement of Case" which had read:

"Without prior notification, the interview was conducted under caution and was tape recorded. Both Mr Khan and Mr Arifeen considered the atmosphere of the interview and the behaviour of the officer intimidating."
36. Both the officers who had conducted the interview gave oral evidence before the Tribunal and were (I infer) cross-examined by Mr Arifeen. The Tribunal had before it a full transcript of the interview. It was therefore perfectly possible for Mr Arifeen to make what he could of this point before the Tribunal without the need to give evidence himself.
37. Mr Arifeen's decision not to call the appellant himself may or may not have been a wise one. In the context of the appeals against compulsory registration and against the best judgement assessment, the burden of proof lay on the appellant. The burden of proof of dishonesty in relation to the civil penalty assessment under section 60 lay on Customs. It seems clear that Mr Arifeen's strategy was to seek to deal with all three matters by relying on such favourable inferences as he could persuade the Tribunal to draw from the records which existed of tickets issued in the 12 month period in 1999 and on discounting the inferences which Customs had drawn from their analysis of the lost ticket books (as to the number of books used in the relevant period) and from the only two used ticket books which they had (as to the average price per ticket during the relevant period). 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.

38. However that may be, two things have to be said. First the strategy did have a partial success. The Tribunal was persuaded that some account should be taken of the 1999 figures so far as average price was concerned. That it was not persuaded to accept that the 1999 figures (showing a turnover of some £50,000) could be read back into the relevant period is hardly surprising. The period concerned was not the relevant period, and the records dated from a period after the Notice 730 interview when the appellant knew that his affairs were under close scrutiny. Secondly, there was in my judgment nothing in the failure of Mr Arifeen to call the appellant which should have alerted the Tribunal to the fact that some egregious mistake was being made in the representation of the appellant such as to require the Tribunal to take the steps which Mr Young says that it should have taken.

The second submission

39. The submission in general terms was that the Tribunal was wrong to have admitted or given weight to the Notice 730 interview on the ground that the evidence which emerged from that had been obtained unfairly. More particularly the submission was that the interview ought to have been conducted in accordance with Code C of the Codes of Practice issued under the Police and Criminal Evidence Act 1984 (PACE) because the provisions of section 67(9) of PACE applied. That subsection 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.”

40. So far as the provisions of Code C were concerned the only one specifically relied on by Mr Young was the failure to conduct the interview under the form of caution 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.”

41. Mr Young did however also intimate that the failure at that stage to advise the appellant that he could have the services of a lawyer was also a matter for legitimate complaint under Code C. This was not, however, developed either in his written or oral submissions.

42. The submission involves the proposition that the officers conducting the interview were doing so in discharge of their duty of investigating “offences”. Mr Young

identified the “offence” as the matter giving rise to liability to the civil penalty under section 60(1). Alternatively he submitted that the relevant offence was conduct giving rise to potential criminal liability under section 72.

43. In order to examine that submission it is necessary to say something about the origins and purposes of the civil penalty system under VATA. This was fully reviewed in the judgment of Potter LJ in *Han*. 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. Paragraph 46 to 48 of Potter LJ’s judgment in *Han* summarise the outcome of those recommendations, and the current features of the civil penalty scheme in the following terms:

“THE RELEVANT FEATURES OF THE VAT CIVIL PENALTY CODE

[46] Section 60 of VATA was enacted pursuant to the Keith Report recommendations for a civil penalty code for VAT offences; however, the recommendation that mitigation of the penalty imposed for offences involving dishonesty should not exceed 50% was not followed, s 70 of VATA permitting reduction to such amount (including nil) as the commission should think proper.

[47] Following the recommendations of the Keith Report, s 13 of the 1985 Act introduced a penalty for evasion of VAT where it could be shown that a taxpayer’s conduct involved dishonesty, the terms of which are now embodied in s 60 of VATA. Section 14 of the Finance Act 1986 introduced a provision allowing the recovery of the penalty from directors and managing officers where it could be shown that the facts giving rise to the penalty was attributable to their dishonesty. That is now s 61 of VATA. Section 8(1) of FA 94 introduced the power to issue a civil evasion penalty for evasion of excise duty involving dishonesty.

[48] Before us the parties have emphasised various features of the civil penalty code introduced by VATA. In the following list, the commissioners emphasise points (1) to (4), while the respondents emphasise points (5) to (10).

(1) Section 60(4)(a) of VATA expressly refers to ‘an amount due by way of a civil penalty’.

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(2) Such penalties were provided for as a deliberate decriminalisation of the VAT and duty penalty scheme.

- Customs and Excise approach to reaching an agreement on the VAT underdeclared; and
- How you can lessen any penalty.

What is the law?

2. Under the VAT Act 1994 Section 60(1) a penalty may be imposed “in cases where:

- a. for the purpose of evading VAT a person does any act or omits to take any action; and
- b. his conduct involves dishonestly (whether or not it is such as to give rise to criminal liability)”

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.

What happens first?

3. 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.

How are penalties worked out?

4. They are a percentage of the tax evaded. (We hope that you will agree the amount of underdeclaration with the officer at an early stage, but you may dispute it to a VAT Tribunal or ask for a reconsideration by your local VAT office). In law, the penalty can be 100%, but if the arrears are agreed, it will be less than that.

The officer starts with a penalty figure of 100% of the tax alleged (or agreed) to be underdeclared. However, whilst in

cases of dishonest evasion a penalty will normally be applied, you can considerably reduce this by the actions which you take during the investigation.

How can I reduce the penalty?

5. 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.

Disclosure

At interview an early and truthful admission of the extent of the arrears and why they arose will attract a considerable reduction.

Of course, a wide variety of circumstances is possible. The officer has to decide how much information you gave, how soon you gave it and how it contributed towards settling the investigation.

Co-operation

You can receive further major reduction if you:

- supply information promptly;
- attend interviews;
- answer questions honestly and accurately; and
- give the relevant facts to establish your true liability.

The Commissioners will consider the extent to which your co-operation has saved official time and resources, and the extent to which co-operation was possible when applying a penalty.

You may receive no penalty reduction at all if you:

- put off supplying information
- avoid attending interviews
- give untrue answers to questions
- do nothing until formal action is taken against you
- or generally obstruct the course of the investigation.

By how much can the penalty be reduced?

6. Reductions from the penalty figure will normally be made for three reasons, too the maximum percentages specified, as follows:

a. An early and truthful explanation as to why the arrears arose and the true extent of them-

up to 40%

b. Co-operation in substantiating the true amounts of arrears-

up to 25%

c. Attending interviews and producing records and information as required-

up to 10%

In most cases therefore, the maximum reduction obtainable will be 75% of the tax underdeclared. In exceptional circumstances however, consideration will be given to a further reduction, for example where you have made a full and unprompted voluntary disclosure, as in a. b. and c. above.

If there are any other matters whatsoever which you consider may affect the level of penalty, you should inform the officer accordingly.

What happens next?

7. When the arrears have been established and/or agreed, you will receive an assessment notifying the tax arrears and any interest chargeable. Subsequently you will receive a penalty assessment and a letter showing how much mitigation has been allowed.

What if I cannot pay?

8. It may be possible to pay by instalments. You will be expected to make a significant down payment, with the balance by agreed instalments over a short period.

Failure to pay may result in Civil Recovery Proceedings.

What if I do not agree with the arrears and/or penalty?

9. If you disagree with the tax assessment or penalty, you may ask the issuing office to reconsider the matter. If you are not satisfied with the outcome you have the right of appeal to a VAT Tribunal.

What if I am unhappy about the way the investigation has been conducted?

10.If at any time you are dissatisfied with the conduct of the investigation, you can complain to the Assistant Collector at you local VAT office, who will review the case as necessary. There is a Notice No 1000 which explains complaints procedures.”

46. It is relevant to mention that the form currently in use contains a number of differences, including the potentially significant passages:

“2.2 Do I have to co-operate?

You are under no obligation to speak to the investigating officers or provide information. Any information you do provide may be used in assessing your liability to tax or to a penalty, should the evidence show that an offence has been committed. However it is a matter for you to decide whether or not you wish to provide information or respond to questions. If you are being interviewed you are free to leave at any time.

You should remember that the investigation is not being conducted with a criminal prosecution in mind. We 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.”

47. In paragraphs 83 and 84 of his judgment in *Han*, Potter LJ made the following observations:

“[83] It appears that the inducement procedure, at least as refined in December 2000, makes explicit to the taxpayer, in addition to the information supplied in VAT Notice 730, that the civil evasion investigation is not being conducted with a view to prosecuting the trader for VAT evasion, that the trader is not obliged to co-operate in the Customs investigation, and it is entirely a decision for the trader to decide whether or not to speak to the investigating officer or assist generally in the Customs investigation. It must be remembered that the requirements of art 6(1) in relation to a fair trial, together with what has been held to be the implicit recognition of a right to silence and a privilege against self-incrimination, are of a general nature and are not prescriptive of the precise means or procedural rules by which domestic law recognises and protects such rights.

[84] It by no means follows from a conclusion that art 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. Any argument as to whether and how far that Act and the codes apply is one which will have to be separately considered if and when it is advanced. In this context, however, the specific provisions of s 60(4) of VATA are plainly of considerable importance. I would merely add my view that, if matters are made clear to the taxpayer on the lines indicated at [83] above at the time when the nature and effect of the inducement procedure are also made clear to him (whether by VAT Notice 730 or otherwise), it is difficult to see that there would be any breach of art 6. It also seems to me that, even if PACE were applicable, it is most unlikely that a court or tribunal would rule inadmissible under ss 76 or 78 of that Act any statements made or documents produced as a result, at any rate in the absence of exceptional circumstances. On the other hand, it follows from this decision that a person made subject to a civil penalty under s 60(1) of VATA will be entitled to the minimum rights specifically provided for in art 6(3).”

To similar effect Mance LJ at paragraphs 88 and 89 said:

“[88] The classification of a case as criminal for the purposes of art 6(3) of the ECHR, 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. The submissions before us did not address this point, or, indeed, the subject of burden of proof (although I note that no objection was even raised to a civil burden in Georgiou’s case). As Mr Stephen Oliver and Potter LJ have both observed, the precise implications under the ECHR of classification of any case as criminal for the purposes of the ECHR will have to be worked out on a case-by-case basis.

[89] The present decision might be thought to be detrimental to a sensible policy of decriminalisation, although any stigma which might attach to convention criminality has evidently been outweighed in the respondent taxpayers’ thinking by the perceived benefits of protections afforded during investigation and determination of any claims to penalties. I think that it is perhaps unfortunate that the case law cited to us does not enable, and the present preliminary issue does not allow, any more detailed analysis or conclusions with respect to the effects of treating the present offences as criminal for convention purposes. But I remain to be convinced that our decision will

seriously undermine or disrupt the general nature of existing procedures.”

It is clear that all these observations were obiter.

48. In paragraph 83 of his judgment Potter LJ had referred to a refinement of the inducement procedure in December 2000. He did not elaborate on this in his judgment. However, since the conclusion of the argument on this appeal, Miss Shaw has supplied me with information as to what that was. It consisted of an internal direction to officers, made in the light of the coming into force of the HRA, as to the “Form of Words [to be used by them] for inducement”. The formula was designed to emphasise that the investigation was being conducted with a view to the imposition of a civil penalty and “not being conducted with a view to your prosecution for VAT evasion”, and that the words should conclude:

“...you should be under no misapprehension that this means you are obliged to co-operate in our investigation. It is up to you to decide whether or not to speak to us or assist us generally in our investigation. Do you understand?”

49. In the present case, although the Notice 730 does not itself spell out the matters contained in that December 2000 form of words or in paragraph 2.2 of the current version, the transcript of the interview makes it clear that at its inception the appellant was told that:

“We’re looking at this in a civil manner where it’s not a criminal investigation... that we’re looking at. You’re more than welcome to leave any time you want to here... but if there has been an evasion of VAT and we find out that that is the case, then a penalty will look to a 100% can be levied, 100% of the amount evaded and with your co-operation that could be reduced down to 25%.”

50. The appellant neither then nor thereafter complained that he did not understand either the Notice 730 or that warning. In his witness statement before me he said:

“18. Paragraph 33 [of the Decision] deals with my interview on 10 December 1998. At the time I understood the meaning of the significance of the Notice 730. I was not formerly cautioned. Mr Arifeen was present with me at the interview. I was happy for the interview to proceed, although I felt intimidated by the officers, and it was necessary for Mr Arifeen to interrupt the officers on a number of occasions. I felt under pressure at the interview (paragraph 49) as mentioned by Mr Arifeen in his submissions.”

51. Mr Young relied on the recent decision of the Court of Appeal in *R v. Gill and Another* [2004] 1 WLR 469 in support of his submission that a Code C caution should have been given. *Gill* 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 (as it obtained at the relevant time) 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 they had made in the course of the Hansard interview. The judge rejected that on the grounds that the Hansard interviews were part of the civil procedure for the collection of tax, and that since the officers were not “charged with the duty of investigating offences” within section 67(9) of PACE the statements were admissible. The Court of Appeal (Clarke LJ, Astill J and Judge Beaumont QC) held that section 67(9) of PACE did apply. Its reasoning was expressed thus:

“[37] While we fully understand the importance of the Revenue being able to recover the tax owed to it and the value of the Hansard procedure in that regard, we are unable to accept the Revenue’s submission. The statement of the Chancellor of the Exchequer made in Parliament on 18 October 1990 makes 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 (including presumably an appropriate penalty), it gives no undertaking to do so or to refrain from instituting criminal proceedings. Tax fraud involves the commission of a 691 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.

[38] Although we recognise that a caution had not been administered in the past at a Hansard interview because such an interview has not been regarded by the Revenue as subject to Code C, in our judgment, that is to give too narrow an interpretation of the expression ‘charged with the duty of investigating offences’ in s 67(9) of the 1984 Act. The officers of the SCO were charged with investigating serious fraud and, since serious fraud inevitably involves the commission of an offence or offences, it seem to us to follow that they were charged with the duty of investigating offences.

[39] The purpose of Code C is to ensure that interviewees are informed of their rights, one of which is not to answer to questions, and to inform them of the use which might be made of their answers in criminal proceedings. It is clear from the parliamentary statement that the SCO had the possibility of criminal proceedings in mind in respect of the fraud about which they were asking questions and we can see no reason why the Revenue should not have cautioned taxpayers suspected of fraud before asking them questions in these circumstances. We cannot see why a caution should reduce the chances of a taxpayer making a full confession, which was the purpose of the process. However that may be, since the Revenue expressly reserved the right to prosecute for fraud, it

appears to us that one of the purposes of asking the questions must have been the ‘obtaining of evidence which may be given to a court in a prosecution’, even if the Revenue’s main aim was to arrive at a monetary settlement. question.”

52. Mr Young also referred me to *R v. Okafor* [1994] 3 All ER 741, which shows that in appropriate circumstances customs officers may be regarded as falling within section 67(9) of PACE.
53. In considering this submission it seems to me necessary to disentangle a number of quite separate propositions.
54. The first is that civil penalty proceedings involve an “offence” for the purposes of section 67(9) of PACE. There can be no doubt that if that proposition is correct the officers in the present case were charged with investigating it. It would then follow that Code C applied.
55. The second proposition is that, if the first proposition is correct, the statements given at interview are inadmissible as a result of having been obtained in breach of Code C in the civil penalty proceedings.
56. The third proposition is 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, the submission is that section 67(9) of PACE applies.
57. The fourth proposition is that, if the third proposition is correct, the statements are inadmissible in the civil penalty proceedings by reason of the breach of Code C.
58. In my judgment the first proposition is simply unsustainable. “Offence” in PACE means a criminal offence, and “criminal” in that context bears a wholly domestic meaning, i.e. an offence prosecuted in the criminal court. I can pass therefore directly to the third proposition. As to that it is the case that conduct which renders a person liable to a civil penalty under section 60 will, if provable to the criminal standard, render him liable to prosecution under section 72 and perhaps also for the common law offence of cheating the Revenue. It is true also that the Notice 730 in the present case contained the rubric set out above reserving the right of Customs to prosecute. On the other hand the appellant was also told at interview that the matter was not being investigated with a view to prosecution (“we’re looking at this in a civil manner where it’s not a criminal investigation”). To that extent the situation is distinguishable from that which obtained in *Gill*. I was told, and have no reason to doubt, that the assurance was wholly in line with the practice of Customs at the relevant time, namely that the product of such interviews would not be used for the purposes of a subsequent criminal prosecution in respect of the conduct under investigation. It seems to me therefore that *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. Having given the appellant the assurance that this was the ambit of their task, it seems to me

arguable that it would have been an abuse for Customs, or another prosecuting authority, to prosecute the conduct under investigation by criminal proceedings (in the domestic sense) on the basis of the product of the interview. If that is right then the very giving of the assurance prevented the officers from investigating that conduct with a view to such a criminal prosecution.

59. Even if I am wrong to distinguish *Gill* on that ground, that case is not authority for the fourth proposition namely that the fruits of the interview could not be used for the purposes for which the interview was conducted, namely ascertaining the appellant's VAT liabilities both in terms of tax owing and civil penalties which might be leviable. *Gill* was concerned only with the admissibility of the statements in a subsequent criminal prosecution. Nothing in PACE requires the VAT Tribunal, hearing an appeal against a section 60 civil penalty assessment, to exclude evidence on the ground of non-compliance with Code C. On the contrary, so far as domestic law is concerned, rule 28 of the Value Added Tax Tribunal Rules 1986 expressly provide that the Tribunal shall not refuse evidence tendered to it on the grounds only that such evidence would be inadmissible in a court of law. It should also be noted that in *Gill* itself the court held that the evidence in that case was properly admitted at the criminal trial despite the non-compliance with Code C.
60. Mr Young submitted that wider principles required the Tribunal to treat the evidence as inadmissible. First, he submitted that the evidence was rendered inadmissible because the appellant had not been advised of his right to silence. For that purpose he relied on the decision of the European Court of Human Rights in *Funke v. France* (1993) 16 EHRR 297. In *Funke* the Court upheld the complaint of the applicant about his conviction for failure to supply documents (details of his overseas bank accounts), disclosure of which might have incriminated him. That case, involving the use of compulsive procedures to obtain from a defendant potentially self-incriminating material, is a long way from the present. There was no compulsion here.
61. Secondly Mr Young referred me, in his reply and in very general terms, to the decision of the House of Lords in *Reg v. Sang* [1980] AC 402. That case, however, was concerned with the existence of a discretion in a criminal court to exclude probative evidence. It was not directly concerned at all with the kind of question under consideration here, namely the admissibility of, or weight to be given to, answers given by a "defendant" after commission of an "offence" to those charged with the duty of investigating the offence.
62. The fact of the matter is that the appellant did not attend the interview under any kind of compulsion, and was told at the interview that he was free to leave at any time. I am unable to see how his right to silence was in any way impaired.
63. It was, in any event, striking that Mr Young did not in his submissions, nor did either the appellant or Mr Arifeen in their witness statements, seek to identify which parts of the interview were regarded as having been so damaging to the appellant as to call into question the fairness of referring to the content of the interview before the Tribunal. With one exception, the damaging aspects of the interview were the failure or inability of the appellant to provide explanations as to why the inferences drawn by Customs from the material which they had obtained were incorrect. In that respect it was his silence, rather than anything he said, which was damaging. The exception to which I refer was the statement, made both on the initial enquiry by Customs and

repeated in interview, that he used only approximately 12 ticket books per annum. This was indeed relied on by the Tribunal as one of the facts contributing to its finding of dishonesty: the appellant was subsequently constrained to concede a different figure (and indeed put forward a third possibility in his witness statement to the court). I am unable to see on what basis it can be suggested that it was unfair of the Tribunal to have admitted this evidence.

The third submission

64. The third submission was that the Tribunal erred both in relation to the burden and standard of proof.

Burden of proof

65. So far as the burden of proof is concerned it is clear that the Tribunal correctly identified that the burden of proving the matters set out in section 60(1)(a) and (b) lay on Customs.
66. Those matters were, respectively, proof that the appellant had done or omitted to take any action “for the purpose of evading VAT”, and proof that “his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability)”.
67. Mr Young’s submission was that, upon a true construction of the statute construed in accordance with the interpretative obligation under section 3 of the Human Rights Act 1988, the burden was on Customs to show both that the VAT threshold had been exceeded and that the best judgement assessment (by reference to which the penalty was calculated) was correct.
68. In my judgment it is correct that the burden lay on Customs to show, for the purposes of showing liability to the section 60 penalty, that the VAT threshold had been exceeded. It was the appellant’s failure to register for VAT which was the action relied on by Customs as having been omitted “for the purposes of evading VAT”. I do not see how Customs can prove that such omission had that purpose without proving that the appellant ought to have been registered. One can test the matter by asking what the position would have been had the appellant confined his appeal to the section 60 penalty. In those circumstances I do not consider that Customs would be dispensed from its obligation to prove this element. The fact that the appellant had not himself challenged the compulsory assessment would be of some probative value in showing that he had been trading above the threshold, but the burden would be on Customs nonetheless. Similarly the fact that the appellant could not himself discharge the burden of showing that the compulsory registration was not justified (as was the case here) does not relieve the Customs of the burden of proving that it was for section 60 purposes.
69. 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 judgement on the material before it at the time, but approached the issue as one of fact on the evidence before it. That seems to me clear from the way in which it analysed the evidence in paragraphs 60 to 71 of its Decision and expressed its own finding in paragraph 72.

70. I find more difficult the question whether the burden is on Customs to show the amount of the VAT which has been evaded for the purposes of establishing the size of the penalty. Customs must of course bear the burden of showing that some VAT has been evaded by the act or omission relied on. Unless that is established it cannot be shown that the purpose of the act or omission was to evade VAT. That does not, however, answer the question. Again, however, in the present case the question seems to me to be of academic interest. The Tribunal had to consider whether the section 73(1) assessment had been made to the best judgement 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. I also find it difficult to imagine a case in which they would when both questions were tried at the same time in relation to the liability of the same propositus. I add that latter qualification to take account of the fact that penalty proceedings may be brought against persons other than the taxpayer: see section 61.

Standard of proof

71. Mr Young accepted that the standard of proof was the civil standard of a preponderance of probabilities rather than the criminal standard of proof beyond reasonable doubt (as decided in *1st Indian Cavalry Club Ltd and Chardbury v. C&E Commissioners* [1998] STC 293 by the Inner House of the Court of Session) but submitted 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. In submitting that this was the correct test, he relied on observations of Lord Scarman and of Lord Bridge in *Khawaja v. Secretary of State for the Home Department* (1983) 1 AER 765 at 784c and 792b. He drew attention to the fact that the Tribunal customarily applied such a standard in dealing with cases of dishonesty, referring me to the Tribunal Decision in *Ghandi Tandoori Restaurant v. C&E Commissioners* of 12th December 1998.
72. In making her submissions to the Tribunal, Miss Shaw is recorded (at paragraph 57) as having referred to all three of those cases in support of her submission that the standard was the balance of probabilities. Her submission was accepted by the Tribunal at paragraph 83 of the Decision.
73. I invited Mr Young to address me on the extent if any to which he might wish to modify his submission in the light of Lord Nicholls' observations in *In Re H* [1996] AC 563 at 586-587, rejecting the notion that the standard of proof is higher where a serious allegation is in issue but accepting the proposition that "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” (see *ibid* at 586G-H). He did not, however, respond to that invitation.

74. In my judgment it is clear that the Tribunal applied the correct standard, and was satisfied that the evidence adduced by Customs was sufficiently strong to enable it to reach the conclusion which it did.

Irrationality

75. Mr Young pointed out that the Tribunal appears to have proceeded on the basis (incorrect as a matter of law) that it had power to increase the penalty. The Tribunal certainly so expressed itself in identifying the issues at paragraph 58, but there is no other trace in its Decision of it having approached the question of the amount of the penalty on anything other than a correct footing.
76. Mr Young then sought to develop his argument on irrationality by taking various points on the evidence which were taken by Mr Curley in his witness statement. Mr Young was constrained to concede that for the most part these were all points which could have been taken below, and were not appropriate to be re-addressed on this appeal.
77. There was, however, one point on which he could and did rely in relation to the Tribunal’s express reasoning. This was that its 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.
78. There is some force in this point as a matter of methodology, although I note that the submission itself proceeds on an assumption that the £7.17 figure was derived from 500 tickets whereas it appears to have been only 114: see paragraph 68 of the Decision. If the first ticket book did contain 500 tickets and the second 114, then the logic of the submission means that the Tribunal ought to have concluded at paragraph 70 of its Decision that the average price per ticket was (on my calculations) some £8.03 rather than £7.70, a point which would not have assisted the appellant taken by itself.
79. The mistake, such that it was, plainly did not affect the Tribunal’s decision on the question of threshold, since, as is clear from paragraph 71, it tested that conclusion against the possibility that £5.99 was the average price to be applied to its period. For the same reason I do not think that the mistake, such as it was, could have affected its conclusion on dishonesty. The question goes solely to the correct amount of the assessment (and therefore the penalty).
80. While I am satisfied that the methodology is unsound in principle, I am not satisfied that it was a mistake such as to justify this court altering the assessment or remitting the matter. The fact that the methodology was mistaken does not mean that the

correct approach (or certainly the only correct approach) would have been to take the weighted average contended for by the appellant. The two averages produced by Customs were based on two ticket books which amounted to an apparently random sample from the period under examination. What the Tribunal was plainly seeking to do was to make some allowance for the possibility that these two books were in fact out of kilter with the norm for the period in question. The fact that the appellant could demonstrate that in the following year (when his affairs were under investigation) an average price of £5.99 could be demonstrated was some evidence that that possibility might be a real one: the range of averages per ticket book in that period is from £4.05 to £8.48, so that it could be said with some force that it might be the case that the two random samples from the earlier period were not necessarily typical of the whole. 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.

81. In fact, although this was not the subject of argument before me, there was another chain of reasoning which, as it seems to me, easily justified the Tribunal in taking £6.84 or a figure very close to it as the average ticket price in the period being considered, and which was supported by evidence before it. The appellant's case from the outset had been that his takings in the relevant period were between £800 and £900 per week and that he used on average one book of 500 tickets every 4 weeks. If the average takings were £850 per week the takings over 4 weeks would have been £3400. That yields an average price per ticket of £6.80. It would not have been irrational for the Tribunal to have adopted this figure (impliedly asserted by the appellant himself) for the period in question while at the same time rejecting his evidence as to the amount of the actual takings and the number of actual ticket books used.
82. For those reasons I have concluded that this appeal should be dismissed.