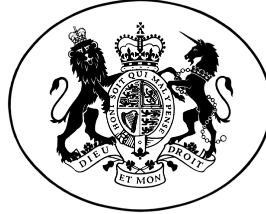

TC02913

Appeal number: TC/2012/06011

VAT – requirement to file online – whether appellants entitled to exemption – whether requirement to file online a breach of their rights under the European Convention on Human Rights to manifest their religion – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRAHAM ARNOLD BLACKBURN AND ABIGAIL BLACKBURN T/A CORNISH MOORLAND HONEY — **Appellants**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bodmin Law Courts on 14 August 2013

The appellants in person

Mr P Woolfe, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The appellants trade in partnership as beekeepers. They are VAT registered.

2. Compulsory VAT online filing was introduced for all businesses with a turnover of over £100,000, and any newly registered business, with effect from 1 April 2010 and for all businesses with effect from 1 April 2012. HMRC refers to businesses liable to registered for online filing from 1 April 2010 as "first tranche" and those only required to be registered from 1 April 2012 as "second tranche".

3. The appellants in this case were in the second tranche. Their turnover was below the limit for tranche 1. Their VAT registration is in any event voluntary as their supplies (of honey) are zero rated. They chose to be VAT registered as it enables them to recover the input tax (VAT) charged on supplies made to them in the course of their business, such as VAT on the cost of the jars.

4. By letter dated 3 March 2012 the appellants' claim for exemption from online filing on religious grounds was refused by HMRC, although no reasons were given for the refusal. Mr Blackburn asked for a review of this decision, and by letter dated 4 May 2012 the original decision was upheld on review. This time, HMRC gave reasons. The letter stated:

> "My finding is that a case for exemption has not been made at review stage. No connection to the beliefs of any individual religious society or order has been shown in the way contemplated by the regulation. The wording in the regulation looks to be a very precise requirement for exemption and has to be construed according to the words which have been used. It is not my belief that there was an intention to broaden the basis of exemption to include constructions of scripture which fall outside the tenets of a definable faith. If that had been so then the statute would not have been worded as it is."

5. The appellants appealed to the Tribunal. The Tribunal stood the appeal behind the joined cases of *Eweida, Ladele, Chaplin* and *McFarlane* in the European Court of Human Rights ("the ECHR"). The ECHR released its judgment in those cases earlier this year and this case (after one postponement) came on for hearing.

The facts

6. Evidence was given by Mr Blackburn. Mrs Blackburn concurred in what her husband said. Mr Woolfe did not seek to challenge Mr & Mrs Blackburn's evidence of their beliefs and I accept that Mr Blackburn accurately represented their beliefs.

7. Mr Mark Rassell also spoke briefly on behalf of Mr Blackburn. Again Mr Woolfe did not seek to challenge what he said and I accept Mr Rassell accurately represented his beliefs.

8. Mr & Mrs Blackburn are members of the Seventh-day Adventist Church. The Church has 28 fundamental beliefs and these are set out on its website. One of its fundamental beliefs is that the Bible should be their only creed. Another one of its fundamental beliefs is in the second, imminent, coming of Christ, and this explains the "Adventist" part of the Church's name. The website explains this fundamental belief as follows:

> "The second coming of Christ is the blessed hope of the church, the grand climax of the gospel. The Saviour's coming will be literal, personal, visible and worldwide. When He returns, the righteous dead will be resurrected, and together with the righteous living will be glorified and taken to heaven, but the unrighteous will die. The almost complete fulfilment of most lines of prophecy, together with the present condition of the world, indicates that Christ's coming is imminent. The time of that event has not been revealed, and we are therefore exhorted to be ready at all times…."

I will return to the relevance of this.

9. None of the Church's fundamental beliefs are anything to do with electronic communications. The Church does have a manual, and the Church's website explains that this is to explain and preserve denominational practices and polity. Page 142 of the Manual sets out the Church's position on "modern media". As Mr Blackburn and Mr Rasssell put it, the Church requires them to be discriminating in their use of modern media, including computers and the internet. The Manual says:

> "Radio, television and the Internet have changed the whole atmosphere of our modern world and have brought us within easy contact with the life, thought, and activities of the entire globe. They can be great educational agencies through which we can enlarge our knowledge of world events and enjoy important discussions and the best in music.
>
> Unfortunately, however, modern mass media also can bring to their audiences almost continuous theatrical and other performances with influences that are neither wholesome nor uplifting. If we are not discriminating, they will bring sordid programs right into our homes…"

10. Mr Blackburn agreed that his Church would use the internet for what it saw as good purposes, such as evangelism and education (and no doubt this is why it had a website).

11. Mr Rassell, like Mr Blackburn, was VAT registered. He considered that he had to be discriminating in his use of computers and the internet and he did not have a computer in his own home. Nevertheless, he considered filing his VAT return online to be compatible with the creed of his Church and he would use the free facilities at his local library to do this.

12. Mr Blackburn and his wife chose instead to shun computers, the internet, television and mobile phones. They were not directly required to do this by their church. Nevertheless, as Mr Blackburn explained it to me, their religion required

them to live in accordance with the teachings of the Bible. He cited a large number of Bible passages to me which he interpreted as requiring him to shun computers, television and mobile phones.

13. My understanding of what he said was that he had a number of reasons for this interpretation. He wished to protect his children from bad influences. The content of some television programmes and internet websites were contrary to the Bible's teaching as he understood it. But in addition, he considered computers and television as a whole as forms of "worldliness" which might seduce people away from "righteousness". This, as I understood it, was also the reason for his objection to mobile phones. He considered that people were obsessed by them, almost regarding them as "idols". He had no concerns with landlines and had one in his own home. He considers that modern media and in particular the "screen" has "blinded the minds of non-believers" and that people's time is so taken up with electronic communications that they no longer have time for religion in their lives.

14. For all these reasons, he and his wife have chosen to entirely shun computers and television. They do not possess a computer or television. They do not use them. Mr Blackburn gave unchallenged evidence that he would regard it as incompatible with his beliefs to go to the library to use a computer to make a VAT return or to ask someone (such as an agent) to make his online VAT return on his behalf. They will not use computers nor have someone use them on their behalf.

15. It was put to him that he must know that HMRC would process his return electronically in whatever form it was submitted. Mr Blackburn agreed that he knew this, but pointed out that his beliefs only required him to act in accordance with his own conscience. He believed each person must act in accordance with their own conscience, and it was for HMRC officers to act in accordance with their own consciences. Similarly he had no difficulties in dealing with people (such as his suppliers) who used computers. It was their choice. He also accepted that his Church used computers. But his individual choice was not to use a computer nor to ask someone to use one on his behalf.

16. HMRC put to him that their choice not to use a computer was really a personal preference and not a fundamental part of their religion. Mr Blackburn's explanation, on the contrary, was that the most important part of his religion to them was the belief in the imminent second coming of Christ, which was one of the fundamental tenets of the Seventh-Day Adventist Church (see §8 above). They believed that only the righteous would be saved when this happened: and this is what the extract I cited above from the Church's 28 fundamental beliefs says. In order to be righteous, it was Mr & Mrs Blackburn's belief that they had to act in accordance with their own consciences. Their conscience told them, for the reasons explained in §12-13, that the Bible required him to shun computers and television.

17. If they lose this appeal, it was Mr Blackburn's unchallenged evidence that, rather than ask someone else to file online on their behalf, they would voluntarily de-register for VAT. This would lead to financial loss as they would lose the ability to reclaim input tax.

The law

Jurisdiction

18. Unlike the other cases involving appeals against requirements to file online, *Le Bistingo Ltd* and *LH Bishop Electric Company Ltd,* HMRC accepted in this case that the Tribunal did have jurisdiction to consider the matter. I agree. S 83(1)(zc) Value Added Tax Act 1983 gives this Tribunal jurisdiction as follows, in so far as relevant:

> "**Section 83(1) VATA**
>
> …an appeal shall lie to a tribunal with respect to any of the following matters –
>
> ….
>
> (zc) a decision of the Commissioners about the application of regulations under section 135 of the Finance Act 2002 (mandatory electronic filing of returns) in connection with VAT (including, in particular, a decision as to whether a requirement of the regulations applies and a decision to impose a penalty).

19. The appellants' appeal was about a decision whether a requirement of the regulations applied to them: in particular it was their case that they were entitled to the religious exemption from the requirement to file online. So I move on to consider the law on online filing in detail.

The law on online filing

20. Section 135 of the Finance Act 2002 permitted HMRC to make secondary legislation requiring VAT registered persons to file online. The primary legislation provided as follows:

> **s 135 Mandatory e-filing**
>
> (1) The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") may make regulations requiring the use of electronic communications for the delivery by specified persons of specified information required or authorised to be delivered by or under legislation relating to a taxation matter.
>
> (2) Regulations under this section may make provision -
>
> (a) as to the electronic form to be taken by information delivered to the Revenue and Customs using electronic communications;
>
> ….
>
> (e) for treating information as not having been delivered unless conditions imposed by any of the regulations are satisfied;
>
> …..
>
> (4) Regulations under this section may –

(a) allow any authorisation or requirement for which the regulations may provide to be given or imposed by means of a specific or general direction given by the Commissioners;

….

5 (7) The power to make provision by regulations under this section includes power –

…

(c) to make different provision for different cases.

(8) References in this section to the delivery of information include
10 references to any of the following (however referred to) –

(a) the production … to a person of any information, account, record or document

….

(d) the making of any return, claim, election or application.

15 ....."

21. HMRC laid secondary legislation in accordance with its powers under s 135 before Parliament. This became new regulation 25A of the Value Added Tax Regulations 1995/2518 ("VAT Regulations"). This provided that with effect from 1
20 April 2012 as follows – I have underlined the most significant part -

25A VAT Regulations

(1) Where a person makes a return required by regulation 25 using electronic communications, such a method of making a return shall be referred to in this Part as an 'electronic return system'.

25 (2) Where a person makes a return or a final return on the relevant form specified in a notice published by the Commissioners such a method of making a return shall be referred to in this Part as a 'paper return system'.

(3) Subject to paragraph (6) below, a person who is registered for
30 VAT must make a return required by regulation 25 using an electronic return system whether or not such a person is registered in substitution for another person under regulation 6 (transfer of a going concern).

(4) In any case where an electronic return system is not used, a return must be made using a paper return system.

35 (5) …..

(6) However a person –

(a) who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications, or

40 (b) to whom an insolvency procedure as described in any of paragraphs (a) to (f) of section 81(4B) of the Act is applied …

is not required to make a return required by regulation 25 using an electronic return system.

(7) ….

(8) A direction under paragraph (8) above may in particular –

5 (a) modify or dispense with any requirement of Form 4 or Form 5 (as appropriate),

(b) specify circumstances in which the electronic return system may be used, or not used, by or on behalf of the person required to make the return.

10 For the purposes of sub-paragraph (b), the direction may specify different circumstances for different cases.

……..

22. As already explained, the appellants asked for, and were refused by HMRC, exemption from liability to file online under regulation 25A(6) above.

15 23. It was Mr Woolfe's position that the decision to refuse exemption was correct. Looking at Regulation 25A as it stands, and ignoring the possible implications of the Human Rights Act 1998 ("HRA 1998"), HMRC's position was that the appellants were not members of a religious society or order whose beliefs are incompatible with the use of electronic communications. HMRC maintained this for two reasons:

20 (a) It was agreed that the appellants were members of the Seventh Day Adventist Church but it was also agreed that the use of electronic communications was not incompatible with the tenets of the Seventh Day Adventist Church;

(b) In any event the appellants' objection was to the use of computers,
25 and television but not to the use of telephones (other than mobile phones). Therefore, they did not object to *all* electronic communications.

If the Commissioners are satisfied

24. The exemption is only available to those 'who the Commissioners are satisfied' fulfil the terms of the exemption. Mr Woolfe informed me that HMRC did not claim
30 that this in any way limited the jurisdiction of the Tribunal and in particular HMRC were not claiming that my jurisdiction was supervisory only. In other words, HMRC thought that I should read regulation 25A(6)(a) as if the words 'who the Commissioners are satisfied' were simply not there.

25. As this point was conceded, I do not need to consider it further.

35 *Whose beliefs are incompatible…*

26. Mr Woolfe recognised that there was an inherent ambiguity in the wording of regulation 25A(6). Whose beliefs need to be incompatible with the use of electronic equipment? Is it the beliefs of the appellants, or the beliefs of the religious society to which they belong? HMRC's case was that it was the beliefs of the religious society.

27. As Mr Woolfe pointed out, any other interpretation appeared to make the reference to a religious society or order redundant. If it was the appellants' personal beliefs that mattered for the purposes of Regulation 25A(6)(a), why would there be a reference to a religious society or order at all?

5 28. Mr Woolfe's view was also that the purpose of the restriction in regulation 25A(6)(a) was to allow HMRC an objective method to test whether the claim to religious exemption was genuine: it was feasible to check whether a society or order had a particular tenet of faith and to check whether an appellant belonged to that society or order; but it would not be possible to check on the personal beliefs of 10 individuals.

29. Therefore, it was HMRC's case that the "whose" referred back to the religious society or order and not to the appellants. I agree for the reasons Mr Woolfe gave. The question for Reg 25A(6) (ignoring the Human Rights Act) is whether the appellants belong to a religious society or order where the beliefs of that society or 15 order are incompatible with the use of electronic communications.

Conclusion on Reg 25A(6)(a) before considering the HRA

30. The appellants did not claim to belong to any religious society or order other than that of the Seventh Day Adventist Church and in particular they did not claim that their family by itself (with its shunning of computers and televisions) amounted 20 to a religious society or order.

31. Further, it was agreed, and I find as a fact, that the religious society of which they were members, the Seventh-day Adventist Church, did not consider its beliefs to be incompatible with the use of electronic communications.

32. Even the appellants' personal beliefs were not incompatible with the use of all 25 electronic communications, just computers, the internet, television and mobile phones.

33. My conclusion on the application of Regulation 25A(6)(a) to the two appellants, if seen purely as a question of the normal rules of construction and without reference to the effect of the Human Rights Act 1998 ("HRA"), is that the appellants are not 30 entitled to the religious exemption from liability to file online contained within Regulation 26A(6)(a).

The Human Rights Act 1998

34. But that is far from being the end of this appeal. Mr Woolfe on behalf of HMRC, accepted at the hearing that the Tribunal must consider whether the HRA 35 1998 was relevant in determining whether the appellants are obliged to file their VAT returns online. Section 3 of the Human Rights Act provides as follows:

> **"3 Interpretation of legislation.**

> (1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2)This section—
>
> (a)applies to primary legislation and subordinate legislation whenever enacted;
>
> (b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

35. The effect of this is that primary and secondary legislation must be read in so far as possible as consistent with the European Convention on Human Rights ("the Convention"). This goes well beyond giving legislation a purposive interpretation: the legislation must be read as consistent if at all possible to do so. It was HMRC's position that, if the appellants were not entitled to exemption under Regulation 25A(6)(a) on a normal purposive interpretation, then I would have to consider whether Regulation 25A(6)(a) could and should be read in a 'strained' way in order to give effect to the appellants' human rights.

36. It was, of course, also HMRC's position that Regulation 25A, and the decision denying the appellants exemption on religious grounds, were not a breach of the appellants' human rights.

37. To determine that I needed to consider the European Convention on Human Rights ("the Convention"). But before doing so I consider the one other potentially relevant provision of the HRA 1998. This is s 6 HRA 1998 which provides:

> **6 Acts of public authorities.**
>
> (1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2)Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3)In this section "public authority" includes—
>
> (a)a court or tribunal, and

> (b)any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
>
> (4). . . . .
>
> (5)In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
>
> (6)"An act" includes a failure to act but does not include a failure to—
>
> (a)introduce in, or lay before, Parliament a proposal for legislation; or
>
> (b)make any primary legislation or remedial order.

38. HMRC's position is that this tribunal is a public authority as s 6(3)(a) HRA 1998 says so. Therefore, this tribunal must act compatibly with the appellants' human rights. In particular it must allow the appeal rather than apply regulations in breach of the appellants' human rights. (It was of course HMRC's case that the regulations did not breach the appellants' human rights).

39. Section 6 does not apply where *primary* legislation is incompatible with the Convention and nor does it apply to secondary legislation which is in the form it is due to constraints imposed by primary legislation. But the regulations at issue here are *secondary* legislation and (at least in so far as the exemptions are concerned) they are not constrained by primary legislation to be in the form in which they are. Section 6 HRA 1998 is therefore in point *if* the appellants human rights would be breached by the application of the regulations to them.

40. Interpreting s 6 in this way provides symmetry in the legislation. S 4 of the HRA permits senior courts (of which this Tribunal is not one) to make declarations of incompatibility where they consider *primary* legislation is incompatible with the Convention. A declaration of incompatibility is no more than a declaration: it does not impinge on the effectiveness of the legislation, which all courts are required to apply.

41. But s 4 does not give any limit on the jurisdiction of all courts and tribunals in respect of *secondary* legislation (other than secondary legislation which is constrained in its precise terms by the primary legislation) and so the implication must be that no such limit was intended.

42. There is also authority in support of this view. In the first instance decision in *Preddy v Bull* the county court judge held that he had no power not to apply subordinate legislation which was incompatible with ECHR. On appeal to the Court of Appeal (reported at [2012] 1 WLR 2514 CA) the appeal was dismissed on other grounds, but in a non-binding aside ("per curiam") Lady Justice Rafferty said:

> "[28] I can deal briefly with [the Judge's] conclusion as to the powers of a judge sitting in the county court. He was wrong to say that he had

> no alternative but to apply the Regulations even if they were incompatible with the convention. Unless the primary legislation dictates the contents of the Regulations…, any judge can strike down subordinate legislation: see section 4(3) of the Human Rights Act 1998."

Although Rafferty LJ did not expressly refer to s 6, what her ladyship said is entirely consistent with the above interpretation of s 6. The compatibility of unconstrained secondary legislation with the ECHR is something over which the HRA gave this and all other tribunals jurisdiction.

43. So I need to determine what are the appellants' human rights and whether the application of Regulation 25A (on a normal interpretation without reference to the HRA 1998) is in breach of them.

Freedom of thought, conscience and religion

44. Article 9 of the Convention provides as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, of for the protection of the rights and freedoms of others."

45. The question in this case is whether the VAT online filing regulations have interfered with the appellants' right to *manifest* their religion and beliefs in practice and observance.

46. HMRC accept that in shunning computers the appellants are manifesting their religious beliefs. However, Mr Woolfe also said, somewhat in contradiction to this, that HMRC do not accept that using a computer to file online, or using an agent to file online on their behalf, would be incompatible with their religious beliefs.

47. I reject HMRC's case on this. Having heard Mr Blackburn's evidence, I accept that using a computer, or having an agent use it on their behalf, is contrary to Mr & Mrs Blackburn's religious beliefs. Even Mr Woofe accepted, having heard Mr Blackburn, that HMRC's statement of case was wrong to describe Mr Blackburn's decision not to use a computer as simply a "preference" dictated by a desire to keep the 'bad' content on televisions and computers out of his home to protect his children. I find, as explained above in §§12-13, that by entirely shunning computers, the Blackburns considered they were acting, as the Bible required them to do, in accordance with their religious conscience. They were manifesting their religious beliefs by refusing to use computers.

Sufficient nexus between manifestation & belief?

48. While Mr Woofe accepted that the manifestation of religious belief referred to in Article 9 of the Convention did not require that the appellants were acting in fulfilment of a religious duty, it was also HMRC's position that there was an insufficient nexus between this manifestation of religious belief (refusing to use computers) and the underlying belief (the 28 fundamental beliefs of the Seventh-day Adventist Church). Mr Woolfe referred to the case of *Eweida* (ECHR 48420/10).

49. In this case the European Court of Human Rights ("ECHR") said:

> "[81. The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance….Provided this is satisfied, the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the way in which those beliefs are expressed…."

50. Mr Woolfe did not suggest that the Blackburns' beliefs failed to attain this necessary level of cogency, seriousness, cohesion and importance to obtain protection of Article 9. What he did suggest was that there was a lack of a close link between the beliefs and the shunning of computers. The ECHR said:

> "Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9(1)….In order to count as a 'manifestation' within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question…."

51. Therefore, the ECHR requires there to be a "close and direct nexus" between the manifestation and the underlying belief. I am satisfied that there is such a close and direct nexus in this case. Indeed, as Mr Blackburn explained it, in shunning computers he and his wife are acting in what they see as fulfilment of a duty mandated by their religion, in that he and his wife believe that they must act in accordance with their conscience in order to be judged righteous at the second coming (see §16 of facts). And their conscience dictated that they shun computers.

52. In this, therefore, it is apparent to me the manifestation of their religious beliefs in shunning computers *is* acting in fulfilment of a duty mandated by their religion as they perceive it to be. This is clearly within the meaning of 'manifestation' in Article 9 as explained by the ECHR in *Eweida.*

Is there interference with the right to manifest religion?

53. But that is not the only consideration. As *Eweida* and earlier cases, such as *Cha'are Shalom Ve Tsedek v France* (ECHR 27417/95) show, the ECHR does not find there to be an interference with the right to manifest a person's religion, if that person is

> "able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief"

54. It was HMRC's case that the appellants could circumvent the need to use a computer to file online by using a computer at a public library or employing an agent to do it on their behalf. As can be seen from the findings of fact at §14, I do not accept this. Mr Blackburn's unchallenged evidence was that it was as much against his conscience to use a public computer or to ask another person to use a computer on his behalf, as to have a computer in his home. Therefore, I find that the appellants are not able to circumvent the restriction placed on their right to manifest their religion by the requirement to file online by using an agent or a public library.

55. HMRC did not suggest that there was any other method by which the appellants could circumvent the restriction. In particular, they did not suggest that the appellants should de-register for VAT, although it was the appellants' evidence that this is what they would do to circumvent the requirement to file online if they lost the appeal (§17).

56. In *Eweida,* the court indicated at § 83 that the question of whether a person is able to take steps to circumvent a restriction on their right to manifest their religion is something to be weighed in the balance. They did not say this in the context of Article 9(2)(justification) but in the context of a potential breach of Article 9(1) by restrictions placed on persons in the workplace:

> "[83] It is true … that there is case-law of the Court… which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9(1) and the limitation does not therefore require to be justified under Article 9(2)….Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."

While a restriction in the workplace placed on an employee by a private employer is not at issue in this case, nevertheless it seems to me that the same requirement of proportionality would apply.

57. HMRC relied on the *Cha'are Shalom Ve Tsedek v France* case. In that case new rules meant the complainants could no longer slaughter animals in France in accordance with the strict requirements of their religion. But the Court found Article

9(1) was not breached because the appellants were able to circumvent the restriction because meat from animals slaughtered in Belgium in accordance with their religious law was readily available for purchase in France: see §§80-81.

58. Thus, while it was not HMRC's case, I note that the appellants could de-register for VAT in order to avoid the requirement to file online. But, like HMRC, I disregard this option. The right to recover input tax is a fundamental right under European Union law: it cannot be proportional to require the appellants to give up this right and suffer the financial consequences of doing so as the cost of abiding by their religious beliefs and refusing to use a computer. This must be all the more so when UK law actually provides an exemption for persons with certain religious beliefs, albeit not for the appellants.

59. So I find that the requirement to file online was a restriction under Article 9(1) so far as these appellants are concerned in their right to manifest their religion. In particular, it restricts the manifestation of their belief that they should shun using computers, and that manifestation was in fulfilment of a duty imposed on them by their religion and/or was 'intimately linked' with their religion. I also find that the appellants have no proportionate means to circumvent the requirement.

Justification

60. The second part of any case on Convention rights is to consider whether the restriction is justified. Article 9(2) sets out the grounds on which a restriction on the right to manifest religion may be justified. HMRC accept that none of the grounds in Article 9(2) could apply and they do not seek to justify the restriction.

61. Therefore, I find that Regulation 25A was in breach of the appellants' Article 9 rights.

62. I note that the only justification which HMRC put forward in any event, and they do not suggest it is sufficient for Article 9(2) purposes, is, as mentioned, that while recognising that there needed to be a religious exemption, HMRC decided to limit it to a form that would enable an HMRC officer to easily assess whether the criteria were met. I doubt that such a reason could ever be sufficient justification under any of the provisions of the Convention. It amounts to recognising an entitlement exists but refusing to give effect to it on merely on the grounds that it is difficult to sort out genuine claims from those that are not. However, be that as it may, it is clearly insufficient justification for Article 9(2) which requires the justification to be on the basis of public safety, public order, public health, public morals or the protection of the rights of others.

Breaches of other Convention rights?

63. I note in passing that there may be other possible breaches of the Convention in so far as the appellants are concerned, but, as HMRC accepted, the Tribunal does not need to consider them if I make a finding, as I do, that there was a straightforward breach of Article 9. These possible breaches are of Article 14 combined with Article

9 and in particular either or both (a) an allegation of indirect discrimination in that failing to make an exemption for persons in the appellants' situation the UK Government has failed to make an exemption for persons in a significantly different position, or (b) an allegation of direct discrimination in that the law gives persons with certain religious beliefs (ie those within regulation 25A(6)(a)) exemption but not those persons in the same position as the appellants.

Effect on Regulation 25A of a breach of Article 9 of the Convention

64. I agree with Mr Woolfe that, if I find there to be a breach of the Convention, as I do, then I must apply s 3 HRA before s 6 HRA. This follows because if the regulations can be interpreted under s 3 to be consistent with the Convention, there is no need to disapply them under s 6.

65. Can the regulations be interpreted under s 3 to be consistent with the appellants' rights under the Convention? The only way that s 3 could be consistent with the appellants' rights under the Convention is if s 3 could be interpreted to give them exemption. This is because I have found that the obligation to file online is in breach of their right to manifest their religion.

66. There are a number of reasons why the appellants (on an ordinary interpretation) are unable to have the benefit of the exemption. This refers back to §30-33 above.

67. Firstly, as explained, they need to belong to a society one of the beliefs of which is incompatible with electronic communications. But a *strained* reading of Regulation 25A(6)(a) (which I rejected in favour of a natural reading when I was not considering the HRA) is that the "whose" refers to the beliefs of the appellants and not the beliefs of the society to which they belong. Alternatively I could give "society" a very loose interpretation and regard the *family* of the appellants as a 'society'. Either strained interpretation would bring the appellants within that part of the exemption.

68. Secondly, in addition the belief must be one with which "electronic communications" are incompatible. As Mr Woolfe pointed out, it is only certain electronic communications which the appellants consider to be incompatible with their beliefs. But a *strained* reading of Regulation 25A(6)(a) is that the belief need only refer to *some* electronic communications and not all of them and in particular it need extend no further than the use of online communications which, after all, are the subject of Regulation 25. This would be sufficient to bring the appellants within Regulation 25A(6)(a).

69. Therefore, I consider that on a strained reading, as dictated by s 3 HRA, the appellants are within the terms of the exemption contained in regulation 25A(6)(a). While that exemption is prefaced by the words

> "who the Commissioners are satisfied…."

HMRC have not sought to take a point on this and argue that my jurisdiction is supervisory. Even if it was, it seems to me that the only conclusion which HMRC

could have reached, consistent with the Convention and the 'proper' interpretation of the regulation as dictated by s 3 HRA, is that they were so satisfied.

70. The conclusion is that the appeal must be allowed. The appellants are entitled to the exemption in regulation 25A(6)(a).

71. In any event, had I not been able to interpret the regulation to be consistent with the appellants' Convention rights, then s 6 would compel me to disapply the regulation. Either way, the appellants succeed in their appeal.

72. I note in passing that the HRA is not the only route which may have been open to the appellants to challenge HMRC's decision that they must file online. As I understand it, HMRC's view is that, while the law of the European Union is applicable (via the European Communities Act of 1972), the law of the European Union adds nothing to the issues in the case as the CJEU would merely apply the Convention, which is directly applicable to the regulations in this case in any event by virtue of s 3 and s 6 HRA. I do not agree that that is the only relevance of European Law: European law has a separate requirement that implementing measures are proportionate. But as the appellants have won their appeal under the HRA it is not necessary for me to consider whether they could also have won it under European Union law and the requirement for proportionality.

73. The appeal is allowed.

74. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 2 October 2013