19 October 2011

PRESS SUMMARY

R (on the application of Davies and another) (Appellants) v The Commissioners for Her Majesty's Revenue and Customs (Respondent);
R (on the application of Gaines-Cooper) (Appellant) v The Commissioners for Her Majesty's Revenue and Customs (Respondent) [2011] UKSC 47

On appeal from: [2010] EWCA Civ 83

JUSTICES: Lord Hope (Deputy President); Lord Walker; Lord Mance; Lord Clarke; Lord Wilson

BACKGROUND TO THE APPEALS

In 1999 the Inland Revenue [now known as Her Majesty's Revenue and Customs, 'HMRC'] published a booklet known as IR20 and entitled "*Residents and Non-Residents – Liability to tax in the United Kingdom*", which offered general guidance on the word "*residence*" and the phrase "*ordinary residence*" for the purposes of an individual's liability for UK income and capital gains tax. IR20 remained operative until 2009.

The Appellants contend that, on its proper construction, IR20 contained a more benevolent interpretation of the circumstances in which an individual becomes non-resident and not ordinarily resident in the UK than did the ordinary law; alternatively that prior to 2005 it was the settled practice of HMRC to adopt such a benevolent interpretation of IR20. Either the construction or the practice gave rise (so they say) to a legitimate expectation that the benevolent interpretation would be applied to determinations of their status for tax purposes and consequently HMRC should not have determined that, during the years relevant to them, they were resident or ordinarily resident in the UK.

The First Appellants, Mr Davies and Mr James, contend that prior to 6 April 2001 they left the UK for the settled purpose of establishing and working full-time for a Belgian company. Although their wives and Mr Davies' daughters remained resident in the UK and although they returned frequently to the UK, albeit for short periods, they contend that they are entitled to be treated as non-resident and not ordinarily resident in 2001 - 2002 by reference to paragraph 2.9 of IR20 since they had gone abroad for a settled purpose and had remained abroad for at least a whole tax year.

The situation of the Second Appellant, Mr Gaines-Cooper, is different from that of the First Appellants in that it has already been conclusively determined, by reference to the ordinary law, that he was resident and ordinary resident in the UK in the years relevant to him. He contends, however, that his status should instead be determined by reference to paragraphs 2.8 and 2.9 of IR20 or to the alleged settled practice and that, on either basis, he was not resident in the UK from 1993 to 2004 nor ordinarily resident here from 1992 to 2004.

The High Court refused the Appellants permission to apply for judicial review of the determinations by HMRC that they were resident and ordinarily resident in the UK in the relevant years. The Court of Appeal granted them permission but dismissed their substantive applications. The Appellants appeal to the Supreme Court.

JUDGMENT

The Supreme Court, by a 4-1 majority, dismisses the two appeals on the grounds that the proper construction of IR20 does not support the Appellants' contentions and that there is insufficient evidence of any settled practice on the part of the HMRC by way of departure from the IR20 guidance. Lord Wilson gives the leading judgment; Lords Hope, Walker and Clarke give short concurring judgments. Lord Mance gives a dissenting judgment.

REASONS FOR THE JUDGMENT

An individual's status as being resident and ordinarily resident in the UK largely determines his liability for UK income tax and capital gains tax. In law an individual who has been resident in the UK ceases to be so resident only if he ceases to have a settled or usual abode in the UK per *Levene v Inland Revenue Comrs* [1928] AC 217 [**13 -**

14]. *Section 334 of the Income and Corporation Taxes Act 1988* (now replaced) also provided that an individual would nevertheless be deemed to have remained resident in the UK if he had left the UK for the purpose only of occasional residence abroad [**15-17**]. At law, an individual needs to effect a '*distinct break'* in the pattern of his life in the UK in order to become non-resident per *Reed v Clark* [1986] Ch 1 [**18-19**]; this mandates a multifactorial evaluation of his circumstances [**20**]. But an individual's pursuit of full-time employment abroad is likely to be sufficient to cause him to cease to be a UK resident and not to be deemed under the statute still to be a UK resident [**21**].

HMRC issued guidance on residence and ordinary residence in IR20. HMRC accepts that it is bound by whatever might be the proper construction of the guidance and that the guidance gave rise to a legitimate expectation that it would appraise any individual's case by reference to such guidance even if it failed to reflect the ordinary law [**27**]. The First Appellants contend that HMRC represented in IR20 that non-residence was achieved if an individual left the UK to take up full-time employment abroad, or left the UK permanently or for at least three years, or went abroad for a settled purpose and remained abroad for at least a whole tax year, provided in each case that any visits to the UK totalled less than six months in any one year and averaged less than 91 days each year ['the day-count proviso'] [**30**]. The Second Appellant contends that HMRC thereby represented that it was sufficient for an individual to live abroad for at least three years and to satisfy the day-count proviso, thus eliminating any need for consideration of whether he had effected a distinct break in the pattern of his life in the UK [**31**].

The majority holds that the proper construction of IR20, when read as a whole, does not support the Appellants' contentions [**45**, **64**]. Paragraph 2.1 indicated that an individual's claim to non-residence would generate consideration of various aspects of his life with a view to the identification of its usual location [**35**]. The heading to paragraphs 2.7 to 2.9 namely '*Leaving the UK permanently or indefinitely'* required consideration of the quality of his absence from the UK [**37**]. Paragraph 2.9, which stated that if an individual had gone abroad for a settled purpose, he would be treated as not resident and not ordinarily resident if his absence from the UK had covered at least a whole tax year and he had met the day-count proviso, could not be construed as a freestanding route to non-residence since there was an express link to paragraph 2.8, which required an individual to leave indefinitely [**41**]. Although its exposition of how to achieve non-residence should have been much clearer, IR20, taken as a whole, informed the ordinarily sophisticated taxpayer that he had to leave the UK permanently, indefinitely or for full-time employment; had to do more than to take up residence abroad; and had to relinquish his '*usual residence*' in the UK. It also informed him that any subsequent returns to the UK had to be no more than '*visits*' and that any '*property*' retained in the UK by him for his use had to be used for the purpose only of such visits rather than as a place of residence [**45**]. He will have concluded that such requirements in principle demanded, and might well in practice generate, a multifactorial evaluation of his circumstances [**45**, **64**] and, in summary, that he had to make a distinct break [**45**]. Alternatively, IR20 was so unclear as to communicate nothing to which legal effect might be given [**47**].

The majority holds that there was insufficient evidence that HMRC had departed from IR20 as a matter of settled practice [**58**]. Such a contention requires evidence that the practice was so unambiguous, so widespread, so well-established and so well-recognised as to amount to a specific commitment of treatment in accordance with it [**49**] but the Appellants' evidence to this effect was far too thin and equivocal [**58**].

Lord Mance, dissenting, holds that the references to going abroad permanently or living outside the UK for three years or more in paragraphs 2.7 – 2.8 referred to the taxpayer's intention regarding the duration of his absence rather than the quality of any absence or the nature of any return visits or continuing UK connections [**89**]. Paragraph 2.9 was designed to assist taxpayers who never intended to leave permanently or indefinitely, but went abroad for a settled purpose to engage in an overseas activity for an extended period of time of lesser duration [**89**]; or where the taxpayer could subsequently show he had acquired an intention to leave the UK permanently or that his actual absence covered three years from departure [**90**]. It would be remarkable if there were a requirement for '*a distinct break*' from life in the UK when no such requirement was clearly expressed [**93**] and other factors, including the day-count proviso, militated against such a requirement [**95**; **96**].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgements are public documents and are available at:
www.supremecourt.gov.uk/decided-cases/index.html