Michaelmas Term
[2011] UKSC 47
On appeal from: [2010] EWCA Civ 83

JUDGMENT

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)

before

Lord Hope, Deputy President
Lord Walker
Lord Mance
Lord Clarke
Lord Wilson

JUDGMENT GIVEN ON

19 October 2011

Heard on 6 and 7 July 2011

Appellant (Davies)
David Goldberg QC
Nicola Shaw

(Instructed by PricewaterhouseCoopers Legal LLP)

Respondent
James Eadie QC
Ingrid Simler QC
Akash Nawbatt
Christopher Stone
(Instructed by HMRC Solicitor's Office)

Appellant (Gaines-Cooper)
Lord Grabiner QC
Conall Patton

(Instructed by Squire, Sanders & Dempsey (UK) LLP)

Respondent

James Eadie QC
Ingrid Simler QC
Akash Nawbatt
Christopher Stone
(Instructed by HMRC Solicitor's Office)

LORD WILSON

A. Introduction

1. In 1999 the Inland Revenue, as it was then known and to which I will refer as the "Revenue", published a revised version of a booklet known as IR20 and entitled "Residents and non-residents – Liability to tax in the United Kingdom". The 1999 version of the booklet, which remained operative until 2009 and which I will call the booklet, offered general guidance upon the meaning of the word "residence" and of the phrase "ordinary residence" in the context of an individual's liability for UK income tax and capital gains tax. The present appeals require the court mainly to construe the guidance in the booklet. For the main contention of the appellants is that, on its proper *construction*, the guidance contained a more benevolent interpretation of the circumstances in which an individual becomes non-resident and not ordinarily resident in the UK than is reflected in the ordinary law and that the appellants had a legitimate expectation, to which the court should give effect, that the more benevolent interpretation would be applied to the determination of their status for tax purposes. Their subsidiary and alternative contention is, that, even if, when properly construed, the guidance did not contain a more benevolent interpretation than is reflected in the ordinary law, it was the settled *practice* of the Revenue to adopt such an interpretation of it and that the practice was such as to give rise to a legitimate expectation, to which again the court should give effect, that the interpretation would be applied to the determination of their status.

2. The latter limb of each of the appellants' alternative contentions is not in dispute. The Revenue accepts that, if either the proper construction of the booklet or its settled practice was as they contend, a legitimate expectation arose which requires that their status for tax purposes should be determined in accordance with the allegedly more benevolent interpretation of the circumstances in which an individual becomes non-resident and not ordinarily resident in the UK.

3. The issues arise within applications for judicial review. Mr Davies and Mr James ("the first appellants") issued their application in February 2007. They sought judicial review of determinations by the Revenue dated 28 November 2006 that they had each been resident and ordinarily resident in the UK for the tax year 2001-02. Mr Gaines-Cooper ("the second appellant") issued his application in April 2007. He sought judicial review of a determination by the Revenue dated 25 January 2007 that he had been resident and ordinarily resident in the UK for the tax years from 1993-94 to 2003-04. In each application the appellants contended

that, by reference to the allegedly more benevolent interpretation contained in the guidance or adopted by the Revenue in accordance with its settled practice, the determinations were erroneous.

4. In addition to the issue of their application for judicial review the first appellants filed a notice of appeal to the special commissioners – which would now be heard by the Tax Chamber of the First-tier Tribunal – against the determinations of the Revenue dated 28 November 2006. There was a dispute as to whether their application or their appeal should first be determined. On 10 July 2008 the Court of Appeal, in my view correctly and irrespective of its reasoning, ruled that the application should first be determined and it therefore remitted to the Administrative Court the question whether permission to apply for judicial review should be granted. The appeal of the first appellants to the commissioners has been stayed pending determination of the present proceedings.

5. But the course taken in the case of the second appellant was different. The Revenue's determination dated 25 January 2007 accorded with assessments for the years from 1992-93 to 2003-04 which it had raised against him in 2005 and against which he had appealed to the commissioners. In June/July 2006, at a hearing which proceeded for ten days, the commissioners conducted a trial of preliminary issues whether he had been:

(a) domiciled in the UK from 1992-93 to 2003-04;

(b) resident in the UK from 1993-94 to 2003-04; and

(c) ordinarily resident in the UK from 1992-93 to 2003-04.

I will explain in para 24 below why he did not dispute that he had been resident in the UK in 1992-93. In the event, by Decision dated 31 October 2006, the commissioners held that he had been domiciled, resident and ordinarily resident in the UK during all those years respectively. Against their conclusion in respect of domicile the second appellant appealed, on point of law, to the High Court; on 13 November 2007 Lewison J dismissed his appeal. The result is that the second appellant, can no longer dispute that he was domiciled in the UK from 1992-93 to 2003-04; but his UK domicile is irrelevant to the present proceedings. Nor can he continue to dispute that, according to the ordinary law, he was resident in the UK from 1993-94 to 2003-04 and ordinarily resident in the UK from 1992-93 to 2003-04. His case is, however, that, by reference to either of the contentions set out above, the ordinary law does not govern determination of the issue surrounding his UK residence and ordinary residence during those years.

6. It is unfortunate that, for whatever reason, the course taken in the case of the first appellants was not taken in the case of the second appellant. Were either of his contentions in the present proceedings to prevail, it would follow that the commissioners invested a large amount of time – as well as a conspicuous degree of care – in application to the issues of his residence and ordinary residence of principles inapplicable to them. In their Decision they expressly noted that their function was to apply the law rather than the guidance in the booklet. But, whereas issues of fact between the Revenue and the first appellants in relation to their circumstances in 2001-02 remain unresolved, the now conclusive resolution by the commissioners of the issues of fact between the Revenue and the second appellant in relation to his circumstances from 1992-93 to 2003-04 at any rate throws the effect of these proceedings into sharp relief. For, although it remains an open question whether, upon application of the ordinary law, the first appellants were resident and ordinarily resident in the UK during the year relevant to them, we know that, upon application of the ordinary law, the second appellant was resident and ordinarily resident in the UK during the years relevant to him. As the appellants rightly stress, a legitimate expectation that the ordinary law will apply to them is a matter of no legal significance in that it adds nothing to the right of every citizen to due application to him of the ordinary law.

7. A complication, to which I will turn in para 30 and para 31 below, is that, while they all contend for what I have described as a more benevolent interpretation of the circumstances in which a taxpayer becomes non-resident and not ordinarily resident in the UK than is reflected in the ordinary law, the benevolent interpretation for which the first appellants contend is not identical to that for which the second appellant contends. I infer that it is the unchallengeable findings of fact made by the commissioners against the second appellant which drive him to contend for a more ambitious interpretation than that for which the first appellants now contend.

8. In the Administrative Court permission to apply for judicial review was refused in both cases – by Wilkie J on 10 October 2008 in the case of the first appellants and by Lloyd Jones J on 3 November 2008 in the case of the second appellant. All the appellants appealed against the refusals and, when granting permission to appeal, the Court of Appeal listed the appeals to be heard together. On 10 July 2009 the court allowed their appeals against the refusals and, pursuant to CPR 52.15(4), directed that it should itself, on a later date, hear their applications for judicial review. The hearing took place on 4, 5 and 6 November 2009 and judgments were handed down on 16 February 2010. The court (Ward, Dyson and Moses LJJ) thereby dismissed the applications for judicial review and it is against the dismissals that the present appeals are brought.

B. The appellants

9. The first appellants are successful property developers. By March 2001, then based in Swansea, they each held 50% of the preference shares in Liberty Property Holdings Ltd ("Liberty"). They were also prominent in the administration of Swansea Rugby Football Club and were respected members of the local community. They decided to extend their property development business to Brussels. Whether their decision was related to a possible disposal of their shares in Liberty appears to be in dispute. At all events, in March 2001, they caused a company, in which each of them had a one-third shareholding, to be incorporated in Belgium. Furthermore they began to rent furnished apartments in the same block in Brussels and began to reside in them, at any rate in part, prior to 6 April 2001. They contend that, prior to 6 April 2001, they had begun to work full-time for the Belgian company in the field of property development; that, alternatively, during the weeks after 5 April 2001, they had begun to work full-time for it; that, from the date – whatever it was – when their full-time work for it began, they have worked for it full-time throughout a number of years; and that it has become extremely successful. On the other hand they accept that neither of them sold their homes in Swansea; that their wives, and in the case of Mr. Davies his daughters, remained resident, or partly resident, in Swansea; and that they returned very frequently, albeit not for lengthy periods, to their homes in Swansea in order to be with their families or in connection with Liberty (of which they remained non-executive directors) or with rugby in Swansea or with other matters of local importance.

10. In December 2001 Liberty acquired the first appellants' shares in itself for a consideration of £4.5m each. Although the capital gain within the consideration remains unidentified, it is clearly important for the first appellants that they should be recognised at law to have been neither resident nor ordinarily resident in the UK in 2001-02.

11. The second appellant is a successful entrepreneur. His domicile of origin was in England (and Wales) and he remains a British citizen. His case before the commissioners was that in 1976, when aged 39, he acquired a domicile of choice in the Seychelles. But, by their Decision, we know that he remained domiciled in England until, at any rate, 2003-04. Between 1976 and 2004 he led an international existence, assiduously charted in their Decision. But, by reference inter alia to two substantial homes successively maintained and to a significant extent occupied by him in Berkshire and in Oxfordshire throughout those years and to the presence in England, following 1977, of the wife whom he was ultimately to marry in 1993 and also, from his birth in 1998 until after 2004, of their son, the commissioners concluded that from 1992 to 2004 the second appellant "dwelt permanently" in the later home in England and that thus, notwithstanding his residence in the

Seychelles throughout those years, he was resident and ordinarily resident in the UK during the years under review.

C. Residence as a matter of law

12. The status of being "resident" in the UK creates liability to UK tax under provisions of the Income Tax (Earning and Pensions) Act 2003 and the Income Tax (Trading and Other Income) Act 2005. But the word itself is not currently defined in statute. In 1936 the Income Tax Codification Committee appointed by the Chancellor of the Exchequer issued a Report (Cmd 5131) in which, in para 59 of Volume I, it concluded that the lack of clarity surrounding the word "residence" was intolerable and in which, in Volume II, it set out a proposed Bill including, in clause six, a definition of the circumstances in which an individual would be resident in the UK. But the Bill was never enacted. Under active consideration today, however, is the government's proposal to introduce a full statutory definition of tax residence for individuals; and the time for response to its initial consultation paper, issued in June 2011 by HM Treasury and HMRC and entitled "Statutory definition of tax residence: a consultation", has recently expired.

13. In the absence to date of any statutory definition of residence taxpayers and their advisers have had to turn to the guidance given by the courts – and, importantly, also by the Revenue – in relation to its meaning. But the courts have not – nor, as we shall see, has the Revenue – found it easy to formulate the guidance. For more than 80 years the leading authority has been *Levene v Inland Revenue Comrs* [1928] AC 217. Until 1919 Mr. Levene was resident and ordinarily resident in the UK. During the next five years he spent about five months (mainly in the summer) each year, staying in hotels in the UK and receiving medical attention or pursuing religious and social activities. He spent the remaining months staying in hotels abroad. The appellate committee declined to disturb the conclusion of the commissioners that Mr Levene had remained resident and ordinarily resident in the UK during those years. Viscount Cave, the Lord Chancellor, adopted, at p 222, the definition of "reside" given in the Oxford English Dictionary, namely "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place"; and, of these three descriptions, the Lord Chancellor chose, no doubt as being the most helpful, that of a "settled or usual abode".

14. Since 1928, if not before, it has therefore been clear that an individual who has been resident in the UK ceases in law to be so resident only if he ceases to have a settled or usual abode in the UK. Although, as I will explain in para 19 below, the phrase "a distinct break" first entered the case law in a subtly different context, the phrase, now much deployed including in the present appeals, is not an inapt description of the degree of change in the pattern of an individual's life in the

UK which will be necessary if a cessation of his settled or usual abode in the UK is to take place.

15. To the legal analysis of a taxpayer's residence must be added a provision which can be traced back to section 10 of an Act of 1799 (39 Geo III, c 13) which introduced income tax in order "to raise an ample Contribution for the Prosecution of the War" against Napoleon. Parliament has recently placed the provision, in modified form and in clearer terms than those of its several predecessors, in section 829 of the Income Tax Act 2007; but it is convenient to cite the section in which it was to be found when the booklet was operative and indeed during the years for which assessments have been raised against the appellants. The section was section 334 of the Income and Corporation Taxes Act 1988 and it provided as follows:

> "Commonwealth citizens and others temporarily abroad
>
> Every Commonwealth citizen or citizen of the Republic of Ireland –
>
> (a) shall, if his ordinary residence has been in the United Kingdom, be assessed and charged to income tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad, and
>
> (b) shall be charged as a person actually residing in the United Kingdom upon the whole amount of his profits or gains…"

16. The effect of this provision is – or should be – now clear. If an individual (restricted under the 1988 Act to Commonwealth and Irish citizens) who has been resident and ordinarily resident in the UK ceases to be resident in the UK, he will nevertheless be deemed to have remained resident in the UK if he has left the UK for the purpose only of occasional residence abroad. So the provision puts a second hurdle in his way in that, in order to escape liability as a resident, he needs to establish not only that he has become non-resident but also that his change to non-residence was not for the purpose only of occasional residence abroad.

17. That such is the effect of the statutory provision can be discerned in the opinions in *Levene* itself. For the Lord Chancellor (with whose opinion Lord Atkinson agreed) and Lord Warrington of Clyffe both held that the appellant could not overturn the conclusion that he had remained resident and ordinarily resident in the UK and, at pp 224 and 232, they each made clear that, while they considered

that alternatively he may well have fallen foul of the provision (which was then in General Rule 3 in the First Schedule to the Income Tax Act 1918), they did not rest their decision upon it. Viscount Sumner, on the other hand, at p 227, expressly rested his decision upon it.

18. In *Reed v Clark* [1986] Ch 1, however, Nicholls J made it expressly clear that such was the effect of the statutory provision. Mr Dave Clark, who had been resident and ordinarily resident in the UK, moved to Los Angeles on 3 April 1978 and made his home and place of business there until 2 May 1979, when, not having set foot in the UK in the interim, he returned to reside here. Nicholls J dismissed the Revenue's appeal against the ruling of the commissioners that he had not been resident nor ordinarily resident in the UK in 1978-79. He rejected each of the Revenue's alternative arguments that (a) on the primary facts found by the commissioners Mr Clark had been so resident and ordinarily resident and (b) for the purposes of the provision (which was then in section 49 of the Income and Corporation Taxes Act 1970) he had left the UK for the purpose only of occasional residence abroad. Nicholls J, at p 15C, accepted the Revenue's submission that the provision brought into the tax net those who were not resident in the UK at all in the year of assessment. He held, at p 16H, that "occasional residence" was the converse of "ordinary residence" and he cited, at p 17D, the statement of Lord Scarman in *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309, 343 that "ordinary residence" referred "to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life or the time being, whether of short or of long duration". By that route Nicholls J came to contrast "occasional residence" with residence for a settled purpose. In observing, at p 18A, that his construction might give little scope in practice for the operation of the statute as an independent charging provision, Nicholls J perhaps had in mind that, were the person's residence abroad not to have been for a settled purpose, his settled or usual abode might have remained in the UK with the result that, in the light of the definition adopted in *Levene*, he would not have ceased to be a UK resident and so would already have fallen at the first hurdle. Nevertheless the concepts of settled purpose and settled abode are clearly different. Nicholls J proceeded to hold, at p 18G, that there had been a "distinct break" in the pattern of Mr Clark's life in the UK such that his becoming non-resident had not been for the purpose only of occasional residence abroad.

19. In referring to a "distinct break" Nicholls J, as he acknowledged at 14F, was adopting a phrase first used in this context in the decision of the Court of Session in *Inland Revenue Comrs v Combe* (1932) 17 TC 405. Until 1926 Captain Combe was resident and ordinarily resident in the UK. Then he went to New York to work as a broker for a firm on Wall Street. The objective was that he should become its European representative and, in furtherance of it, he returned to the UK, staying in hotels, for 52 days, 175 days and 181 days during each of the following three years. In upholding the conclusion that he was not liable to tax as a UK resident

for those years the court proceeded straight to the statutory provision (which then remained in General Rule 3) and concluded that the captain had not left the UK for the purpose only of occasional residence abroad. It was implicit in its conclusion that he *had* left the UK in the sense of becoming non-resident in it. When, therefore, Lord Sands observed, at p 411, that "there was a distinct break" in what he described as the captain's "residence" in the UK, it was with a view to explaining his conclusion that the captain's residence abroad had been more than occasional. In *Reed v Clark* Nicholls J applied the phrase in precisely the same context and helpfully added that what was required distinctly to be broken was "the pattern of the taxpayer's life" [1986] Ch 1, 18.

20. It is therefore clear that, whether in order to become non-resident in the UK or whether at any rate to avoid being deemed by the statutory provision still to be resident in the UK, the ordinary law requires the UK resident to effect a distinct break in the pattern of his life in the UK. The requirement of a distinct break mandates a multifactorial inquiry. In my view however the controversial references in the judgment of Moses LJ in the decision under appeal to the need in law for "severance of social and family ties" pitch the requirement, at any rate by implication, at too high a level. The distinct break relates to the pattern of the taxpayer's life in the UK and no doubt it encompasses a substantial *loosening* of social and family ties; but the allowance, to which I will refer, of limited visits to the UK on the part of the taxpayer who has become non-resident, clearly foreshadows their continued existence in a loosened form. "Severance" of such ties is too strong a word in this context.

21. It became clear from decisions like *Combe* that, if a taxpayer left the UK in order to pursue employment abroad which was full-time, it was likely not only that he would cease to be a UK resident but also that he would escape being deemed still to be a UK resident under the statutory provision. For, from the fact that the employment was full-time, it was likely to follow that he had made a distinct break in the pattern of his life in the UK. By section 11 of the Finance Act 1956 the position of the full-time employee or other worker abroad was strengthened by a provision (now in effect contained in section 830 of the 2007 Act) that, in determining whether he remained resident in the UK, regard should not be had to any place of abode in the UK which he maintained for his use. As I will demonstrate in para 36 below, the Revenue also sought to eliminate any remaining element of doubt about the proper treatment of the full-time employee abroad by providing in the booklet that, subject to specified conditions of ostensibly simple application, he would – definitely – be treated as not resident, nor ordinarily resident, in the UK. In his case, therefore, the Revenue was dispensing with the need for the multifactorial inquiry.

22. In its piecemeal contribution to the law relating to UK residence for tax purposes, Parliament has also made provision in respect of the individual who has

been non-resident in the UK and challenges a contention that he has become resident here for tax purposes. He is, as Nicholls J pointed out in *Reed v Clark* above, at p 16G, the converse of the UK resident who contends that he has become non-resident in the UK and who, as I have explained, is required by statute also to address the purpose of his change to non-residence. Until 1993 Parliament's provision in respect of the former individual, now in effect to be found in sections 831 and 832 of the 2007 Act, was that, subject to one bright-line rule, he did not become resident in the UK for income tax purposes if, in the words of subsections (1)(a) and (2) of section 336 of the 1988 Act (entitled "Temporary Residents in the United Kingdom"), he was "in the United Kingdom for some temporary purpose only and not with any view or intent of establishing his residence there". The bright-line rule, set out in subsection (1)(b) and, albeit in slightly different terms, in subsection (2), was that he had "not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment"; and both subsections concluded by making clear that, if he had so resided for such a period in any year, he was chargeable to UK income tax for that year.

23. Until 1993, however, the "available accommodation rule", abrogated in 1956 in respect of the full-time employee abroad, continued to apply to the person who claimed to be only a temporary resident within the meaning of section 336: its effect was that, were living accommodation in the UK to have been available for his use during any year of assessment, any presence on his part within the UK during that year would be taken to have been otherwise than "for some temporary purpose only and not with any view or intent of establishing his residence there". The application to him of the available accommodation rule was abrogated, with effect from 1993-94, by the insertion into section 336 of subsection (3).

24. It will now be clear why the second appellant did not dispute that he had been resident in the UK in 1992-93, namely the first of the 12 years of assessment. Before the commissioners he unsuccessfully contended that the relevant inquiry was not whether he had become non-resident in the UK in 1976 but whether, having then become non-resident, he had again become resident in the UK in any of the years of assessment. In other words he unsuccessfully contended that the parameters of the inquiry were set by section 336, rather than by section 334, of the 1988 Act. But, in that in 1992-93 living accommodation in the UK had been available for his use and in that during that year he had been present in the UK albeit not for a total of six months, he was constrained to concede that, even on his approach, he was in principle liable to tax as a UK resident for that first year.

D. Revenue guidance

25. There can be no better introduction to this section than in the words of Moses LJ in his judgment in the decision under appeal:

> " 12. The importance of the extent to which thousands of taxpayers may rely upon guidance, of great significance as to how they will manage their lives, cannot be doubted. It goes to the heart of the relationship between the Revenue and taxpayer. It is trite to recall that it is for the Revenue to determine the best way of facilitating collection of the tax it is under a statutory obligation to collect. But it should not be forgotten that the Revenue itself has long acknowledged that the best way is by encouraging co-operation between the Revenue and the public… Co-operation requires fair dealing by the Revenue, and frank and open dealing by the public. Of course the Revenue may refuse to give guidance and re-create a situation in which the taxpayers and their advisers are left to trawl through the authorities to find a case analogous to their own, or, if they are fortunate, a statement of principle applicable to their circumstances. But since 1973, in a field fraught with borderline cases relating to an enormous variety of circumstances, the Revenue has chosen to confer what presumably it regarded as a benefit on taxpayers who wished to know whether they were likely to be treated as resident or not."

26. The primary duty of the Revenue is to collect taxes which are properly payable in accordance with current legislation but it is also responsible for managing the tax system: section 1 of the Taxes Management Act 1970. Inherent in the duty of management is a wide discretion. Although the discretion is bounded by the primary duty (*R(Wilkinson) v Inland Revenue Comrs* [2005] 1 WLR 1718, para 21 per Lord Hoffmann), it is lawful for the Revenue to make concessions in relation to individual cases or types of case which will, or may, result in the non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return: *Inland Revenue Comrs v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617, 636 per Lord Diplock. In particular the Revenue is entitled to apply a cost-benefit analysis to its duty of management and in particular, against the return thereby likely to be foregone, to weigh the costs which it would be likely to save as a result of a concession which cuts away an area of complexity or likely dispute.

27. The Revenue accepts first that, were it in the booklet to have made the representations about the circumstances necessary for the achievement of non-

residence for which either the first appellants or the second appellant contend, such would have been within its powers; and second that, for so long as the representations remained operative, an individual would have had, and therefore have been able to enforce, a legitimate expectation that it would appraise his case by reference to them notwithstanding that they failed to reflect the ordinary law.

28. In this connection, however, the Revenue refers to the decision of the Divisional Court of the Queen's Bench Division in *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545. It was advantageous to members of syndicates at Lloyd's that funds required to be held for them by their underwriters should be so invested as to yield what the Revenue would accept to be capital gain rather than as income. Prior to their investment in American and Canadian index-linked bonds underwriters had, by their agents, inquired of the Revenue whether the uplift for indexation to be achieved on sale or redemption of the bonds would be treated as capital gain rather than as income. They unsuccessfully contended that the Revenue's responses constituted an affirmative to which it should be held irrespective of whether such treatment of the uplift was correct as a matter of law. Having rejected the Revenue's argument that any such affirmative response would have been outside its powers, Bingham LJ proceeded, at p 1569, as follows:

> "I am, however, of the opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the revenue the factual context, including the position of the revenue itself, is all-important. Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law… Such taxpayers would appreciate, if they could not so pithily express, the truth of the aphorism of "One should be taxed by law, and not be untaxed by concession": *Vestey v Inland Revenue Comrs* [1979] Ch 177, 197 per Walton J. No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the revenue is of a less formal nature a more detailed inquiry is in my view necessary… First, it is necessary that the taxpayer should have put all his cards face upwards on the table… Secondly, it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification."

The court held that the Revenue's statements about the treatment of the uplift had not been clear enough to give rise to any legitimate expectation.

29. In that the representations in the booklet are formally published by the Revenue to the world rather than being its response to approaches of a less formal nature, a literal reading of Bingham LJ's judgment suggests that, although they are binding in relation only to cases falling clearly within them, the requirement that they should be "clear, unambiguous and devoid of relevant qualification" does not apply to them. But in my view a case would fall clearly within them only if they were clear, unambiguous etc; and in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453, Lord Hoffmann, at para 60, applied the quoted words of Bingham LJ to a formal publication, namely a press announcement, on the part of the Foreign Secretary. It is better to forsake any arid analytical exercise and to proceed on the basis that the representations in the booklet for which the appellants contend must have been clear; that the judgement about their clarity must be made in the light of an appraisal of all relevant statements in the booklet when they are read as a whole; and that, in that the clarity of a representation depends in part upon the identity of the person to whom it is made, the hypothetical representee is the "ordinarily sophisticated taxpayer" irrespective of whether he is in receipt of professional advice.

E. The alleged representations

30. The first appellants contend that, in the booklet, the Revenue represented that an individual would be accepted as not resident and not ordinarily resident in the UK if he:

> (a) left the UK to take up full-time employment abroad (paragraph 2.2 of the booklet); or
>
> (b) left the UK permanently or for at least three years (paragraph 2.8); or
>
> (c) went abroad for a settled purpose and remained abroad for at least a whole tax year (paragraph 2.9)

provided, in each case, that his visits to the UK during the years following departure totalled less than six months in any tax year and averaged less than 91 days in each such year ("the day-count proviso"). The first appellants accept that, if he is to become non-resident in the UK, the law requires an individual to effect a distinct break in the pattern of his life in the UK such as to demonstrate that, when subsequently present in the UK, he is here only as a visitor; and they contend that, by (a), (b) and (c) above, the Revenue reflected in a simplified form the

requirement of a distinct break. Their primary contention is that, irrespective of whether they fell within (a) or (b), they fell within (c). They therefore contend that, if (as appears to be the case) they went abroad for a settled purpose for at least one tax year and satisfied the day-count proviso, the Revenue is bound to acknowledge their status as having been neither resident nor ordinarily resident in the UK in 2001-02 notwithstanding that, were their cases to be appraised on a wider basis, they might not have effected a distinct break in the pattern of their life in the UK.

31. The second appellant, by contrast, contends that, in the booklet, the Revenue represented that a taxpayer would be accepted as not resident and not ordinarily resident in the UK if he went to live abroad for at least three years and satisfied the day-count proviso. His contention is that, in the interests of simplicity, the Revenue thereby cut away its need – or entitlement – to afford any independent consideration to whether he had effected a distinct break in the pattern of his life in the UK.

F. The proper construction of the booklet

32. The preface to the booklet stated:

> "The notes in this booklet reflect the law and practice at October 1999. They are not binding in law and do not affect rights of appeal about your own tax.
>
> You should bear in mind that the booklet offers general guidance on how the rules apply, but whether the guidance is appropriate in a particular case will depend on all the facts of that case. If you have any difficulty in applying the rules in your own case, you should consult an Inland Revenue Tax Office…"

The first paragraph quoted does not advance the Revenue's case: no doubt it intended the booklet to reflect the law but it accepts that, were the booklet to have failed to do so, it would be bound by its terms irrespective of the discrepancy. The second paragraph is however of greater significance: it stressed that the guidance was general; that its application to a particular case depended upon its facts; and that, in the event of any difficulties in its application to his case, the individual should consult a Revenue tax office. Neither in 1976 nor at any time thereafter did the second appellant seek advice from a tax office, still less a ruling on residence such as was available until the introduction of self-assessment on 6 April 1996. Nor did the first appellants (who were at all material times advised by

PricewaterhouseCoopers LLP) seek such advice in advance of their going to Brussels in March 2001.

33. Paragraph 1.1 of the booklet stated:

> "The terms 'residence' and 'ordinary residence' are not defined in the Taxes Acts. The guidelines to their meaning in this Chapter and in Chapters 2 (residence status of those leaving the UK) and 3 (those coming to the UK) are largely based on rulings of the Courts. This booklet sets out the main factors that are taken into account, but we can only make a decision on your residence status on the facts in your particular case."

The paragraph therefore told the taxpayer that the booklet set out only the "main" factors to be taken into account and repeated that the decision in relation to residence could be made only upon an evaluation of the facts of the case.

34. Paragraph 1.4 of the booklet stated:

> "It is possible to be resident (or ordinarily resident) in both the UK and some other country (or countries) at the same time. If you are resident (or ordinarily resident) in another country, this does not mean that you cannot also be resident (or ordinarily resident) in the UK."

So here the taxpayer learned that it would be insufficient for him to become resident abroad: if he was to become non-resident in the UK, more was needed.

35. Crucial to the appeals is the second chapter of the booklet, entitled "Leaving the UK". Paragraph 2.1, headed "Short absences", stated:

> "You are resident and ordinarily resident in the UK if you usually live in this country and only go abroad for short periods – for example, on holiday or on business trips."

The appellants stress the reference to "short periods" and they reasonably submit that the day-count proviso was the other side of the same coin. The Revenue, by contrast, stresses the word "usually". I accept its submission that the word conveyed to the reasonably sophisticated taxpayer that the inquiry would

encompass consideration of various aspects of his life with a view to the identification of its usual location.

36. Paragraph 2.2, headed "Working abroad", stated:

> "If you leave the UK to work full-time abroad under a contract of employment, you are treated as not resident and not ordinarily resident if you meet all the following conditions
>
> - your absence from the UK and your employment abroad both last for a least a whole tax year
>
> - during your absence any visits you make to the UK
>
> - total less than 183 days in any tax year, and
>
> - average less than 91 days a tax year. (The average is taken over the period of absence up to a maximum of four years… Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or a member of your immediate family, are not normally counted for this purpose.)"

The second bullet point, which has two parts, represented the day-count proviso. Although the first part of it was statutory (now section 830 of the 2007 Act), the second part of it reflected long-established Revenue practice: thus, if the individual visited the UK for six months or more in any year of assessment, he was treated as resident here for that year but, if he did not do so and his visits to the UK averaged less than 91 days each year during up to four tax years, he was treated as not resident here for those years. Reluctant though I am to be distracted from consideration of the substantive issues in the appeals, it is convenient here to append a footnote about an alternative ground of appeal on the part of the first appellants, which their leading counsel described as peripheral and which he did not address in oral argument save to decline formally to abandon. The argument is based on their alternative, fall-back assertion that it was only after 5 April 2001, namely during the weeks which followed it, that they began the full-time work in Belgium which has since proceeded for a number of years and at least throughout the year 2002-03. On that basis the argument is that the Revenue is required to treat the first appellants as not resident and not ordinarily resident in the UK even in the crucial year 2001-02 because they had left the UK prior to the start of that year and because they had left "to work full-time abroad" even though the work

did not begin until after the start of that year. But no rational taxpayer could imagine that the route to non-residence by his pursuit of full-time employment abroad throughout a tax year could be successfully traversed even in relation to a preceding year. It is only the individual's full-time employment abroad which yields the distinct break in the pattern of his life in the UK (see para 21 above) and the terms of paragraph 2.2 adequately convey its status as a pre-requisite to non-residence.

37. Paragraphs 2.7 to 2.9, which lie at the centre of the appeals, were headed "Leaving the UK permanently or indefinitely" so their content was entirely governed by that rubric, in which the two adverbs provided important colour to the type of "leaving" which the Revenue was proposing to address. I also agree, however, with the observation of Moses LJ that:

> "It makes no sense to construe "leave" when qualified by the adverbs permanently or indefinitely as referring to the process of going abroad. They clearly require consideration of the quality of the absence." (para 44)

38. The paragraphs stated:

> "2.7 If you go abroad permanently, you will be treated as remaining resident and ordinarily resident if your visits to the UK average 91 days or more a year… Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or your immediate family, are not normally counted for the purposes of averaging your visits.
>
> 2.8 If you claim that you are no longer resident and ordinarily resident, we may ask you to give some evidence that you have left the UK permanently, or to live outside the UK for three years or more. This evidence might be, for example, that you have taken steps to acquire accommodation abroad to live in as a permanent home, and if you continue to have property in the UK for your use, the reason is consistent with your stated aim of living abroad permanently or for three years or more. If you have left the UK permanently or for at least three years, you will be treated as not resident and not ordinarily resident from the day after the date of your departure providing…[viz the day-count proviso].

2.9 If you do not have this evidence, but you have gone abroad for a settled purpose (this would include a fixed object or intention in which you are going to be engaged for an extended period of time), you will be treated as not resident and not ordinarily resident from the day after the date of your departure providing

- your absence from the UK has covered at least a whole tax year, and

- your visits to the UK since leaving [satisfy the day-count proviso].

If you have not gone abroad for a settled purpose, you will be treated as remaining resident and ordinarily resident in the UK, but your status can be reviewed if

- your absence actually covers three years from your departure, or

- evidence becomes available to show that you have left the UK permanently providing [viz the day-count proviso]."

39. On any view the three paragraphs were very poorly drafted. But does it follow that, when read in conjunction with the other parts of the booklet to which I have drawn attention, they amounted to a clear representation of the types for which the appellants respectively contend? Regrettable though it would be, a confusing presentation would be likely to have lacked the clarity required by the doctrine of legitimate expectation.

40. There is now a preliminary dispute between the appellants about the nexus between paragraph 2.9 and paragraphs 2.7 and 2.8. For in this court the first appellants for the first time contend that paragraph 2.9 charts a free-standing route to non-residence; to be specific, that the subject of paragraph 2.7 is leaving the UK permanently, that that of paragraph 2.8 is leaving it permanently or indefinitely and that that of paragraph 2.9 is leaving it for a settled purpose; and that they themselves travelled by the route charted in paragraph 2.9. The second appellant, by contrast, accepts the Revenue's contention – as did the first appellants in the

Court of Appeal - that paragraph 2.9 was linked to paragraph 2.8 and charted only a different way in which an individual might establish that he had left the UK indefinitely.

41. In one sense it comes as no surprise that the Revenue should explain that paragraph 2.9 (which first appeared in the 1996 version of the booklet, as paragraph 2.10) was introduced as a result of the decision in 1985 of Nicholls J in *Reed v Clark* [1986] Ch 1. For, by referring to the need for a "settled purpose", the paragraph introduces a phrase adopted by Nicholls J: see para 18 above. But the paragraph is a garbled reference to the decision: for Nicholls J was describing the settled purpose not as a route to becoming non-resident but as the means by which the taxpayer who had become non-resident escaped being treated otherwise under what is now section 829 of the 2007 Act. Nevertheless, as all parties agree, the exercise required by these appeals is not to compare the booklet with the law but to construe it by reference to its own terms; and, as a matter of construction, the contention of the first appellants that paragraph 2.9 was independent of paragraph 2.8 is in my view patently incorrect. It was grouped with paragraphs 2.7 and 2.8 under the heading "Leaving the UK permanently or indefinitely"; and, following paragraph 2.8 in which the Revenue offered one example of evidence which might satisfy it that the individual had left either permanently or indefinitely, paragraph 2.9, which, by its opening hypothesis "if you do not have this evidence", made an express link with paragraph 2.8, purported to identify another situation in which the Revenue would accept that he had left indefinitely, namely that in which he had gone abroad for a settled purpose (including for a project in which he was to be engaged for an extended period of time) and satisfied the other specified conditions.

42. So the three paragraphs must be read compendiously. They shared one important feature: they all referred to "visits" on the part of the individual to the UK. If he usually resides in the UK, he will go abroad as a visitor but, if he has left the UK and has adopted a usual residence abroad, he will come to the UK as a visitor: we are not visitors in the country of our usual residence. The reference to visits to the UK therefore underlined the need for a change in the individual's usual residence and therefore, by ready inference, for a distinct break in the pattern of his life in the UK.

43. Another important feature lay in paragraph 2.8. The evidence there suggested was that the individual had taken steps to create a permanent home abroad. He was then warned however that, if he continued to have "property" in the UK for his use, his reason for doing so must have been consistent with his stated aim of living abroad permanently or for at least three years. The suggestion was therefore that it might be permissible for him to maintain in the UK not a "home" but "property… for [his] use" but that, if he did so, he would fail to secure

non-resident status unless his reason for doing so survived the test of consistency with his stated aim.

44. In the course of his submissions leading counsel for the first appellants invited the court to consider a document not placed before the Court of Appeal. It is entitled "Notes on NON-RESIDENCE, ETC" and, when an individual asks the Revenue to supply him with the supplementary pages of a tax return referable to his claim to non-residence, it will supply not only the extra pages but also the Notes in order to assist him in completing them. The Notes put before the court were referable to the tax year 2001-02, being the crucial year for the first appellants. By question 2A, first inserted into the Notes supplied for the year 2000-01, the individual was invited to ask himself "Have you left the UK?" In order to help him answer the question, the Notes said:

> "Even if you make frequent trips abroad in the course of your employment, you will not have 'left' the UK if you usually live in the UK, and your home and settled domestic life remain there."

The premise of the question which followed was that prior to the relevant tax year the individual had 'left' in the above sense and, on that basis, he was invited to consider whether he had lived or had intended to live outside the UK for at least three years (reflective of paragraph 2.8 of the booklet) or had worked abroad full-time "throughout" the relevant tax year (reflective of paragraph 2.2, when properly construed) or had been abroad for a settled purpose (reflective of paragraph 2.9). The proposition in the Notes quoted above was a clear (and, as it happens, also a reasonably accurate) definition of "leaving" the UK for the purposes of attaining non-residence; and, inasmuch as the Notes had apparently been furnished in that form to everyone who submitted a claim to the Revenue that he had become non-resident for any year after 1999-2000, it would, in the event of any significant doubt about the meaning of the booklet, have been legitimate to construe it in the light also of the quoted proposition. On any view it is inconsistent with the contention of the first appellants, accepted by Lord Mance, that the Revenue was treating as non-resident an individual who had done no more than to go abroad for a settled purpose (and to remain there for at least a year and to satisfy the day-count proviso) irrespective of whether he had continued usually to live in the UK and to make his home and settled domestic life here.

45. At last comes the moment in which to stand back from the detailed textual analysis of the booklet and to survey the wood instead of the trees. Unlike – so it seems – its successor, namely HMRC6, the exposition in the booklet of how to achieve non-resident status should have been much clearer. My view however, is that, when all the passages in it to which I have referred were considered together,

it informed the ordinarily sophisticated taxpayer of matters which indeed were unlikely to come as a surprise to him, namely that:

> (a) he was required to "leave" the UK in a more profound sense than that of travel, namely permanently or indefinitely or for full-time employment;
>
> (b) he was required to do more than to take up residence abroad;
>
> (c) he was required to relinquish his "usual residence" in the UK;
>
> (d) any subsequent returns on his part to the UK were required to be no more than "visits"; and
>
> (e) any "property" retained by him in the UK for his use was required to be used for the purpose only of visits rather than as a place of residence.

He will surely have concluded that these general requirements in principle demanded – and might well in practice generate – a multifactorial evaluation of his circumstances on the part of the Revenue albeit subject to appeal. If invited to summarise what the booklet required, he might reasonably have done so in three words: a distinct break.

46. The evaluative nature of the inquiry described in the booklet was fairly recognised by the first appellants' accountant himself when he stated as follows:

> "[W]hat IR20 does (according to the understanding which I have always had as a practitioner) is to set out certain factors which will be taken into account. Some of these factors relate to the quality of the links which the taxpayer has with another country (eg fulltime employment for at least a whole tax year, settled purpose, acquiring accommodation abroad, living outside the UK for three years or more), and some of the factors relate to the extent of the links retained by the taxpayer with the UK (eg the number of days spent here, retaining a property in the UK). It follows from this that HMRC have set out their view of the quality of the links with another country and the extent of the remaining links with the UK which should together be taken into account in determining whether someone has ceased to be UK resident. The quality of the links with

the other country are relevant insofar as they help to determine the extent to which the taxpayer has removed himself from the UK."

47. Were I wrong, however, to have concluded that the booklet succeeded in conveying to the taxpayer the information to which I have referred in para 45 above, it would in no way follow that, on this, the main, basis upon which they are advanced, the appeals should succeed. Were I wrong, I would feel driven to conclude only that the treatment in the booklet of the means of becoming non-resident was so unclear as to communicate to its readers nothing to which legal effect might be given. Such a conclusion would leave the appeals far short of their necessary foundation, namely of clearly specified criteria by reference to which they legitimately expected their claims to non-residence to be determined.

G. The alleged change of practice

48. I summarise the subsidiary and alternative contention of the appellants as follows: that, even if, on a proper construction of the booklet, the Revenue did not thereby make the representations for which they have respectively contended, its settled practice over many years was nevertheless to determine claims to non-residence on the footing that, in the booklet, it had made such representations; that its settled practice continued until a date shortly after all the years of assessment (ie until a date in 2004-05); that its practice thereupon changed in that it began to conduct, including in relation to the appellants, a general inquiry into whether the taxpayer had effected a distinct break in the pattern of his life in the UK; and that the Revenue had thus raised in the appellants a legitimate expectation that it would determine their claims in respect of the years of assessment by reference to its earlier settled practice.

49. It is an arresting proposition that, having published and regularly revised a booklet in which it purported to explain how it would determine claims by individuals to have become non-resident and of which it encouraged widespread use, the Revenue departed from it as a matter of settled practice. Clear evidence would be necessary in order to make the proposition good. But there is another reason for the need for clear evidence in this connection. For, whereas, in the *booklet* the Revenue gave unqualified assurances about its treatment of claims to non-residence which, if dishonoured, would readily have fallen for enforcement under the doctrine of legitimate expectation, it is more difficult for the appellants to elevate a *practice* into an assurance to taxpayers from which it would be abusive for the Revenue to resile and to which under the doctrine it should therefore be held. "[T]he promise or practice…must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured": *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755, per Laws LJ at [43]. The result is that the appellants need evidence that the

practice was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it.

50. The appellants place before the court statements by their tax advisers and others that in their experience the Revenue did not prior to 2004-05 conduct any general inquiry into whether a person who claimed to have become non-resident pursuant to paragraphs 2.7 to 2.9 of the booklet had effected a distinct break in the pattern of his life in the UK; and they add that, so far as they know, it was the settled practice of the Revenue not to do so and thus that the general inquiries in that regard which were directed at the appellants from 2004-05 onwards represented an unheralded departure from it. By its witness statements the Revenue disputes the existence of any such alleged practice and, in an argument which found favour in the Court of Appeal, suggests that the appellants' witnesses may have mistakenly deduced the existence of the alleged earlier practice from what was on any view a later increase in the level of Revenue scrutiny of claims to have become non-resident.

51. In any event, however, the appellants accept that, in order to make good their case, they need evidence beyond the generalised, anecdotal understanding of their witnesses, however highly regarded; and in this regard they primarily rely on a letter, entirely unrelated to the cases before the court, from a Revenue Inspector, Mr Wilks, to an accountant, Mr Sawyer, dated 7 July 1999, which was never published and of which the appellants learnt only following the Revenue's disclosure of it in the course of these proceedings. I should add that, in this court albeit not in the Court of Appeal, the appellants have also relied on a document published by the Institute of Chartered Accountants in England and Wales, dated 30 November 1994, in which, no doubt accurately, it recorded the Revenue as confirming that, were a UK resident to "retire" overseas to a house which he owned but to retain ownership of another house in the UK to which he were to make regular "holiday visits" of 50 days each year, he would have become non-resident and not ordinarily resident in the UK; but in my view the quoted words sufficiently betoken a distinct break.

52. In his letter to Mr Sawyer, Mr Wilks wrote:

> "As promised… I'm writing to confirm the way we approach the residence status of individuals who leave the UK for purported permanent residence but who cannot produce the sort of evidence mentioned in paragraph 2.9 of IR20.

> Subject only to the caveat that the following guidance is general and particular cases will always need to be decided on their own specific facts, I can say that provided such an individual
>
> - lives outside the UK for 3 years or more from the date of departure, and
>
> - after departure has not visited the UK for as much as 183 complete days in any one tax year or 91 or more days a year on average
>
> then we will, after the 3 years has elapsed, accept the claim to have become not resident and not ordinarily resident.
>
> Specifically, circumstances such as
>
> - the spouse and/or children having continued to live in the UK
>
> - a residence having been maintained here
>
> - duties having continued to be performed in the UK
>
> will not prejudice the claim to non-residence."

The reference by Mr Wilks to IR20 was to the 1996 version and, in the 1999 version, paragraph 2.9, which he cited, became paragraph 2.8.

53. There is no doubt that Mr Wilks' letter accords well with the assertions of the appellants' professional witnesses. If and insofar as, by his reference to "individuals who leave the UK", Mr Wilks was attempting to refer to individuals who effect a distinct break in the pattern of their lives in the UK, the attempted reference was too elliptical; and the fact that, in another context, he wrote a further letter to Mr Sawyer dated 8 March 2000, in which he referred to a person who continues to be resident in the UK "on the basis that he hasn't in reality *left* the UK", cannot alter the natural construction of the earlier letter. But did it reflect a settled practice to depart from the law and indeed from the then current version of the booklet?

54. Until 1998 some UK residents had been able to take advantage of what was known as the foreign earnings deduction. To the extent that they earned income from employment carried out wholly or partly abroad for at least a year, they had been able to deduct it in full from their income for UK tax purposes. But, by section 63 of the Finance Act 1998, the right to make the deduction was abolished. The abolition precipitated an increase in claims to non-residence on the part of "mobile workers", ie persons, such as lorry drivers and airline pilots, who made frequent and regular trips abroad in the course of their work but who remained based in the UK. In the present proceedings the Revenue disclosed its statements made in 2000 and 2001 to a variety of professionals about its treatment of such claims.

55. The statements are unhelpful to the appellants' case. For example the gist of a tax bulletin, published by the Revenue in April 2001, was that, unless he was working full-time abroad for at least a whole tax year and so could satisfy the requirements of paragraph 2.2 of the booklet, it was probable that the mobile worker usually lived in the UK, thus also failed to fall within paragraphs 2.7 to 2.9 and so was resident in the UK. The bulletin explained that "individuals usually live in the UK if their home continues to be in the UK and their settled domestic life remains here". Although the bulletin related to mobile workers, tax advisers sought clarity as to how it affected the Revenue's treatment of business executives who were seconded to work abroad but who regularly returned to the UK. For example, one of the expert witnesses of the first appellants, Mr Hilton-Gee, who was a senior manager at PricewaterhouseCoopers LLP until 2006 but who never handled their case, spoke to a Revenue manager on 8 May 2001 and made the following note:

> "I asked whether the Tax Bulletin article reflects a change of Practice by the Revenue or a change in policing standards. [He] confirmed that the article does not reflect any change in the Revenue's practice, but it does reflect their view that whereas in the past they might have taken a claim to non-residence at face value, they now feel that they should be asking for more facts. The article was directed at a specific category of individual… and [he] can see that, if you try to apply its literal wording to other categories of businessmen, one might get the wrong impression.
>
> The Revenue are attempting to describe the difference between a businessman who is based in the UK but travels abroad for most of the time, and a businessman who is based abroad but manages to visit the UK from time to time, and are saying that in a case which may not be clear-cut you need to look at all relevant factors."

56. In June 2001 accountants at Arthur Andersen raised analogous questions at a meeting with senior Revenue officers. According to the Revenue's note, its officers explained that paragraph 2.2 of the booklet still applied; that mobile workers who worked partly within the UK did not fall within it; but that business executives seconded to work abroad might well do so; and that they could fall within the paragraph without severing every link with the UK. Arthur Andersen acknowledged – in the words of the note – that:

> "If an individual had full time employment abroad, it was not necessary to look at the wider factors in paragraph 2.7 about personal circumstances such as accommodation, family life etc."

Arthur Andersen, at any rate, were under no illusion about the nature of the inquiry into a claim for non-residence which was required by the booklet when it did not fall within paragraph 2.2.

57. The Revenue's dialogue with the accountants culminated in its letter, dated July 2001, sent to the Institute of Chartered Accountants, the Chartered Association of Certified Accountants, the Chartered Institute of Taxation, the Confederation of British Industry, and the "big five" firms of accountants. It made clear that most mobile workers failed to become non-resident because they did not fall within paragraph 2.2 and because they had not "genuinely 'left' the UK in the residence sense". In the light of the wide circulation of the letter, it is hard to imagine that tax practitioners did not realise that the Revenue required that an individual who claimed to have become non-resident but who failed to fall within paragraph 2.2 should genuinely have "left" the UK, being a requirement reflective only of the ordinary law. Had there been a facility for cross-examination of the appellants' professional witnesses in the proceedings, no doubt their precise understanding of what was or was not required both in law and in practice – and their grounds for having it – would have been laid bare.

58. In my view the Court of Appeal was right to hold that the appellants failed to establish that, by its inquiries and determinations in respect of them, the Revenue was departing from a settled practice such as to found a legitimate expectation. In about 2001, probably triggered by the mobile workers, scrutiny of claims to non-residence became more frequent. But when, previously, claims had been scrutinised, had the Revenue adopted a settled practice of applying criteria different from those identified not only by the ordinary law but also in its own booklet read as a whole? The appellants' evidence to this effect was far too thin and equivocal.

H. Conclusion

59. I would dismiss the appeals.

LORD HOPE

60. I am grateful to both Lord Wilson and Lord Mance for their description of the background to these appeals and for the way in which they have identified the points that are in issue. I have reached the conclusion that, for the reasons that are set out in Lord Wilson's judgment, the appeals should be dismissed.

61. I have nothing to add to what Lord Wilson has said about the appellants' secondary and alternative contention. Their case that the Revenue had raised a legitimate expectation that their claim would be determined more favourably than the law and a proper construction of IR 20 would indicate was simply not made out by the evidence.

62. The difference between Lord Wilson and Lord Mance as to the primary issue turns on the meaning that paragraphs 2.7 to 2.9 of IR 20 would convey to the ordinarily sophisticated taxpayer. Is the question whether the taxpayer has become non-resident and not ordinarily resident in the United Kingdom to be determined simply by reference to the taxpayer's intention when going abroad regarding the overall duration of his absence and counting up the days of any return visits? Or is it to be determined by evaluating the quality or nature of the absence and of any return visits that he has made?

63. There is an obvious attraction in keeping the test as simple as possible, especially as taxpayers are now responsible for self assessment when making their returns. But the underlying principle that the law has established is that it must be shown that there has been a distinct break in the pattern of the taxpayer's life in the UK. The inquiry that this principle indicates is essentially one of evaluation. It depends on the facts. It looks to what the taxpayer actually does or does not do to alter his life's pattern. His intention is, of course, relevant to the inquiry. But it is not determinative. All the circumstances have to be considered to see what light they can throw on the quality of the taxpayer's absence from the UK. The question then is whether on its proper construction the booklet sets out tests which are so clear that they eliminate the need for an inquiry into whether there was in fact a distinct break.

64. As Lord Mance points out, the requirement for a distinct break is not clearly expressed in the relevant paragraphs of the booklet. But I cannot agree with him that chapter 2 is to be read as substituting for that test a series of specifically delineated cases which clearly and unambiguously eliminated the need for such an inquiry: see para 100, below. The booklet must be read as a whole, including its introductory paragraphs. As the preface to the booklet made clear, it offered general guidance. Its application to a particular case was to depend on its own facts. So paragraphs 2.7-2.9 do not stand alone. Taken as a whole, the message that the booklet conveyed was that all the circumstances were open to evaluation in order to see whether the rules for non-residence were satisfied. I am in full agreement with Lord Wilson's careful analysis.

LORD WALKER

65. I agree that these appeals should be dismissed for the reasons given in the judgment of Lord Wilson. The stronger appeal is that of Mr Davies and Mr James, but it is by no means as strong as is claimed by the exaggerated opening of their printed case.

66. The preface to the relevant edition of IR 20 made clear that it gave general guidance only, and that whether the guidance was appropriate in a particular case would depend on all the facts of the case. In the event of difficulty taxpayers were invited to consult an Inland Revenue tax office.

67. The appellants had expert professional advisers, and it was well known to them that a large amount of tax was at stake. The guidance in IR 20 is far from clear, as Lord Wilson explains. Yet there is no suggestion that any attempt was made to seek clarification from an office of the Inland Revenue, still less that any specific guidance or assurance was given on the particular course of action proposed by the appellants. It seems possible that the preferred strategy was to let sleeping dogs lie, despite the obscurity of parts of IR 20. But whether that is right or not, the appeals must be dismissed for the reasons given by Lord Wilson, which are essentially the same as those given by Moses LJ in the Court of Appeal.

LORD CLARKE

68. I agree that these appeals should be dismissed for the reasons given by Lord Wilson. I have reached the conclusion that his reasoning is to be preferred to that of Lord Mance for the reasons given by Lord Hope.

LORD MANCE

Introduction

69. In these appeals, the issue is whether Her Majesty's Revenue and Customs ("HMRC") is entitled to treat the appellants as resident and ordinarily resident in the United Kingdom, in the case of Mr Davies and Mr James in the tax year 2001-02 and in the case of Mr Gaines-Cooper in respect of the tax years 1993-94 to 2003-04. The issue turns primarily upon the interpretation and effect of Revenue guidance on the liability to tax in the United Kingdom of residents and non-residents, known as IR20. IR20 was first issued in 1973, and existed in various versions developed from time to time until April 2009, when IR20 was entirely replaced by materially different guidance called HMRC 6. A secondary issue in each appeal is whether HMRC, in seeking to treat the appellants as ordinarily resident, resiled illegitimately from a practice followed prior to 2005 with respect to the interpretation and application of IR20.

70. HMRC has confirmed in each appeal (HMRC Case para 2) that it

> "accepts that a taxpayer has a legitimate expectation that HMRC will apply the guidance of IR20 to the facts of his particular case and, if satisfied that the facts and evidence fall within one of the circumstances in chapter 2 of IR20 indicating a certain residence treatment, will treat him accordingly."

This accepts that the guidance of IR20 gives rise to a legitimate expectation, but the nature of that legitimate expectation depends upon the terms of the guidance. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453, para 60, cited recently in *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2011] 3 WLR 219, para 28, Lord Hoffmann said that:

> "… a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification' … It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power …".

As to the need for a representation to be "clear, unambiguous and devoid of qualification", the Board in *Paponette* endorsed Dyson LJ's statement in *R*

(Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] EWCA Civ 473, [2003] QB 1397, para 56, that

> "the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made" ([2011] 3 WLR 219, para 30).

The primary issue in each appeal is thus how, on a fair reading, IR20 would have been reasonably understood by those to whom it was directed. It is for the courts to resolve this as a matter of law. If any of the appellants succeeds on either issue, it may also be necessary to consider what precise relief would be appropriate. Mr Eadie QC for HMRC suggested in his oral submissions that a requirement to treat the taxpayer as not resident and ordinarily resident should not follow axiomatically. However, the unequivocal nature of the above confirmation makes it difficult to see how this could be so if and in so far as any of the appellants succeeds on the primary issue.

71. More specifically the issues are whether, upon the true interpretation of IR20 or under Revenue practice prior to 2005, taxpayers seeking to show that they are neither resident nor ordinarily resident in the United Kingdom are required to show that they have made a "distinct break" from - or "severed" - "family and social ties" in the United Kingdom. HMRC maintains and the Court of Appeal (paras 50, 53-55) has held that this is not required where a taxpayer can show that he or she is in full-time employment abroad, but is required in all other circumstances. This is said to reflect the test which would, having regard to past case law, apply in strict law. The present judicial review proceedings are brought on the basis that, whatever the legal position might otherwise be, HMRC must as a matter of public law honour the terms of IR20. This, as I have explained in para 70, follows from the HMRC's assurance, that if satisfied that the facts and evidence fall within chapter 2 of IR20, it will treat the relevant taxpayer accordingly. While accepting this assurance, I confess to some residual unease about a concession so apparently general and independent of any consideration of particular circumstances, including any knowledge and advice possessed by or available to the particular taxpayer. Nevertheless, that is the agreed basis upon which this appeal falls to be considered as a matter of public law.

Statutory background

72. Although this case concerns the effect of IR20 and/or Revenue practice, I refer at points to the limited statutory provisions relating to residence to be found in the Income and Corporation Taxes Act 1988 ("ICTA 1988"), which it will therefore be helpful to set out:

“335 Residence of persons working abroad

(1) Where—

(a) a person works full-time in one or more of the following, that is to say, a trade, profession, vocation, office or employment; and

(b) no part of the trade, profession or vocation is carried on in the United Kingdom and all the duties of the office or employment are performed outside the United Kingdom;

the question whether he is resident in the United Kingdom shall be decided without regard to any place of abode maintained in the United Kingdom for his use.

(2) Where an office or employment is in substance one of which the duties fall in the year of assessment to be performed outside the United Kingdom there shall be treated for the purposes of this section as so performed any duties performed in the United Kingdom the performance of which is merely incidental to the performance of the other duties outside the United Kingdom.

336 Temporary residents in the United Kingdom

(1) A person shall not be charged to income tax under Schedule D as a person residing in the United Kingdom, in respect of profits or gains received in respect of possessions or securities out of the United Kingdom, if—

(a) he is in the United Kingdom for some temporary purpose only and not with any view or intent of establishing his residence there, and

(b) he has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment,

but if any such person resides in the United Kingdom for such a period he shall be so chargeable for that year.

(2) For the purposes of Cases I, II and III of Schedule E, a person who is in the United Kingdom for some temporary purpose only and not with the intention of establishing his residence there shall not be treated as resident in the United Kingdom if he has not in the aggregate spent at least six months in the United Kingdom in the year of assessment, but shall be treated as resident there if he has.

(3) The question whether –

(a) a person falls within subsection (1)(a) above, or

(b) for the purposes of subsection (2) above a person is in the United Kingdom for some temporary purpose only and not with the intention of establishing his residence there,

shall be decided without regard to any living accommodation available in the United Kingdom for his use".

Section 336(3) was only introduced for and with effect from the tax year 1993-94 by section 208 of the Finance Act 1993.

IR20

73. IR20 has, as stated, developed over the years. The version which matters in the case of Mr Davies and Mr James was issued in December 1999. Mr Gaines-Cooper's case may require consideration also of earlier versions issued in October 1992, November 1993 and October 1996. However, Mr Gaines-Cooper's case is that he left the United Kingdom permanently long ago and has lived abroad for many years, and the changes in provisions governing his situation are relatively limited. The 1992 version read as follows:

"Leaving the UK permanently

2.5 If you go abroad permanently but have accommodation in the UK available for your use, you will be treated as resident for any tax

year during which you visit the UK (see Chapter 4 for details of when accommodation is regarded as available). The length of the visit does not matter. If you come to the UK in most tax years, you remain ordinarily resident.

2.6 If you go abroad permanently and do not have available accommodation in the UK, you will be treated as remaining resident and ordinarily resident if your visits to the UK average 91 days or more a year.

2.7 If you claim that you are no longer resident and ordinarily resident you will normally be asked to give some evidence that you have left the UK permanently - for example, that you have sold your UK home (or you have left it empty and on the market for sale) and set up a permanent home abroad. If you can provide this, you may be treated as provisionally not resident and not ordinarily resident from the day after the date of your departure. Normally this provisional ruling is confirmed after you have lived abroad for a whole tax year, as long as your visits to the UK since leaving have averaged less than 91 days a tax year.

2.8 If you do not have this evidence, a decision is postponed for up to three years. The decision will be based on what has actually happened since you left the UK. Until then you are provisionally treated as remaining resident in the UK. You continue to receive tax allowances and reliefs (see paragraph 8.1). Your tax bill may be adjusted when the final decision has been made."

74. In the event, the guidance regarding accommodation in paragraphs 2.5 and 2.6 was superseded as a matter of law by the introduction (for and from the tax year 1993-94) of section 336(3) of ICTA 1988 (para 72 above), providing that whether a person is in the United Kingdom "with the intention of establishing his residence there" should be decided without regard to any living accommodation available in the United Kingdom for his use. This change was reflected in the 1993 version of IR20 which read:

"Leaving the UK permanently

2.6 If you go abroad permanently, you will be treated as remaining resident and ordinarily resident if your visits to the UK average 91 days or more a year.

> For tax years before 1993-94, if you went abroad permanently but had accommodation in the UK available for your use, you were treated as resident for any tax year during which you visited the UK (see Chapter 4 for details of when accommodation was regarded as available). The length of the visit did not matter. If you came to the UK in most tax years, you remained ordinarily resident.
>
> 2.7 If you claim that you are no longer resident and ordinarily resident, you will normally be asked to give some evidence that you have left the UK permanently - for example, that you have taken steps to acquire accommodation abroad to live in as a permanent home, and if you continue to own property in the UK, the reason is consistent with your stated aim of permanent residence abroad. If you can provide this, you may be treated as provisionally not resident and not ordinarily resident from the day after the date of your departure. Normally this provisional ruling is confirmed after you have lived abroad for a whole tax year, as long as your visits to the UK since leaving have averaged less than 91 days a tax year.
>
> 2.8 If you do not have this evidence, a decision is postponed for up to three years. The decision will be based on what has actually happened since you left the UK. Until then you are provisionally treated as remaining resident in the UK. You continue to receive tax allowances and reliefs (see paragraph 8.1). Your tax bill may be adjusted when the final decision has been made."

The Revenue in its submissions before the Supreme Court suggested that section 336(3) has no bearing on the present appellants' situations, being relevant to persons who have established residence and ordinary residence abroad and come back here temporarily, rather than to the question whether persons have established ordinary residence abroad (an analysis encapsulated in the title to a contribution to issue 435 of CCH Taxes' The Weekly Tax News after the Special Commissioners' decision in relation to Mr Gaines-Copper: "'Tis better to have left and returned than never to have left at all": p 37). Whatever the accuracy of the Revenue's submission on this point in strict law, it is clear, from the change in treatment of the significance of available accommodation in the 1993 and subsequent versions of IR20, that for the purposes of IR20 the Revenue treated the thinking behind section 336 as directly relevant to the question whether a taxpayer had established residence and ordinary residence abroad.

75. The 1996 version of IR20 was amended by the addition - in the light of the decision, some ten years before, of Nicholls J in *Reed v Clark* [1986] Ch 1 - of a new paragraph 2.10, which became paragraph 2.9 of the 1999 version and is of

particular relevance to the cases of Mr Davies and Mr James. The 1999 version read:

> "1 Residence and ordinary residence
>
> …
>
> *Residence in both the UK and another country*
>
> 1.4 It is possible to be resident (or ordinarily resident) in both the UK and some other country (or countries) at the same time. If you are resident (or ordinarily resident) in another country, this does not mean that you cannot **also** be resident (or ordinarily resident) in the UK. Where, however, you are resident both in the UK and a country with which the UK has a **double taxation agreement**, there may be special provisions in the agreement for treating you as a resident of only one of the countries for the purposes of the agreement (paragraph 9.2).
>
> 2 Leaving the UK
>
> …..
>
> *Short absences*
>
> 2.1 You are **resident and ordinarily resident in** the UK if you usually live in this country and only go abroad for short periods - for example, on holiday or on business trips.
>
> *Working abroad*
>
> 2.2 If you leave the UK to work full-time abroad under a contract of employment you are treated as not resident and not ordinarily resident if you meet all the following conditions - your absence from the UK and your employment abroad both last for at least a whole tax year - during your absence any visits you make to the UK total less than 183 days in any tax year, **and** average less than 91 days a tax year. (The average is taken over the period of absence up to a

maximum of four years - see paragraph 2.10. Any days spent in the UK because of exceptional circumstances beyond your control for example the illness of yourself or a member of your immediate family, are not normally counted for this purpose.)

2.3 If you meet all the conditions in paragraph 2.2, you are treated as not resident and not ordinarily resident in the UK from the day after you leave the UK to the day before you return to the UK at the end of your employment abroad. You are treated as coming to the UK permanently on the day you return from your employment abroad and as resident and ordinarily resident from that date.

If there is a break in full-time employment, or some other change in your circumstances during the period you are overseas, we would have to review the position to decide whether you still meet the conditions in paragraph 2.2. If at the end of one employment you returned temporarily to the UK, planning to go abroad again after a very short stay in this country, **we** may review your residence status in the light of all the circumstances of your employment abroad and your return to the UK.

If you do not meet all the conditions in paragraph 2.2, you remain resident and ordinarily resident unless paragraphs 2.8 - 2.9 apply to you. Special rules apply to employees of the European Community (see paragraph 2.14).

2.4 The treatment in paragraph 2.3 will also apply if you leave the UK to work fulltime in a trade, profession or vocation and you meet conditions similar to those in paragraph 2.2.

Meaning of 'full-time'

2.5 There is no precise definition of when employment overseas is full-time, and a decision in a particular case will depend on all the facts. Where your employment involves a standard pattern of hours, we will regard it as full time if the hours you work each week clearly compare with those in a typical UK working week. If your job has no formal structure or no fixed number of working days, we will look at the nature of the job, local conditions and practices in the particular occupation to decide if the job is full-time.

If you have several part-time jobs overseas at the same time, we may be able to treat this as full-time employment. That might be so if, for example, you have several appointments with the same employer or group of companies, and perhaps also where you have simultaneous employment and self-employment overseas. But if you have a main employment abroad and some unconnected occupation in the UK at the same time, we will consider whether the extent of the UK activities was consistent with the overseas employment being full-time.

Accompanying spouse

2.6 If you are the husband or wife of someone who leaves the UK within the terms of paragraph 2.2 or 2.4 and you accompany or later join your spouse abroad, you may also by concession (extra-statutory concession A78) be treated as not resident and not ordinarily resident from the day after your departure to the day before your return, even if you are not yourself in full-time employment abroad.

This applies where you are abroad for a complete tax year, and during your absence any visits you make to the UK - total less than 183 days in the tax year - average less than 91 days a tax year. (The average is taken over the period of absence up to a maximum of four years - see paragraph 2.10. Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or a member of your immediate family, are not normally counted for this purpose.)

Where the tax years of your departure or return are spilt in this way, your tax liabilities which are affected by residence status are calculated on the basis of the period you are treated as resident in the UK.

Leaving the UK permanently or indefinitely

2.7 If you go abroad permanently, you will be treated as remaining resident and ordinarily resident if your visits to the UK average 91 days or more a year – see paragraph 2.10. Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or your immediate family, are not normally counted for the purposes of averaging your visits.

2.8 If you claim that you are no longer resident and ordinarily resident, we may ask you to give some evidence that you have left the UK permanently, or to live outside the UK for three years or more. This evidence might be, for example, that you have taken steps to acquire accommodation abroad to live in as a permanent home, and if you continue to have property in the UK for your use, the reason is consistent with your stated aim of living abroad permanently or for three years or more. If you have left the UK permanently or for at least three years, you will be treated as not resident and not ordinarily resident from the day after the date of your departure providing your absence from the UK has covered at least a whole tax year, **and** your visits to the UK since leaving have totalled less than 183 days in any tax year, and have averaged less than 91 days a tax year. (The average is taken over the period of absence up to a maximum of four years - see paragraph 2.10. Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or a member of your immediate family, are not normally counted for this purpose.)

2.9 If you do not have this evidence, but you have gone abroad for a settled purpose (this would include a fixed object or intention in which you are going to be engaged for an extended period of time), you will be treated as not resident and not ordinarily resident from the day after the date of your departure providing your absence from the UK has covered at least a whole tax year; **and** your visits to the UK since leaving have totalled less than 183 days in any tax year and have averaged less than 91 days a tax year.

If you have not gone abroad for a settled purpose, you will be treated as remaining resident and ordinarily resident in the UK, but your status can be reviewed if your absence actually covers three years from your departure, or evidence becomes available to show that you have left the UK permanently

providing in either case your visits to the UK since leaving have totalled less than 183 days in any tax year and have averaged less than 91 days a tax year.

Calculating annual average visits

> 2.10 If it is necessary to calculate your annual average visits to the UK, the method is as follows: Total visits to the UK in days x 365 ÷ Total period since leaving (in days) = annual average visits ...
>
> After the third review the year of departure is dropped from the calculation. At each subsequent review the oldest year is dropped, so that there is a rolling period of four years being reviewed.
>
> However, if during your absence the pattern of your visits varied substantially year by year, it might be appropriate to look at the absence as being made up of separate periods for the purpose of calculating average visits. This might be necessary if, for example, a shift in the pattern of your visits suggested a change of circumstances, which altered how we viewed your residence status.
>
> *Contacting the Inland Revenue*
>
> 2.11 You should let us know when you leave the UK (other than for short trips as in paragraph 2.1). You will normally be asked to complete form **P85**,which will help to determine your residence status."

Paragraphs 2.1 to 2.6 repeated similar provisions in previous editions, all including a 183 day limit. Such a limit appears for the first time in the 1996 edition in paragraphs dealing with "Leaving the UK permanently …". Again, it is clear that, even if the scope of section 336 of ICTA 1988 may in strict law be regarded as confined to persons who have already established residence and ordinary residence abroad, the Revenue was inspired to take a more generalised view of the relevance of a 183 day limit in IR20, treating it as part of the test whether someone has established residence and ordinary residence abroad.

Davies and James

76. Mr Davies and Mr James are British citizens, who were born in the United Kingdom and lived and worked in Wales until 2001, when they took decisions, with the benefit of undisclosed professional tax advice, aimed at bringing about a cessation of ordinary residence here. In pursuit of those decisions, in March 2001, they moved from the United Kingdom to apartments in Brussels, and incorporated and became directors of a Belgian company, Beaufort House SA, in which each held one-third of the shares. They also entered into employment contracts for full-time work with that company for three years from 1 April 2001. They say that, in

planning for and making this move, they and their tax advisers, PriceWaterhouseCoopers, relied upon the guidance in IR20 in believing that it would mean that they would cease to be ordinarily resident in the United Kingdom. The importance of this is that, in the tax year 2001-02, as they probably already envisaged, they realised chargeable gains in respect of which they became liable to capital gains tax unless they were not resident and ordinarily resident in the United Kingdom in that tax year. In May 2002 they submitted to HMRC forms P85 ("Leaving the United Kingdom") declaring that their intention had been to live outside the United Kingdom for a full tax year after their departure (though not permanently), that they would be working full-time under a contract for their employment abroad for three years and that they expected to be in the United Kingdom for less than 90 days a year.

77. HMRC maintains and the Court of Appeal has held that Mr Davies and Mr James are unable to take advantage of paragraph 2.2 of IR20, because their employment by Beaufort House SA did not in fact commence from 5 April 2001, but only later, since on 5 April 2001 they were in fact on holiday in Italy. That is accepted factually, but Mr Goldberg QC does not abandon his clients' submission that it is sufficient under paragraph 2.2 that their employment should last "for at least a whole tax year" including a later tax year, such as 2002-03. Rightly, however, he did not elaborate on the submission, which is without merit. It is plainly implicit that the "whole tax year" to which paragraph 2.2 refers is that in relation to which absence of ordinary residence in the United Kingdom is asserted.

78. Mr Goldberg QC for Mr Davies and Mr James has thus to fall back on paragraph 2.8 or 2.9. In relation to these paragraphs, Mr Davies's and Mr James's case is that they went abroad either to live outside the United Kingdom for three years or more within paragraph 2.8 or, at least, for a settled purpose within paragraph 2.9, and that they were in fact absent from the United Kingdom for the whole tax year 2001-02, indeed for three tax years, from such departure, and that their visits to the United Kingdom totalled less than 183 days in any such tax year and averaged less than 91 days a tax year.

79. HMRC asserts in response that Mr Davies and Mr James failed to establish the necessary distinct break with family and social ties in the United Kingdom. In particular, they continued to each to have a substantial house here, in which their spouses lived when not visiting them in Belgium and where they lived when in the United Kingdom; and they retained employment and business links in the United Kingdom, as well as other links such as with Swansea Football Club and the Area Health Authority. The Court of Appeal held that the issue whether such a break was necessary under IR20 should be determined in the present judicial review proceedings prior to any proceedings before the Special Commissioners ([2008] EWCA Civ 933, paras 18-19 and 24).

Gaines-Cooper

80. Mr Gaines-Cooper's case involves very different and more complex facts, which have already been established in proceedings before the Special Commissioners, who, in a full and very clearly reasoned decision, concluded that Mr Gaines-Cooper was in law resident and ordinarily resident during the relevant tax years in the United Kingdom. In doing so they said that "in this appeal we must apply the law rather than the provisions of IR20": para 99. A brief summary will suffice, since it is of the essence of the present appeal that most of the facts so established are irrelevant under IR20 and/or under Revenue practice. Mr Gaines-Cooper is also a British citizen, who was born and educated and for many years lived here. But by 1974 he had formed the view that the tax regime in the United Kingdom was unfavourable to businessmen and entrepreneurs, and on that basis he began to establish overseas interests. He did so first in Canada and then in the Seychelles, where he purchased a house (Bois Noir) in late 1975 and was granted a residency permit in February 1976 and with which he has had close links ever since, and later elsewhere worldwide. In February 1980, HMRC wrote to him asking for details of his travel to the United Kingdom between 1976 and 1979. The figures provided for days spent, which there is no reason to doubt, were 49, 45 and 56, not counting days of arrival and departure. HMRC raised no further queries thereafter and did not suggest that he might be taxable as resident or ordinarily resident in the United Kingdom until 2000, when the inquiries began which led eventually to these proceedings.

81. After marrying Mrs Dilona Lantang in 1979, Mr Gaines-Cooper also purchased a house in California, where they lived for a time, but the marriage was dissolved in 1986. In 1993 he married a Seychellois citizen, Miss Jane Laye-Sion, whom he had met in the Seychelles, but who had moved with her family to the United Kingdom, and their son James was born in 1998. Through off-shore companies, Mr Gaines-Cooper has retained property in the United Kingdom which was, apart from occasional periods of letting, available for his use. Since early 1989 that has consisted of Old Place, near Henley, where his wife, Mrs Jane Gaines-Cooper lives during term time, as does Mr Gaines-Cooper when here. By reason of the availability of such property, Mr Gaines-Cooper accepts that, in the tax years immediately prior to 1993-94 and under the language then of IR20, the availability of such property meant that he was, even though he might satisfy all other conditions of IR20, to be treated as ordinarily resident in the United Kingdom. In school holidays, Mrs Gaines-Cooper and James also join Mr Gaines-Cooper abroad in the Seychelles or wherever he may be. In October 1987 Mr Gaines-Cooper acquired an Italian company, Orthofix, administered from Cyprus and from about 1988 serviced by a company of which he was director based in Henley. He developed it by 2003 into a worldwide company with subsidiaries registered in twenty-four countries. From 1992 to 1995 he was employed half-time to perform duties in the United Kingdom for Orthofix. After about 1987 he also

became involved in manufacturing Laryngeal masks, first through a Seychelles company and then from 1988 by mass production in Indiana, USA. So far as he had earnings here, he paid tax on them here.

82. During the relevant tax years, Mr Gaines-Cooper spent about 150 days each year on airplanes, travelling between his interests in different countries, and spending each year in total about three or four months in the United Kingdom, three or four months in Jersey, six to eight weeks in the United States, two weeks in Cyprus and two weeks in Italy. He also made visits to the Seychelles, which involved in the years 1991-92 to 1995-96 weeks in total rather than months according to the Special Commissioners (para 108). It is now common ground that the total days spent by Mr Gaines-Cooper in the United Kingdom, calculated by ignoring days of arrival and departure (in accordance with IR20) were, in the tax years 1992-93 to 2002-03, as follows (the square-bracketed figures being those arrived at by the Commissioners who concluded that when examining the position in strict law they should add back days of arrival and departure, including single day trips to the United Kingdom): *1992-93:* 107 (including 60 for a heart bypass) [147]; *1993-94:* 78 [121]; *1994-95:* 110 [158]; *1995-96:* 66 [110]; *1996-97:* 109 [146]; *1997-98:* 92 (including 8 for James's birth) [141]; *1998-99:* 110 (including 8 for James's birth) [151]; *1999-2000:* 81 [127]; *2000-01:* 50 [94]; *2001-02:* 0 [27]; and *2002-03:* 68 [105]. The Commissioners concluded, looking at the position overall, that England remained the "centre of gravity of [Mr Gaines-Cooper's] life and interests", because he lived in Henley more than anywhere else and because of his many other ties to Berkshire and Oxfordshire. On the basis of figures calculated according to IR20 (and all the more so if one excludes as "exceptional circumstances" the time spent here for a heart bypass and James's birth), Mr Gaines-Cooper satisfied in the relevant tax years the conditions both that his visits should in no tax year total 183 days and that they should have averaged over any four year period less than 91 days a year. Mr Gaines-Cooper clearly intended to maintain that position permanently or for three years or more, and has maintained it over a period of many years. The essential question is whether that is sufficient to attract the benefit of paragraph 2.7, read with paragraph 2.8, or paragraph 2.9 of IR20.

The status and interpretation of IR20

83. Giving the leading judgment in the Court of Appeal Moses LJ, with whose reasoning Dyson LJ agreed, addressed the question of the status and interpretation of IR20 (1999 version) in relation to questions of residence for the purpose of taxation as follows (para 4):

> "It is notorious that the principles to be applied [on such questions] are to be found, not in the few statutory provisions (sections 334-336

> ICTA 1988, now sections 829-832 ITA 2007), which do not purport to be a statutory code but in case law, mainly from the late 19th and early 20th Century. As the Codification Committee recognised, only study of that jurisprudence would enable intelligent prediction of the outcome of an assertion as to residence or non-residence. All the more important, then, that guidance should be given on which taxpayers could rely."

The Income Tax Codification Committee, chaired by Lord Macmillan and reporting in 1936 (Cmd 5131), put the matter strongly, saying:

> "We are, however, of opinion that the present state of affairs, under which an enquirer can only be told that the question whether he is resident or not is a question of fact for the Commissioners, but that by the study of the effect of a large body of case law he may be able to make an intelligent forecast of their decision, is intolerable and should not be allowed to continue." (paragraph 59)

The Codification Committee's prescription to resolve this situation was a draft set of statutory rules, which was not however enacted.

84. Nearly 20 years later in 1955, the Royal Commission on The Taxation of Profits and Income (Cmd 9474) set out what it believed to be the practice which the Revenue followed and claimed to derive from the few statutory rules existing and from decided cases. This included a principle that:

> "A man who has been regularly resident in the United Kingdom and has then gone abroad may or may not be treated as a visitor if he comes back again at any time. That depends primarily on the question whether the circumstances in which he went abroad indicate a clear break with the United Kingdom as his place of ordinary residence." (paragraph 290)

The Commission, quoting the 1936 report's words set out above, agreed that the state of affairs was unsatisfactory. It suggested as the remedy "a printed leaflet which sets out at any rate the main lines of the Revenue Department's established practice", and went on to say that:

> " …. fixed rules would simplify the work of administration even if they worked unreasonably in some instances. But it is one of the arguments against the existing system that it does lead to the

> devotion of a great deal of time and skill to considering and adjudicating upon individual cases, whereas the establishment of certain fixed rules would make this unnecessary without giving any individual a serious cause of complaint. Indeed we think that the visitor or potential visitor would normally prefer certainty to the assurance that there will be the fullest consideration of his personal circumstances". (paragraph 292)

By 1961 separate "visitors" and "permanent residence" leaflets were in existence, and steps were begun to bring into existence the single guidance which became the first edition of IR20 in 1973.

85. The Preface to IR20 has since 1992 started with the statement that:

> "The notes in this booklet reflect the law and practice at the time of writing. They are not binding in law and do not affect rights of appeal about your own tax.
>
> You should bear in mind that the booklet offers general guidance on how the rules apply, but whether the guidance is appropriate in a particular case will depend on all the facts of that case".

Until 1996 it went on:

> "You should therefore always consult an Inland Revenue Tax Office on how the rules apply in your own case …."

From 1996, it read:

> "If you have any difficulty in applying the rules in your own case, you should consult an Inland Revenue Tax Office …."

This change followed from the introduction in April 1996 of self-assessment, representing a major shift in the responsibilities of taxpayers, who from then on had to determine for themselves in the first instance whether or not they were ordinarily resident for tax purposes. However, it is not, I understand, suggested that the change is critical to the outcome of the present appeals in any year.

86. Paragraph 1.1 of IR20 notes that the terms residence and ordinary residence are not defined in the Taxes Acts, but states that:

> "The guidelines to their meaning in this Chapter and in Chapters 2 …. and 3 …. are largely based on rulings of the courts. This booklet sets out the main factors that are taken into account, but we can only make a decision on your residence status on the facts in your particular case"

87. As Moses LJ underlined in paras 17 to 25 of his judgment, HMRC has given, both by the language of paragraphs 2.2 to 2.9 and expressly in the present proceedings (para 70 above), a "binding and lawful assurance that it will treat a taxpayer, whose case falls within the circumstances described, as not resident and not ordinarily resident". The significance of the words quoted above from the Preface and paragraph 1.1 is to show that the guidance is meant to reflect "the law and practice", and to set out the "main factors" and that, although it is not binding in law and does not affect a taxpayer's right of appeal, it was and is intended to obviate any need for a taxpayer to look further. As HMRC itself put the matter, in writing to PriceWaterhouseCoopers about Mr Davies's and Mr James's positions on 14 March 2005:

> "… it is generally accepted that some of the practices outlined in IR20 are relaxations from the strict position. Not all these 'relaxations' are covered in Extra Statutory Concessions (ESCs). …
>
> Parliamentary Draftsmen did not draw up the IR20 notes, as they are simply general guidance. Therefore it is not appropriate to seek to construe this general guidance as if it were statute law.
>
> On the other hand we do consider ourselves bound to follow the practices outlined in IR20. Therefore if your clients' circumstances place them within IR20 2.2, or 2.7 etc we will accept the non-resident (NR) claim. This conclusion would apply even if a strict interpretation of the law suggested otherwise."

88. Moses LJ correctly identified each of paragraphs 2.2 to 2.9 in the 1999 version as requiring at the outset not merely a departure from the United Kingdom, but satisfaction of a further qualification (in addition to the later provisos relating to the duration of absence from and of visits to the United Kingdom). In the case of paragraph 2.2, the further qualification was that he must have left to work full time; no more, and in particular no severance of any family and social ties within

the United Kingdom, was required (para 43). But, in the case of paragraphs 2.7 to 2.9, he held that severance of ties had to be demonstrated, because (para 44)

> "The adverbs 'permanently or indefinitely' make, as a matter of construction, all the difference. The extent to which a taxpayer retains social and family ties within the United Kingdom must have a significant and often dispositive impact on the question whether a taxpayer has left permanently or indefinitely (for at least three years). It makes no sense to construe 'leave' when qualified by the adverbs permanently or indefinitely as referring to the process of going abroad. They clearly require consideration of the quality of the absence and contrast with 2.1 …".

Moses LJ considered that this interpretation was supported both by the contrast with paragraph 2.1 (short absences) and by the reference in paragraph 2.8 to the need, "if you continue to have property in the UK for your use", for evidence that "the reason is consistent with your stated aim of living abroad permanently or for three years or more".

89. To my mind, however, the references in paragraphs 2.7 and 2.8 to going abroad permanently or to live outside the UK for three years or more and to a "stated aim" of living abroad permanently or indefinitely are directed most obviously to the taxpayer's intention regarding the overall duration of his or her absence, rather than to the "quality" of absence or the nature of any return visits or continuing British connections. Further, it is clear that the words "Leaving the UK permanently or indefinitely" cannot and do not precisely or accurately reflect all the paragraphs above which they appear. Thus, the only requirements under the first part of paragraph 2.9 are (i) going abroad (ii) "for a settled purpose", which is expressly defined to include "a fixed object or intention in which you are going to be engaged for an extended period of time". That paragraph, reflecting *Reed v Clark* [1986] Ch 1, is again focused on the taxpayer's intention when going abroad; and a settled purpose to engage in an overseas activity for an extended period of time may clearly exist without any intention to stay overseas either permanently or indefinitely. As in *Reed v Clark*, therefore, a taxpayer may have a settled purpose simply to remain outside the United Kingdom for one tax year. When paragraph 2.9 starts with the phrase "If you do not have this evidence", this cannot mean that paragraph 2.9 only applies as a sort of long-stop, when a taxpayer is asserting that his intention was to go abroad permanently or indefinitely, but when he cannot prove this but can prove some more limited "settled purpose". To that extent, I disagree with Moses LJ's description of paragraph 2.9 as "designed to assist taxpayers who lack evidence" (para 50), a description which may have been based on a partial concession below (para 51) which cannot however be sustained. In my opinion, paragraph 2.9 is designed to

assist taxpayers who never intended to leave permanently or indefinitely, but can show a settled purpose of lesser duration.

90. The second part of paragraph 2.9 deals likewise with situations where there was neither an intention to go abroad permanently or indefinitely nor, additionally, any settled purpose. It covers two possibilities: one that the taxpayer can subsequently say and show that he has now acquired an intention to leave the United Kingdom permanently (or, one would presume though this is not expressed, for three years or more); the other that his actual absence covers three years from departure. This second possibility looks on its face at the period for which he is abroad, again without focusing on the "quality" of absence.

91. Paragraph 2.1 in my view also lends no real support to HMRC's case. It focuses on persons who "usually live in this country and only go abroad for short periods – for example, on holiday or on business trips". Not only does this leave open what is meant under IR20 by "usually living" here, but the reference to only going "abroad for short periods" cannot be regarded as matching either Mr Gaines-Cooper's or Mr Davies's and Mr James's lifestyles during the relevant periods, and is consistent with an analysis whereby persons spending less than 91 days here within the terms of paragraphs 2.2 onwards are not treated as ordinarily resident. What is also worth note is the use throughout chapter 2 of words such as "go abroad", "leave" and "departure" interchangeably in relation to short and long term absence. It is impossible to derive from any of them any message as to the quality of the absence required for cessation of United Kingdom residency.

92. Reference was made to a short check sheet ("Notes on Non-residence") issued by HMRC to persons making tax returns, which included from the tax year 2000-01 a question 2A, asking "Have you left the UK?" with a note: "Even if you make frequent trips abroad in the course of your employment, you will not have 'left' the UK if you usually live in the UK, and your home and settled domestic life remain here, If 'NO', you are resident in the UK …". This was introduced after a number of long-distance lorry drivers based in, but driving overseas for substantial periods from, the United Kingdom made claims to be not ordinarily resident here. One would have thought that such claims were self-evidently not admissible, on the basis that part of such drivers' work must have taken place in the United Kingdom, eg when they collected and returned vehicles or tractors. Question 2A recognises this by its reference to making frequent trips abroad "in the course of" your employment. It does not address persons who worked basically abroad, although sometimes coming here on business. In any event, it does not form part of IR20, and it has not been relied upon by HMRC as qualifying whatever IR20 may mean.

93. It follows from what I have already said that I do not find in the express terms of paragraph 2 of IR20, or in particular in the words "permanently or indefinitely", direct support for any requirement for a distinct break. Looking at the matter more broadly, it would seem to me remarkable that, if any such requirement were intended, it was not clearly expressed. The guidance is intended to be useful as well as reliable. A requirement for a "distinct break" from family and social ties in the United Kingdom would certainly be a "main factor" (see paragraph 1.1). It and its uncertainty would also be matters of obvious concern to many taxpayers. How (for example) does one demonstrate a "distinct break" from family ties, in a world where spouses or partners may live and work in different countries, but meet regularly in one or the other? This is highlighted by a point made by Moses LJ after he had referred to section 334 of ICTA 1988 and to case law including *Levene v Inland Revenue Comrs* [1928] AC 217, *The Comrs of Inland Revenue v Combe* (1932) 17 TC 405, *Revenue and Customs Comrs v Grace* [2009] STC 2707 and *Reed v Clark.* He said (para 53):

> "While IR20 is designed to guide and simplify, I cannot accept that it provides a warrant for ignoring so obvious a factor [as the need for a 'distinct break'] for determining whether a taxpayer hitherto resident and ordinarily resident in the UK has ceased to be so and has left permanently or indefinitely."

Yet HMRC now suggests that the existence of "so obvious a factor" was left to inference from what appear, at best, very opaque clues.

94. Moses LJ regarded the statutory and case law position as confirming his view that a distinct break was required. He said (para 52):

> "I am confirmed in that view by the objective of IR20 stated in the opening words of the preface, that it is designed to reflect the law. It would, therefore, be surprising if IR20 had the effect of contradicting established jurisprudence."

In my opinion, it is wrong to start with the premise that IR20 was designed to reflect the law as a court would interpret it apart from IR20 and Revenue practice; and also wrong to assume a knowledge of the case law as background to the construction of IR20. The purpose of IR20 was to reflect "the law and practice". It was addressed to individual taxpayers, and, even if they might often have professional advisers, those advisers would be very likely to be, as Mr Davies's and Mr James's were, accountants rather than lawyers, and correspondingly interested in HMRC's understanding and practice rather than prepared to attempt exhaustive analysis of legal authority. These points are underlined, rather than

undermined, by Miss Simler QC's submission that there is nothing in IR20 to suggest that there is likely to be any divergence from the law. To the extent that that is so, it confirms that, even if he were interested in the legal position apart from Revenue understanding and practice, a taxpayer or professional adviser need look no further than IR20. It follows that the terms of IR20 should be read as independent of any conclusion to which a "strict interpretation of the law" might lead: see HMRC's letter dated 14 March 2005 (para 87 above). A degree of simplification brought about by fixed rules, in place of a difficult judgment as to whether the circumstances indicated "a clear break with the United Kingdom as his place of ordinary residence", is indeed precisely what the Royal Commission on The Taxation of Profits and Income encouraged in 1955 (para 84 above).

95. The aim and function of IR20 in this respect is demonstrated by consideration of the further conditions of chapter 2. In addition to the requirements already discussed, a taxpayer seeking to take advantage of paragraphs 2.7 to 2.9 must satisfy two conditions relating to duration of absence from and visits to the United Kingdom. As I have already stated (para 75 above), the first (absence totalling less than 183 days in a tax year) was clearly inspired by the provisions of section 336(1)(b), delimiting what counts as temporary residence in the United Kingdom. The second (an average of less than 91 days a tax year in the United Kingdom) has no statutory basis. It is a condition introduced by HMRC to enable a taxpayer to know where he stands in HMRC's eyes. It is there, on its face, as a measure of the degree of separation from the United Kingdom which HMRC will in practice accept as sufficient to avoid ordinary residence here. The further references in paragraph 2.8 to the exclusion from this 91 day average period of days spent here due to exceptional circumstances such as "the illness of yourself or a member of your immediate family" do not fit with an expectation of a distinct break of social or family ties with the United Kingdom.

96. The reference in all versions of IR20 from November 1993 on to a person being able to have property available for use in the United Kingdom during his visits here also militates against a requirement of a distinct break. IR20 should in this connection be read on its own terms, independently of the statutory or common law background to that reference. There is here, however, a minor paradox, since the October 1992 version contains a contrary reference, reflecting the law as it was prior to the Finance Act 1993 which introduced section 336(3) into ICTA 1988 for the tax year 1993-94 (para 74 above). Mr Gaines-Cooper had property available for his use in the United Kingdom at all material times. In relation to the tax year 1993-94 he cannot simply rely on IR20, he must rely upon it as (notionally) supplemented by section 336(3). However, HMRC did not in its submissions identify this as a specific problem for Mr Gaines-Cooper in relation to the tax year 1993-94, and I will put it on one side for the moment.

97. Moses LJ found support in paragraph 1.4 for his view that a value judgment was necessary as to whether there had been a direct break (para 53). That the guidance in paragraph 1.4 is correct is clear. But it says, to my mind, nothing about whether such a value judgment is necessary under paragraphs 2.7 to 2.9. In particular, it is obvious that, if a person falls automatically to be treated as ordinarily resident here if he or she spends 91 days or more here, he or she may well be ordinarily resident in one or two other countries in the same tax year, whether on the basis of an equivalent 91 day rule there or for more general reasons. It does not follow that compliance with the express requirement and conditions of paragraphs 2.7 to 2.9 may not be sufficient to ensure that a person is not ordinarily resident here.

98. Ward LJ appears to have concluded (paras 118-119) that the appellants each had "an unarguably strong case for claiming to be ordinarily resident abroad" under IR20. But he went on to say that the principle of case law recognised in Viscount Cave LC's dictum in *Levene v Inland Revenue Comrs* [1928] AC 218, 233, that "a man may reside in more than one place", entitled HMRC to look for a clear or clean break with this country. That is once again to make the error of applying the case law, rather than the terms of IR20. In so far as paragraph 1.4 reflects a similar principle, it must be read not as watering down the categorical guidance as to situations of non-residence given in chapter 2, but consistently with that guidance in the way which I have indicated in the previous paragraph.

99. It is submitted on behalf of HMRC that all that the specific 91 day rule does is identify a limit which HMRC applies to persons who would or might otherwise be able to show that they are not ordinarily resident (ie by having made a distinct break with United Kingdom ties). It is an upper limit above which HMRC will not accept absence of ordinary residence, but keeping below that limit does not indicate or point to an absence of ordinary residence. The word "providing" used in paragraphs 2.8 and 2.9 of the 1999 version is particularly relied upon. The language used in IR20 is however variable. In previous versions of paragraph 2.8 (see the versions of paragraph 2.7 quoted in paras 73 and 74 above) and in paragraph 2.7, words such as "as long as" and "if" were and are used, and the limit is clearly expressed as a condition of entitlement in paragraphs 2.2 and 2.6 dealing with persons with full-time employment outside the United Kingdom and their accompanying spouses. It is of course HMRC's case that a distinction is to be drawn between paragraphs 2.2 to 2.6 and later paragraphs, but to my mind the distinction rests on weak foundations in so far as it is based on such terminological differences. The natural meaning to a potential taxpayer of all relevant paragraphs of the guidance is, as I see it, that, as long as he confines his presence within the United Kingdom to less than 183 days in any one tax year and less than 91 days average per tax year, and satisfies the other requirements relating to intention and/or years spent abroad, he will qualify as not ordinarily resident.

100. In my opinion, the natural meaning of chapter 2 in all its versions since at least 1993 is that, rather than imply the case law test of a distinct break, they introduced (and for public law purposes substitute) a series of specifically delineated cases, into which, if a taxpayer falls, he or she will be treated without more as not resident or ordinarily resident in the United Kingdom. I repeat that the suggestion that the distinct break test is implicit in the language of paragraphs 2.5 to 2.9 (though not in that of paragraph 2.2) appears to me remarkable in the light of the obvious importance of such a factor if it were envisaged. Paragraphs 2.5 to 2.9 of IR20 are essentially futile, indeed positively misleading, if they are read as incorporating or reiterating the difficult case law test of a distinct break, and moreover imposing a further specific restriction (a 91 day average limit) to the taxpayer's disadvantage. I appreciate that, in all the appellants' cases, the view may be taken that it is desirable and appropriate that HMRC should be able to tax as ordinarily resident persons with the life-style and connections with the United Kingdom of these appellants. That is a moral or fiscal judgment, which may well reflect the strict law (and evidently does so in the case of Mr Gaines-Cooper). But it does not follow that it is the conclusion to be drawn from the guidance in IR20 which HMRC issued, in the interests of good governance, clarity and transparency for the benefit of individuals, to explain the combination of the law and practice by reference to which such individuals could direct their affairs.

101. I would therefore allow these appeals, so far as they concern the correct interpretation of IR20. It seems to me to follow from the assurance given by HMRC in these proceedings (para 70 above) that there should be a declaration that HMRC should treat the appellants in respect of the relevant tax years (save perhaps 1992-93, on which I would be prepared to hear any further specific submissions) in accordance with that interpretation of IR20. I did not find in Mr Eadie's submissions any good reason to the contrary.

102. Since writing this judgment, I have had the benefit of reading Lord Wilson's judgment. My own view, as will be apparent from what I have already written, is that to treat IR20 as pregnant with the detailed implications listed in para 45 (or, in summary, as informing an ordinarily sophisticated taxpayer of a need for a "multifactorial evaluation" of his or her circumstances and for a "distinct break") runs contrary not only to the wording and sense of the document itself but also to its genesis and purpose: paras 83-87 above; so also, to treat IR20 as so unclear as to communicate nothing to which legal effect can be given on the means by which non-resident status might be acquired.

Practice

103. It is in these circumstances unnecessary to go into the secondary issue regarding HMRC's practice prior to 2005, when the issues relating to the

appellants first crystallised. Whether the appellants can show a clear and unequivocal practice is in issue, as are potentially how far it would be necessary to establish any general or particular knowledge of or reliance on such a practice and how far they could hold HMRC to such a practice as a matter of legitimate expectation. These are all matters into which I prefer not to go.

Conclusion

104. I would allow these appeals, on the primary issue of interpretation of IR20 and make the declaration to which I have referred in para 101.