Possible legal issues arising under the Regulatory Enforcement and Sanctions Act 2008: Lessons to be learnt from the Alphasteel greenhouse gas emissions trading penalty appeal

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Introduction

1. This paper focuses on Part 3 of the Regulatory Enforcement and Sanctions Act 2008 ("RESA 2008") which provides for a system of "civil sanctions" in respect of "relevant offences".

2. The offences concerned are broad in range, covering those matters in which 27 different regulatory bodies have enforcement powers, and applying further to any body which has an enforcement function in respect of offences in some 144 Acts of Parliament.[2]

3. This paper is necessarily constrained by the fact that Part 3 of RESA 2008 depends heavily on provision being made for the penalty regimes by the relevant government departments. It is not expected that any penalty regimes will be in place before October 2009, and it seems more likely that the relevant secondary legislation will not take effect until April 2010.

4. Nonetheless, the provisions for civil sanctions in RESA 2008 raise a series of controversial issues which seem likely to colour the process of creation of the new sanctions regimes and raise legal issues for the regulators and the regulated.

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[2] Ss 37-38 and Sch 5-6 RESA 2008

5. One question which is of particular significance is the compatibility of the statutory provisions with Article 6 of the European Convention on Human Rights ("ECHR"), as implemented in the UK by the Human Rights Act 1998 (HRA 1998). This paper analyses that question, in particular in light of the Alphasteel greenhouse gas emissions trading penalty appeal.

Alphasteel

The facts of the case

6. The Greenhouse Gas Emissions Trading Scheme Regulations 2005 (SI 2005/925) ("the ETS Regulations") create a system of allowances for carbon dioxide emissions, and permited the trading of those allowances. The ETS Regulations implement Directive 2003/87/EC ("the Directive") establishing an EU-wide system of greenhouse gas emission allowance trading ("The EU ETS").

7. At the end of each year installations subject to the EU ETS are required to ensure they have enough allowances to account for their emissions and must in due course surrender those allowances. Both the ETS Regulations and the Directive provide for "civil penalties" where an emitter of greenhouse gases fails to surrender sufficient allowances to cover its emissions in any particular year. The penalties consist of a financial charge in respect of each allowance which should have been but was not surrendered. The scheme is administered by the Environment Agency ("EA").

8. Alphasteel Limited, the operator of a steel foundry in Newport in Wales, failed to surrender sufficient allowances to cover its emissions in April 2006. Accordingly, the EA issued a notice requiring the company to pay a civil penalty as provided for under the ETS Regulations. The penalty was calculated by reference to the fixed charge per allowance at £564,559.93. The ETS Regulations provided for an appeal to the Secretary of State or, in the case of Wales, to the Welsh Ministers, against the imposition of a civil penalty. Alphasteel duly appealed, and the Welsh Ministers appointed an inspector to hold a public inquiry and report on the appeal.

Legal issues arising in Alphasteel

9. Although Alphasteel could not challenge either the quantum of the penalty or the bare fact that it had failed to surrender the relevant allowances, it did raise a number of challenges to the legality of the imposition of the penalty. It submitted that the term "civil penalty" in the ETS Regulations was a misnomer, and that "given the magnitude and severity of the penalty imposed… it is properly to be categorised as a criminal rather than as a civil matter".[3] It followed, in Alphasteel's submission, that the penalty scheme was unlawful as there was a failure to provide the protections required by Article 6 ECHR in respect of criminal proceedings. Further, it was submitted that the penalty imposed on Alphasteel for its failure to surrender allowances was, in the circumstances of the case, disproportionate and therefore a violation of the company's Convention rights.

10. The inspector decided that the civil penalty in the ETS Regulations should be considered a civil, rather than criminal, penalty for the purposes of Article 6 ECHR. He identified the criteria from the Strasbourg jurisprudence which were to be taken into account in making that determination:[4]

    a. The classification of the penalty in domestic law;
    b. The essential nature of the liability;
    c. The nature and severity of the potential penalty.

11. It was accepted by all the parties that domestic law classified the penalty as civil, although it was submitted by Alphasteel that such a categorisation did not necessarily flow from the Directive. Nonetheless, the inspector concluded that the ETS Regulations "unambiguously identify the penalty as civil in contradistinction to the criminal sanctions referred to elsewhere" in the Regulations.[5]

[3] See paragraph 75 of the Inspector's Report ("IR75")

[4] See IR77. The three criteria are well established in the Strasbourg jurisprudence: see, for example, *Engel v Netherlands* (1979-1980) 1 EHRR 647. The criteria have been recognised and applied by the English courts, for example in *International Transport Roth GmbH v SSHD* [2003] QB 728 (CA), considered below.

[5] IR79

12. In respect of the nature of the liability, the EA submitted that the scheme was not concerned with reprehensible or blameworthy conduct, but merely with a failure to surrender. The scheme was not of general application, but only applied to those holding relevant emissions permits under the EU ETS. Alphasteel argued that the penalties were dissuasive in nature. The inspector concluded that a "dissuasive" penalty need not necessarily be criminal in character. The scheme of trading was "quite dissimilar to a typical criminal regime of prohibition or regulation" and the fact that the penalty for failing to surrender an allowance was more than the cost of purchasing an allowance did not render the scheme "purely punitive"[6].

13. So far as the nature and severity of the penalty was concerned, the inspector considered the monetary value of the penalty and its effects on Alphasteel. The penalty was clearly large in financial terms and Alphasteel's case was that the imposition of the penalty would cause its Newport plant to close, with a consequential loss of 400 jobs. However, the inspector found that the automatic nature of the penalty rendered it dissimilar to criminal sanctions, and found that the fact that a penalty was large did not necessarily mean that it was criminal in nature[7]. Accordingly, the penalty was civil in nature and the protections applicable to criminal proceedings did not apply.

14. It was further submitted by Alphasteel that, regardless of the proper characterisation of the proceedings, the burden placed upon it to establish blamelessness and the automatic nature of the penalty rendered the proceedings as a whole unfair. The EA argued that blame was irrelevant and, furthermore, that the EA had to prove its case in the sense that it had to demonstrate that Alphasteel had failed to surrender the relevant allowances. The inspector accepted the EA's case that it was for the EA to prove the failure to surrender, and found that the automatic nature of the penalty was a consequence of the terms the Directive which could not itself be impugned in the context of the appeal.[8]

[6] IR82

[7] IR85

[8] IR89-90

15. The inspector found that, given that the ETS Regulations accurately transposed the Directive, the Regulations could not be impugned on the basis of a failure to comply with Article 6 ECHR without also impugning the Directive. The Directive was presumed to comply with Article 6, and in any case could not be impugned before the Inspector. Given those conclusions, the inspector declined to consider whether the appeal process lacked the safeguards required by Article 6 in respect of criminal proceedings.[9] In particular, the inspector did not find it necessary to deal with submissions in respect of the correct standard of proof.

16. With respect to the proportionality of the penalty, the inspector effectively declined to determine the matter. He found that the Directive itself prescribed "both the automatic nature and quantification of the penalty". It followed that he had no power "to declare that either of these features renders the penalty disproportionate".[10] It followed that the inspector recommended that the appeal be dismissed. The Minister duly accepted the inspector's recommendations and dismissed the appeal.

The civil sanctions scheme in Part 3 of RESA 2008

17. The civil sanctions created by RESA 2008 may reflect to some extent the penalties in the ETS Regulations. However, it is important to identify the range of sanctions which are envisaged by in RESA 2008:

    a. ss 39-41 make provision for the creation of fixed monetary penalties in respect of relevant offences;

    b. ss 42-45 make provision of discretionary requirements which may include variable monetary payments, compliance requirements, and restoration requirements;

[9] IR100

[10] IR104

c. ss 46-49 make provision for stop notices, which prohibit a regulated person from carrying on a particular activity;

d. s 50 provides for enforcement undertakings, whereby regulated persons avoid the effects of other civil sanctions by undertaking to take certain actions.

18. Enforcement undertakings are essentially consensual, and accordingly they are not considered here. As has already been noted, the actual schemes for these civil sanctions will be made by the relevant government departments in respect of the matters falling within their respective competences. RESA 2008 simply provides the statutory basis for such enforcement mechanisms. Civil sanctions can therefore only be understood somewhat in the abstract. However, a number of features of each type of sanction can be identified.

Fixed monetary penalties

19. Firstly, in respect of fixed monetary penalties it is noted that RESA 2008 does not prescribe the level of such penalties, save for a single limitation. In respect of offences which are triable summarily (whether or not they are also triable on indictment) and punishable on summary conviction by a fine, the fixed monetary penalty may not exceed the maximum amount of that fine (s 39(4)). That limitation, of course, does not help to identify the likely level of the fixed monetary penalties. The Guidance to the Act issued by the Department for Business, Enterprise and Regulatory Reform ("BERR") gives examples of fines of £50 and £100, but of course the statute permits far higher fixed penalties.[11] The Guidance suggests that the maximum fixed monetary penalty "will usually be capped at" £5000 but this is only where it is imposed in relation to a relevant offence that is triable summarily. The Explanatory Notes to the RESA2008 are in similar terms, see para. 114.

20. The regulator may only impose a fixed monetary penalty in respect of a relevant offence where it is "satisfied beyond reasonable doubt" that the subject of the penalty has committed the relevant offence (s 39(2)). Fixed monetary penalties are to be

[11] *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act* (BERR, July 2008) p 31

imposed by the service of a "notice of intent" to impose a penalty, which affords the subject of the penalty an opportunity to make representations to the regulator. At that stage, provision will be made for a "discharge payment", which will allow the person receiving the notice to escape the imposition of penalty (s 40(2)(b)). If the person neither makes the discharge payment nor convinces the regulator that penalty should not be issued, the regulator will then issue a final notice requiring the payment of a penalty (s 40(2)(d)).

21. Provision must be made for a right of appeal against a fixed penalty. That right of appeal must allow the subject of the penalty to challenge the decision on (at least) the following bases (s 40(6)):

    a. That the decision to impose the penalty was based on an error of fact
    b. That the decision was wrong in law;
    c. That the decision was unreasonable.

22. In common with the other civil sanctions, the appeal is made to the First-tier Tribunal created under the Tribunals, Courts and Enforcement Act 2007. Where there has been an unsuccessful appeal, the enforcement provisions in the 2007 Act can be relied on to recover the fixed monetary penalty. In the absence of an appeal against a fixed monetary penalty, provision can be made either for the recovery of the sum as a civil debt, or for its recovery "as if payable under a court order" (s 52(2)). That would of course allow the regulator to take advantage of the enforcement mechanisms available through a court (such as warrants of execution and third party debt orders) in recovering the penalty.

Discretionary requirements

23. As with fixed monetary penalties, discretionary requirements may be imposed where the regulator is satisfied beyond reasonable doubt that the person has committed the relevant offence (s 42(2)). The requirement may be made to pay a sum of money, to do something to ensure compliance with the relevant statutory scheme or to do something to restore the position to how it would have been if the offence was not

committed (s 42(3)). The monetary penalty is subject to the limit of £5000 but only in cases where the offence is triable summarily only (s 42(6)). There is no limitation on variable monetary penalties in the case of "either way" or indictable offences.

24. Fines can be high for "either way" or indictable offences. In ***R v Cemex Cement Ltd*** [2008] 1 Cr. App. R. (S.) 80 where the appellant company pleaded guilty before a magistrates' court to failing to comply with a condition of a permit granted under the Pollution Prevention Control Regulations 2000. The offence consisted of failing to ensure that an external door on a reject clinker silo was maintained in good operating condition. Both the prosecution and defence were content for the matter to be dealt with by the magistrates. But the magistrates decided that their powers of sentence (limited in the case of a fine to £20,000) were inadequate and they committed the case to the Crown Court for sentence. On October 3, 2006 at Warwick Crown Court Mr Recorder Michael Stephens imposed a fine of £400,000 and ordered Cemex to pay the prosecution costs £12,429.14. The Court of Appeal reduced the fine to £50,000.

25. The procedure for the imposition of a discretionary requirement is the same as that for fixed monetary penalties. However, instead of "discharge payments", provision is made for the giving of undertakings to discharge a discretionary requirement (s 43(5)). Such an undertaking may include an undertaking to pay a sum of money to the regulator. Appeal provisions must allow, in addition to the grounds of appeal in the case of fixed monetary payments, appeals on the grounds that (s 43(7)):

    a. In the case of a variable monetary penalty, that the amount of the penalty is unreasonable;

    b. In the case of another discretionary requirement, that the nature of the requirement was unreasonable.

26. Where a person fails to comply with a non-monetary discretionary requirement, the regulator may impose a "non-compliance penalty" which will be a requirement to pay a sum of money (s 45).

Stop notices

27. Stop notices are notices issued by a regulator with the intention of prohibiting a person from carrying on a certain activity until the steps specified in the notice have been taken. There are two circumstances where stop notices might be issued:

    a. Where the regulator reasonably believes that an activity is causing, or presents a significant risk of causing, serious harm to any of the matters referred to in s 46(6) and the regulator reasonably believes that the activity as carried on involves or is likely to involve the commission of a relevant offence (s 46(4));

    b. Where the regulator reasonably believes that a person is likely to carry out an activity which will cause, or will present a significant risk of causing, serious harm to any of the matters referred to in s 46(6) and the activity will involve or will be likely to involve the commission of a relevant offence (s 46(5)).

28. The matters referred to in s 46(6) are human health, the environment (including the health of animals and plants) and the financial interests of consumers. There is no procedure for "notices of intent" in the provisions for stop notices. The appeal provisions must permit appeals on the grounds that the person has not committed the offence and would not have committed the offence if the stop notice was not served, in addition to the grounds of errors of fact, errors of law and unreasonableness. Stop notices are brought to an end by the issuance of a "completion notice" (s 47(2)(c)), and provision is made for appeals against a refusal by a regulator to issue a completion notice. A failure to comply with a stop notice is a criminal offence (s 49).

<u>Are the sanctions "criminal charges" for the purposes of Article 6 ECHR?</u>

29. As in the Alphasteel appeal, a fundamental question in respect of the sanctions regime in Part 3 of RESA 2008 is whether provisions should be considered to be criminal in nature for the purposes of Article 6 ECHR. The three criteria in the ECHR jurisprudence have been set out above. Each of those criteria will be examined in turn.

The classification in domestic law

30. In the context of a part of an Act headed "Civil Sanctions", it may seem that the classification of the RESA 2008 sanctions in domestic law is beyond doubt. However, it is clear that the sanctions regime only applies in respect of criminal offences established in other statutory regimes. That begs the question as to whether, as a matter of domestic law, it can be said that a sanction becomes "civil" in nature merely because the cross-heading in a statute describes it as such. Although the sanctions regime seeks to "decriminalise" certain offences in certain contexts, it is noted that the Act prevents criminal proceedings from being pursued in respect of the same breach which has led to the imposition of a fixed monetary penalty or a discretionary requirement (ss 41 and 44). The Guidance to the Act explains that these provisions are "for reasons of double jeopardy".[12] Generally, there is no legal bar on concurrent criminal and civil liability for a wrong. Accordingly, the fact that provision has been made to prevent "double jeopardy" suggests that RESA 2008 does, at least to some extent, treat the sanctions as having a criminal element. Furthermore, the provisions expressly rely upon the criminal standard of proof ("beyond reasonable doubt") as the threshold for the decision to require or fixed penalty or a discretionary requirement.

31. Nonetheless, the civil nature of the sanctions is apparent from the fact that sums due under a monetary penalty are recoverable as either a debt, or as a civil judgment. It is only stop notices which are supported by the force of the criminal law, and a breach of a stop notice would have to be prosecuted a separate offence. There is nothing to suggest that the imposition of RESA 2008 sanctions would lead to a criminal record.

32. In *Ozturk v Germany* (referred to in Hansard debates on the RESA 2008) the European Court said:

> "By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of

[12] p 33

> prosecuting and punishing contraventions—which are numerous but of minor importance—of road traffic rules. The Convention is not opposed to the moves towards "decriminalisation" which are taking place—in extremely varied forms—in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention".

33. German law allowed minor traffic offences to be treated as 'regulatory' and dealt with by administrative authorities. The Court held that thee proceedings were criminal for the purposes of Article 6.

34. It is notable that the system of VAT civil penalties was held by the Court of Appeal in *Han v Customs and Excise Commissioners* [2001] 1 WLR 2253 to give rise to "criminal charges" within Article 6. See also *Her Majesty's Revenue and Customs v Tahir Iqbal Khawaja* [2008] EWHC 1687 (Ch) on the income tax system of civil penalties which were accepted by HMRC to give rise to a criminal charge following a long line of earlier cases.

The essential nature of the liability

35. The nature of the liability carries more weight than its domestic classification in assessing whether the matter should be considered to be a criminal offence for the purposes of the ECHR.[13] There are several factors which might be relevant in determining the nature of the liability.

36. Firstly, one must consider whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character.[14] In Alphasteel, the inspector found that it was relevant that the penalty in the ETS Regulations only

[13] *Jussila v Finland* (2007) 45 EHRR 39, [38]

[14] *Bendenoun v France* (1994) 18 EHRR 54, [47]. The provisions in that case were penalties in relation to the French taxation regime which applied to all French taxpayers.

applied to EU ETS permit holders. In the case of the sanctions under RESA 2008, the answer to this question will depend on the particular "relevant offence" in respect of which the sanction is being imposed. As noted above, the sanctions may apply to a broad range of offences. Some of those offences relate to specific group of people, such as licensees[15] or the owners of land within Sites of Special Scientific Interest[16]. Other offences may apply to any person, for example the offence of damaging a public highway[17] or of operating a loudspeaker in a street at night[18]. The range of offences captured by the sanctions regime raises the possibility that some sanctions may be considered criminal in nature whereas others may be considered civil in nature.

37. The next relevant factor is whether the proceedings in question are brought under statutory enforcement powers.[19] Clearly the RESA 2008 sanctions are brought under statutory enforcement powers.

38. The function of the legal rule is also relevant: does it have a punitive or deterrent purpose?[20] It appears that, certainly in respect of fixed monetary penalties, there is an element of punishment.

The nature and severity of the penalty

39. In the absence of actual examples, it is not possible to properly analyse the nature and severity of the penalties which would be imposed by way of sanction under Part 3 of RESA 2008. However, it may be that this consideration influences the way in which the relevant government departments decided to fix the penalties in question. Clearly,

[15] See the Licensing Act 2003

[16] See s 28P(1) Wildlife and Countryside Act 1981

[17] See s 131 Highways Act 1980

[18] See s 62 Control of Pollution Act 1974

[19] *Benham v United Kingdom* (1996) 22 EHRR 293, [56]

[20] *Öztürk v Germany* (1984) 6 EHRR 409, [53]

the smaller the penalty the easier it will be to argue that the sanctions are truly civil in nature.

40. In *International Transport Roth GmbH v SSHD* [2003] QB 728, Simon Brown LJ analysed the second two factors in the Strasbourg case-law (the nature of the liability and the nature and severity of the penalty) together. His lordship held that the considerations arising under those grounds necessarily raise the question as to whether the liability involves blameworthiness. "If it does, then by its very nature it may be thought to include a punitive (in the sense of retributive) element".[21] That case concerned measures taken to combat immigrants entering the country unlawfully by hiding in vehicle. The relevant penalty was a fixed fine of £2000 imposed upon carriers for every clandestine entrant found on their vehicle. Simon Brown LJ held that the penalty was "targeted at those truly regarded as in some degree culpable" and therefore it followed that the scheme was properly to be regarded as criminal in nature. Applying that analysis to the RESA 2008 sanctions, it seems likely that the sanctions should be considered criminal in nature. They arise only when the regulator has come to the conclusion that criminal liability for the relevant offence would be made out.

41. The fact a large penalty is not always in and of itself sufficient - see ***Krone-Verlag GmbH v Austria*** (1997) 23 EHRR CD 152.

Other matters

42. At para. 33 in *International Transport Roth GmbH v SSHD* Simon Brown LJ said:

> " … extensive case-law then establishes that the various procedural safeguards expressly or impliedly provided by Article 6 are not ultimately dependent upon such a classification: the protections are sometimes found unnecessary even though the proceedings are criminal; sometimes essential even though the proceedings are civil. Why, therefore, attempt the classification exercise in the first place? Simpler surely to address the question as to whether the protections are indeed necessary to achieve a fair trial of whatever may be the issue. The contrast, indeed, between the two recent Court of Appeal decisions

[21] [38]

> in *Official Receiver -v- Stern* [2000] 1 WLR 2230 *and Han -v- Customs & Excise Commissioners* [2001] 1 WLR 2253 is striking. In *Stern*, which concerned the use in directors' disqualification proceedings of compelled evidence obtained under the Insolvency Act, the Court held, following the judgment of ECtHR in *Albert & LeCompte -v- Belgium* (1983) 5 EHRR 533, that the issue of fair trial should be considered in the round, having regard to all relevant factors, those factors including, but not being limited to, the facts that disqualification proceedings were not criminal and were primarily for the protection of the public, albeit they involved serious allegations and almost always carried a degree of stigma. In *Albert & LeCompte* the ECtHR found it unnecessary to decide whether the disciplinary action there involved a "criminal charge". In *Han*, on the other hand, this Court by a majority decided as a preliminary issue (*Stern* not having been cited) that the imposition of civil penalties for dishonest evasion of VAT gave rise to "criminal charges", leaving over for later decision whether in the result such proceedings would or would not involve a breach of Article 6. Given that not merely Sir Martin Nourse, who dissented, but also the other members of the Court (Potter and Mance LJJ), were clearly reluctant to categorise the proceedings as criminal, plainly not regarding them as unfair, it may be doubted whether the classification process will ultimately prove decisive. In short, the classification of proceedings between criminal and civil is secondary to the more directly relevant question of just what protections are required for a fair trial. …(emphasis added)."

43. Simon Brown LJ thus regarded the key question for the Court not to be whether the scheme was to be regarded as civil or criminal for the purposes of Article 6 but rather: "is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?" (see para. 26 of the judgment).

44. In *Louku v Slovakia* (4/1998/907/1119) cited by the Court of Appeal in *Han* the European Court held that the second and third criteria are alternative rather than cumulative, but that does not appear to be the approach subsequently followed: see further *Bendenoum v France* (1994) 18 EHRR 54 (again cited in *Han* at para. 59).

45. In *Air Canada* (1995) EHRR 150, not referred to in *Han* the European Court declined to classify, as criminal, proceedings (under the Customs & Excise Management Act, 1979) by which Air Canada were required to pay a £50,000 penalty to redeem their forfeited aircraft.

Consequences of classification

46. In summary, it appears at least arguable that for the purposes of the ECHR, the RESA 2008 sanctions should be considered to be criminal in nature. What does this mean for the sanctions scheme?

47. Article 6(2) provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law."

48. It is at least arguable that the sanctions scheme fails to give effect to the presumption of innocence. If the proceedings are to be regarded as criminal in nature, the issuance of a "notice of intention" would seem to amount to a criminal charge.[22] The imposition of the penalty will follow unless the regulator is persuaded not to impose the penalty. There is no adjudication in any meaningful sense, merely a period of time in which representations could be made. Although there is a right to appeal the decision, by that point the penalty will have been imposed. The fact that the penalty may be accepted to avoid the prospect of a formal criminal prosecution of the relevant offence may also be relevant in assessing whether there has been a breach of Article 6. In *Deweer v Belgium*, the claimant was a butcher who had allegedly sold meat at an illegal profit. Under Belgian law, he had waived his right to a determination of his case in a criminal court by paying a monetary penalty, on fear that otherwise he might be ordered to close his shop. In the circumstances, the European Court of Human Rights held that Mr Deweer's waiver of the fair trial right was "tainted by constraint" and that therefore his rights had been violated.[23] One can envisage a factual situation under the RESA 2008 sanctions where the same points will be made.

49. Turning to the appeal mechanisms, there must be real doubt as to the adequacy of the appeal which is limited to errors of fact, errors of law, unreasonableness and (except in fixed penalties), the nature of the penalty. The first point to note is that the burden

[22] *Deweer v Belgium* (1979-80) 2 EHRR 439, [46], where "charge" was defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".

[23] See above.

appears to be on the subject the sanction to prove a ground of appeal. That is clearly contrary to the presumption of innocence in Article 6(2). The second point, which arguably applies whether or not the sanctions are to be regarded as civil or criminal in nature, is that the grounds do not appear to allow the tribunal to determine for itself whether the relevant offence has been committed "beyond reasonable doubt". In other words, there would appear to remain an area of judgment for the regulator where a decision is not based on an error of law or fact, and not unreasonable (in the *Wednesbury* sense of a decision which no reasonable decision-maker would come to). The regulators decision that the matter was proved beyond reasonable doubt may be difficult to impugn. There must be real concerns as to whether the absence of a full appeal, requiring the tribunal to decide for itself whether the offence has been committed, is compatible with ECHR rights.

50. In my opinion many of these problems could have been avoided if the proposed amendment to the Bill to allow the subject of civil sanction to require the regulator to withdraw the notice and proceed by way of criminal proceedings for the offence had been passed.[24] Such a provision exists in relation to the fixed penalty notice provisions in Part 1 of the Criminal Justice and Police Act 2001, and in the well-known fixed penalty notice provisions in Part III of the Road Traffic Offenders Act 1988.[25] The desire to maintain an absolute discretion for the regulator as to how to pursue breaches of regulatory regimes may come back to haunt the proponents of the Act.

51. Article 6(3) provides:

"Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

[24] See Hansard Commons Debates 10 July 2008, col 1586.

[25] A fixed penalty notice is defined as "a notice offering the opportunity of the discharge of any liability to conviction of the offence to which the notice relates by payment of a fixed penalty" (s 52(1) RTOA 1988).

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

52. Perhaps the most significant of these in the contest of RESA 2008 is (c) and the requirement for legal aid. The position as regards CLF for appeals to the new Tribunals remains unclear. In *Benham v UK* (1996) 22 EHRR 293 the European Court held that proceedings which resulted in imprisonment for non-payment of the community charge were criminal for Article 6 purposes and that the absence of a general right to legal aid violated Article 6(3)(c). The obligation to provide legal aid is limited to where the interests of justice so require. The interests of justice allow consideration of issues such as complexity, ability of the individual to represent himself and the severity of the potential sentence.

53. Beyond these specific procedural safeguards in Article 6(2) and (3) it is clear from the case-law (see e.g. *Han* above) that one does not move seamlessly from a determination that proceedings are criminal for the purposes of Article 6 to introducing all the domestic law consequences of proceedings being criminal. Mance LJ made this plain:

> "88. The classification of a case as criminal for the purposes of article 6(3) of the Convention on Human Rights, using the tests established by the Strasbourg jurisprudence, is a classification for the purposes of the Convention only. It entitles the defendant to the safeguards provided expressly or by implication by that article. It does not make the case criminal for all domestic purposes. In particular, it does not necessarily engage protections such as those provided by the Police and Criminal Evidence Act 1984. The submissions before us did not address this point or, indeed, the subject of burden[26] of proof (although I note that no objection was even raised to a civil burden in Georgiou's case). As Mr Oliver and Potter LJ have both observed, the precise implications under the Convention of classification of any case as criminal for the purposes of the Convention will have to be worked out on a case by case basis."

54. However, the Starsbourg case-law has considered other fair trial rights in the criminal context including e.g. protection against self-incrimination (see the review of the cases

[26] In *Khawaja* (above) Mann J. suggested that Mance LJ must have meant standard of proof. Of course under RESA 2008 the standard of proof is set by the statute so the *Khawaja* issue of standard of proof does not arise.

in *R v Hertfordshire CC, ex p Green* [2000] 1 All ER 773 per Lord Hoffmann); entrapment and agents provocateurs; the prosecution's duty of disclosure; media coverage etc.

Proportionality of penalties

55. Turning back to the *International Transport Roth* case mentioned above, both Simon Brown and Jonathan Parker LJJ held the fixed penalty to be incompatible with ECHR rights. Simon Brown LJ held:[27]

> "The hallowed principle that the punishment must fit the crime is irreconcilable with the notion of a substantial fixed penalty. It is essentially, therefore, on this account rather than because of the reversed burden of proof that I would regard the scheme as incompatible with article 6. What in particular it offends is the carrier's right to have his penalty determined by an independent tribunal. To my mind there surely *is* such a right… Sentencing is, like all aspects of the criminal trial, a function that must be conducted by an independent tribunal. If, as I would hold, the determination of liability under the scheme is properly to be characterised as criminal, then this fixed penalty cannot stand unless it can be adjudged proportionate in all cases having regard to culpability involved".

56. Jonathan Parker LJ similarly held:[28]

> "In considering the penalty in the context of article 6, it seems to me that the degree of severity of the penalty must be a matter which falls within Parliament's "discretionary area of judgment": in other words, it is matter for Parliament and not for the courts. The courts are, however, concerned to ensure that the nature of the penalty is not such as to breach article 6. In this context, the fact that the penalty is not merely severe but *fixed* seems to me to be of the highest importance. The fact that it is fixed means, by definition, that in imposing the penalty where liability has been determined no account can be taken of the facts of particular cases, or of the circumstances of a particular defendant. Nor is there any scope for mitigation."

57. Both judges held that the penalty provisions were incompatible with Article 6 ECHR and, further, that they constituted a disproportionate interference with property rights contrary to Article 1 of the First Protocol to the ECHR. Laws LJ dissented on both grounds.

[27] [47]

[28] [183]

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58. In the absence of any concrete proposals for fixed monetary penalties, it cannot be said whether the *International Transport Roth* reasoning would apply to the RESA 2008 sanctions. However, it is clear that in developing fixed penalty schemes, the relevant government departments should be mindful of the restrictions on the imposition of fixed penalties.

Conclusions

59. Although this analysis has been in the abstract in the absence of concrete provisions for "civil sanctions", it seems clear that a number of difficult issues will arise with respect to the compatibility of the sanctions provisions with Article 6 ECHR. It maybe that regulations can work around these problems. I would suggest that those drafting the regulations must carefully consider:

    a. The appropriate level of fixed penalties, given the warning words in *International Transport Roth* and the fact that a higher penalty will more likely be seen as a criminal provision;

    b. The possibility of providing for fuller rights of appeal beyond those anticipated in the Act;

    c. Whether it is appropriate to provide for a suspensory effect of penalties until an appeal has been heard or the time for appealing has passed.

60. These considerations may help in insulating the schemes of civil sanctions from challenge. However, it seems likely that, contrary to the intent of the legislators, these provisions will be before the courts with some frequency. This is particularly so because each scheme will have its own features which will need to be measured against the Article 6 benchmark. With hundreds of relevant offences potentially involved, expect the litigation to be fairly intense.

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