Neutral Citation Number: [2024] EWCA Civ 16

Case No: CA-2022-000991

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE SCOLDING KC
CTC/886/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2024

Before:

LORD JUSTICE BAKER
LORD JUSTICE SNOWDEN
and
LADY JUSTICE FALK

- -

Between:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and –	
ABUBAKER ARRBAB	**Respondent**

- -
- -

Julia Smyth and Katharine Elliot (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Appellants**
Jamie Burton KC, Desmond Rutledge and Ollie Persey (instructed by **Kirklees Citizens Advice and Law Centre**) for the **Respondent**

Hearing date: 6 December 2023

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 19 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This appeal concerns legislation which provides for a review of HMRC decisions about tax credits in advance of an appeal to the First-tier Tribunal ("FTT"). HMRC's position is that the effect of the legislation is to make the carrying out of a review mandatory before any such appeal may be made, and further that if a review is not requested within the time limit provided and HMRC refuse to extend time then the right to appeal is lost, subject only to the possibility of a judicial review of HMRC's refusal.

2. In this case the Respondent, Mr Abubaker Arrbab, sought to appeal to the FTT against a refusal by HMRC to extend time for a review. The FTT struck out the appeal on the basis that it had no jurisdiction to hear it. The Upper Tribunal ("UT") construed the legislation as not excluding a right of appeal, relying on *R(CJ) and SG v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 324 (AAC), [2018] AACR 5 ("*CJ*"), a decision relating to social security benefits. The UT set aside the FTT's decision and remitted the appeal for the FTT to consider whether to extend time to permit an appeal and, if it did, to deal with the merits of Mr Arrbab's case.

3. Permission to appeal to this court was granted to HMRC by Simler LJ. The single ground of appeal is that the UT judge, Judge Fiona Scolding KC, erred in law in concluding that the provisions of ss.21A, 21B and 38 of the Tax Credits Act 2002 ("the 2002 Act") permit an appeal to be brought in a case where HMRC have decided that the period to apply for a review should not be extended. I will refer to this as the "construction issue".

4. Mr Arrbab filed a Respondent's notice. In that he claims that the statutory instrument that introduced those provisions into the 2002 Act was ultra vires insofar as it sought to amend s.38 of that Act to make the review process mandatory. As will be seen, this question, which I will refer to as the "ultra vires issue", was the primary focus of the submissions before us. The Respondent's notice alternatively sought a declaration of incompatibility with Article 6 of the European Convention on Human Rights (the "Convention").

5. Tax credits are being phased out as claimants move into the universal credit system, but we were informed by HMRC that our decision would affect other claimants, including some who have outstanding appeals to the FTT.

6. I am grateful to Counsel, Julia Smyth and Katharine Elliot for HMRC and Jamie Burton KC, Desmond Rutledge and Ollie Persey for Mr Arrbab, for their submissions not only prior to and at the hearing, but also for the further written submissions requested by us in relation to some aspects.

The tax credit system in outline

7. Under the 2002 Act there are two types of tax credit, a) child tax credit, paid to claimants who are responsible for children; and b) working tax credit, paid to people who work and are on low incomes. Tax credits are administered by HMRC.

8. Unlike benefits administered by the Department of Work and Pensions ("DWP"), once awarded tax credits are generally checked and determined annually, on the basis of tax years. Awards are calculated on a provisional basis by way of an "initial decision" when

a claim is made, based on the claimant's income during the preceding tax year: s.14 of the 2002 Act. A "final notice" is then sent by HMRC to the claimant towards the end of the tax year pursuant to s.17, setting out relevant circumstances affecting their entitlement (most obviously, their income) and the amount of the award. We were not shown the actual form of the notice used, but based on s.17 it should require the claimant either to confirm its accuracy or to provide further information by a specified date, and should also inform the claimant that a failure to respond will be treated as a declaration that the facts are as stated in the notice. Once a response is received, or is not made by the date specified, HMRC will make a final decision under s.18. (There are provisions in ss.15 and 16 allowing revisions to be made during the course of the tax year, but they are not material for present purposes.)

9. Sections 19 and 20 (enquiries and discovery) confer power to revisit a decision under s.18 in certain circumstances. Section 21 provides for regulations to be made for decisions under s.18 (among other provisions) to be revised where there has been an "official error" as defined in the regulations. The relevant regulations are the Tax Credits (Official Error) Regulations 2003, SI 2003/692, which provide that a decision may be revised in favour of the person or persons to whom it relates at any time not later than five years after the end of the tax year if it is incorrect by reason of official error. "Official error" is defined in terms that confine it to errors to which the claimant did not materially contribute.

10. Section 38 of the 2002 Act confers a right of appeal against a decision made under s.18 (and certain other provisions), as set out below. Any appeal is to the FTT: s.63(2). Within the FTT, appeals are dealt with by the Social Entitlement Chamber.

The review procedure

11. When the tax credit system was introduced there was no formal system which enabled HMRC to reconsider their decisions before an appeal was lodged. Instead, under s.39 of the 2002 Act (as originally enacted) a dissatisfied claimant could lodge an appeal under s.38 within 30 days of the decision being notified. The FTT also had power under its rules to extend time limits by up to 12 months.

12. The later introduction of a mandatory review procedure reflected the adoption of such a procedure in a social security context, pursuant to the Welfare Reform Act 2012 (the "2012 Act") (although, as explained in *CJ*, there was an existing non-compulsory review provision in that context under s.9 of the Social Security Act 1998, and there had previously also been compulsory schemes for certain benefits). In both the tax credit and social security contexts the review procedures are often referred to as "mandatory reconsideration", although that term does not appear in the legislation.

13. As can be seen from the Explanatory Notes to what became the 2012 Act, the aim of the proposal was to resolve more disputes without recourse to the tribunals:

> "486. … Although the claimant (or other person) could ask initially for the decision to be reconsidered with a view to revision (under section 9 of the [Social Security Act 1998]), in practice many people do not do so and make an appeal from the outset.

> 487. In order to resolve more disputes with claimants through the internal reconsideration process before an appeal to the tribunal is made, subsections (2) and (3) of clause 99 amend section 12 to enable the Secretary of State to make regulations setting out the cases or circumstances in which an appeal can be made only when the Secretary of State has considered whether to revise the decision."

14. The tax credit review procedure was introduced with effect from 6 April 2014, by the Tax Credits, Child Benefit and Guardian's Allowance Reviews and Appeals Order 2014, SI 2014/886 (the "2014 Order"). The 2014 Order sought to amend the 2002 Act by introducing ss.21A and 21B, and by inserting new subsections (1A)-(1C) into s.38.

15. Section 21A provides:

> "(1) The Commissioners for Her Majesty's Revenue and Customs must review any decision within section 38(1) if they receive a written application to do so that identifies the applicant and decision in question, and—
>
> (a) that application is received within 30 days of the date of the notification of the original decision or of the date the original decision was made if not notified because of section 23(3), or
>
> (b) it is received within such longer period as may be allowed under section 21B.
>
> (2) The Commissioners must carry out the review as soon as is reasonably practicable.
>
> (3) When the review has been carried out, the Commissioners must give the applicant notice of their conclusion containing sufficient information to enable the applicant to know—
>
> (a) the conclusion on the review,
>
> (b) if the conclusion is that the decision is varied, details of the variation, and
>
> (c) the reasons for the conclusion.
>
> (4) The conclusion on the review must be one of the following—
>
> (a) that the decision is upheld;
>
> (b) that the decision is varied;
>
> (c) that the decision is cancelled.
>
> (5) Where—
>
> (a) the Commissioners notify the applicant of further information or evidence that they may need for carrying out the review, and
>
> (b) the information or evidence is not provided to them by the date specified in the notice,
>
> the review may proceed without that information or evidence."

16. Section 21B provides for extensions to the time limit under section 21A(1)(a) as follows:

> "(1) The Commissioners for Her Majesty's Revenue and Customs may in a particular case extend the time limit specified in section 21A(1)(a) for making an application for a review if all of the following conditions are met.
>
> (2) The first condition is that the person seeking a review has applied to the Commissioners for an extension of time.
>
> (3) The second condition is that the application for the extension—
>
> (a) explains why the extension is sought, and

> (b) is made within 13 months of the notification of the original decision or of the date the original decision was made if not notified because of section 23(3).
>
> (4) The third condition is that the Commissioners are satisfied that due to special circumstances it was not practicable for the application for a review to have been made within the time limit specified in section 21A(1)(a).
>
> (5) The fourth condition is that the Commissioners are satisfied that it is reasonable in all the circumstances to grant the extension.
>
> (6) In determining whether it is reasonable to grant an extension, the Commissioners must have regard to the principle that the greater the amount of time that has elapsed between the end of the time limit specified in section 21A(1)(a) and the date of the application, the more compelling should be the special circumstances on which the application is based.
>
> (7) An application to extend the time limit specified in section 21A(1)(a) which has been refused may not be renewed."

17. The material provisions of section 38, as amended and with emphasis supplied, are as follows:

> "(1) An appeal may, subject to subsection (1A), be brought against—
>
> (a) a decision under section 14(1), 15(1), 16(1), 19(3) or 20(1) or (4) or regulations under section 21,
>
> (b) the relevant section 18 decision in relation to a person or persons and a tax credit for a tax year and any revision of that decision under that section,
>
> …
>
> (1A) An appeal may not be brought by virtue of subsection (1) against a decision unless a review of the decision has been carried out under section 21A or section 21C and notice of the conclusion on the review has been given under section 21A(3) or 21C(6) (as the case may be).
>
> (1B) If in any case the conclusion of a review under section 21A is to uphold the decision reviewed, an appeal by virtue of subsection (1) in that case may be brought only against the original decision.
>
> (1C) If in any case the conclusion of a review under section 21A is to vary the decision reviewed, an appeal by virtue of subsection (1) in that case may be brought only against the decision as varied.
>
> (2) 'The relevant section 18 decision' means—
>
> (a) in a case in which a decision must be made under subsection (6) of section 18 in relation to the person or persons and the tax credit for the tax year, that decision, and
>
> (b) in any other case, the decision under subsection (1) of that section in relation to the person or persons and the tax credit for the tax year."

(Section 21C deals with reviews of awards of certain disability benefits. It is similar in effect to s.21A but contains no provision permitting the basic time limit of one month to be extended. It was introduced, with consequential amendments to s.38, by the Tax Credit Reviews and Appeals (Amendment) Order 2021, SI 2021/44.)

18. Under the relevant tribunal rules (the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules, SI 2008/2685 (the "FTT rules")), where "mandatory reconsideration" applies, notice of an appeal must be sent to the FTT within one month

of the notice of the result of that reconsideration being sent (rule 22(2)(d)(i)). The FTT has the power to extend time by up to 12 months, so allowing for a total of up to 13 months (rule 22(8)).

19. Unlike the equivalent procedure for social security, the mandatory review procedure for tax credits was not introduced by regulations made under the 2012 Act. Instead, the preamble to the 2014 Order states that it is made by the Treasury "in exercise of the powers conferred by section 124(1), (2), (6) and (7) of the Finance Act 2008". Mr Arrbab's case is that the 2014 Order was ultra vires this legislation insofar as it sought to amend s.38 of the 2002 Act to make the review process mandatory.

20. Section 124 of the Finance Act 2008 ("FA 2008") provides:

> "**124 HMRC decisions etc: reviews and appeals**
> (1) The Treasury may by order made by statutory instrument make provision—
> (a) for and in connection with reviews by the Commissioners, or by an officer of Revenue and Customs, of HMRC decisions, and
> (b) in connection with appeals against HMRC decisions.
> (2) An order under subsection (1) may, in particular, contain provision about—
> (a) the circumstances in which, or the time within which—
> (i) a right to a review may be exercised, or
> (ii) an appeal may be made, and
> (b) the circumstances in which, or the time at which, an appeal or review is, or may be treated as, concluded.
> (3) An order under subsection (1) may, in particular, contain provision about the payment of sums by, or to, the Commissioners in cases where—
> (a) a right to a review is exercised, or
> (b) an appeal is made or determined.
> (4) That includes provision about payment of sums where an appeal has been determined, but a further appeal may be or has been made, including provision—
> (a) requiring payments to be made,
> (b) enabling payments to be postponed, or
> (c) imposing conditions in connection with the making or postponement of payments.
> (5) An order under subsection (1) may, in particular, contain provision about interest on any sum that is payable by, or to, the Commissioners in accordance with a decision made on the determination of an appeal.
> (6) Provision under subsection (1) may be made by amending, repealing or revoking any provision of any Act or subordinate legislation (whenever passed or made, including this Act and any Act amended by it).
> (7) An order under subsection (1) may—
> (a) provide that any provision contained in the order comes into force on a day appointed by an order of the Treasury made by statutory instrument (and may provide that different days may be appointed for different purposes),
> (b) contain incidental, supplemental, consequential, transitional, transitory and saving provision, and

(c) make different provision for different purposes.

(8) A statutory instrument containing an order under subsection (1) may not be made unless a draft of it has been laid before and approved by resolution of the House of Commons.

(9) But if the order, or any other order under subsection (1) contained in the statutory instrument, is made in connection with a transfer of functions carried out under the Tribunals, Courts and Enforcement Act 2007 (c. 15), the statutory instrument may only be made if a draft of it has been laid before and approved by resolution of each House of Parliament.

(10) In this section–

(a) references to appeals against HMRC decisions include any other kind of proceedings relating to an HMRC matter, and

(b) references to the making, determination or conclusion of appeals are to be read accordingly.

(11) In this section–

"*the Commissioners*" means the Commissioners for Her Majesty's Revenue and Customs;

"*HMRC decision*" means–

(a) any decision of the Commissioners relating to an HMRC matter, or

(b) any decision of an officer of Revenue and Customs relating to an HMRC matter,

and references to an HMRC decision include references to anything done by such a person in connection with making such a decision or in consequence of such a decision;

"*HMRC matter*" means any matter connected with a function of the Commissioners or an officer of Revenue and Customs."

It can be seen from sub-section (8) that regulations made pursuant to subsection (1) require an affirmative resolution procedure in the form of a resolution of the House of Commons.

21. The bundles for the hearing did not include the Explanatory Notes to s.124 FA 2008. We asked about them and subsequently sought written submissions. The relevant notes are to what was then clause 119 of the Bill, which describes what became s.124 in the following terms:

"**Summary**

1. Clause 119 gives HM Treasury power, by order, to make provision for reviews of HM Revenue & Customs (HMRC) decisions and changes to appeals administration processes. The power will be available from the date that Finance Bill 2008 receives Royal Assent. It will enable HMRC to streamline appeals administrative processes in readiness for the introduction of the new Government tribunals established by the Tribunals, Courts and Enforcement Act 2007 (TCEA), and to provide a right to a review of appealable decisions."

And then after outlining what the various sub-sections provided:

"**Background Note**

13. Current HMRC appeals processes reflect the history of the two former departments (Inland Revenue and HM Customs & Excise) and the

> requirements of particular taxes or schemes. Appeals are made to different tribunals (in particular the General and Special Commissioners and the VAT & Duties Tribunals) depending on which former department was responsible for the disputed matter, and different appeal and review processes operate in these different areas. The power will enable these processes to be made more consistent, and to reflect changes being made under TCEA.
>
> 14. TCEA provides a single two tier central government tribunal structure. In particular the new tribunals will replace the existing tribunals which consider HMRC appeals. TCEA provides for the legislative changes required to transfer the functions of existing tribunals to the new structure. It is intended that the functions of the tax tribunals will transfer in April 2009.
>
> 15. This power will also facilitate the move to a single tribunal hearing all tax appeals by enabling differences of approach to be aligned. For example, giving taxpayers the right to a formal review of appealable HMRC decisions.
>
> 16. In this context references to appeals against HMRC decisions covers any other kind of proceedings relating to an HMRC matter, such as the referral of questions for the tribunal's determination during an enquiry (section 28ZA of the Taxes Management Act 1970 (TMA)), applications for a clearance under section 216(7) of the Income and Corporation Taxes Act 1988, and applications to postpone payment of disputed tax during an appeal (section 55 of TMA).
>
> 17. The procedure for the use of the power to transfer functions in TCEA requires approval of both Houses of Parliament. Subsection (9) provides that orders made in connection with TCEA changes must be made under this procedure and this means that it will be possible, where this subsection applies, for TCEA changes and changes made under the power provided by this clause to be made in a single order, where convenient."

22. As discussed further below, s.124 FA 2008 was considered by this court in *R (ToTel Ltd) v First-tier Tribunal (Tax Chamber) and another* [2012] EWCA Civ 1401, [2013] QB 860 ("*ToTel*").

The facts in more detail

23. For the tax year commencing on 6 April 2018, Mr Arrbab submitted a joint claim for working tax credit and child tax credit on the basis of two dependent children and a declared household income of £10,771. He was awarded £2,997.59 in working tax credit and £6,110.10 in child tax credit by HMRC. In July 2018, after the award was made, Mr Arrbab changed his employer. On 3 August 2018, Mr Arrbab telephoned HMRC to inform them of this. Over the course of the conversation the call handler wrongly interpreted the purpose of Mr Arrbab's call as being to inform HMRC that he was now self-employed. On 11 March 2019, Mr Arrbab made a claim for universal credit which terminated his entitlement to tax credit.

24. The effect of the erroneous recording of Mr Arrbab as self-employed was to inflate his income in HMRC's records beyond its actual level, as what was perceived to be separate self-employed income was added to his employment income recorded via the PAYE

system. This inflated figure was conveyed to Mr Arrbab in a notice issued pursuant to s.17 of the 2002 Act on 25 March 2019, which described his earnings as £24,647 for the period from 6 April 2018 to 10 March 2019 (with £10,602 recorded as self-employed earnings). In the absence of any response from Mr Arrbab to this notice, HMRC issued a decision pursuant to s.18 on 30 April 2019 which reduced Mr Arrbab's working tax credit award to £0.00 and his child tax credit award to £4,127.02, based on a calculated notional current year income of £20,589.40. By contrast, Mr Arrbab's P60 for the tax year to 5 April 2019 showed his income to be £13,358.53.

25. Mr Arrbab completed a form requesting mandatory reconsideration of the decision under s.21A of the 2002 Act on 5 July 2019, on the basis that he had never been self-employed and therefore could not have earned the £10,602.00 recorded as being from self-employment. HMRC received the form four days later. The request was rejected in a letter dated 23 July 2019 on the basis that the form had been submitted late. In the same letter, the writer described listening to the phone conversation and stated that there had been "no official error in the calculation" of the award. On 8 August 2019, Mr Arrbab replied by letter, setting out health issues that had been responsible for the delay in applying and providing evidence as to his earnings. As English was not his first language, Mr Arrbab contended that he had needed help to understand the decision letter, further contributing to the delay in his request for a review. The letter was treated as a notice of appeal to the FTT.

Developments since the UT's decision

26. A significant development emerged from a supplementary skeleton argument filed by HMRC to address the Respondent's notice. The skeleton was filed following a change of Counsel and relatively shortly before the hearing. In it, HMRC accepted that their decision dated 23 July 2019 was "unsatisfactory". While they maintain that there had not been an official error (as defined) they accept that the letter did not properly engage with Mr Arrbab's request for an extension of time and explain, as it should have done, the reasons for refusing it. There would therefore have been cogent grounds for a judicial review claim, since HMRC's own internal guidance had not been followed. In those circumstances, HMRC had decided to repay Mr Arrbab the amount that had been wrongly recouped from him by reductions in payments of universal credit.

27. It is highly unfortunate, and of real concern, that it took two tribunal decisions and the immediate prospect of a hearing in this court for the facts of Mr Arrbab's case to be properly considered by HMRC. However that may be, the result is that, so far as the dispute between these parties is concerned, the appeal is academic.

Whether to consider an academic appeal

28. In *R v Secretary of State for the Home Department Ex p. Salem* [1999] 1 AC 450, 456-7 Lord Slynn recognised the existence of a discretion to hear an appeal on an issue of public law involving a public authority, even if by the time the appeal is heard its outcome will not directly affect the rights and obligations of the parties inter se, but added:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a

> discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

29. The conditions that will generally need to be met before this court may exercise its discretion to entertain an academic appeal were summarised by Lord Neuberger MR in *Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party)* [2011] EWCA Civ 1580, [2012] 1 WLR 782 at [15]:

> "(i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."

More recently, the principles have been considered by this court in *R (L) v Devon County Council* [2021] EWCA Civ 358, [2021] ELR 420 and *R (on the application of SB) v Kensington and Chelsea RLBC* [2023] EWCA Civ 924.

30. HMRC's position is that the appeal raises a point of law that has implications for other cases, such that if it is not resolved now it is likely that they would seek to raise it in another case. Further, Mr Arrbab's legal team were content on his behalf for the appeal to proceed, subject to an undertaking as to costs which was provided following a brief adjournment for that purpose. We were also satisfied that both sides of the argument would be (and indeed were) fully ventilated. In the circumstances, we concluded that this is a case where the court should exercise its exceptional discretion to hear an academic appeal.

New points on appeal

31. The ultra vires issue was raised for the first time in the Respondent's notice. It is a pure point of law which HMRC did not object to being raised, and it is appropriate to address it.

32. The position on Article 6 of the Convention is different. Although there is reference to Article 6 in the UT's decision, HMRC say that it was not meaningfully argued, having only been raised in very general terms in submissions. Further and importantly, HMRC would have wished to file evidence in relation to the application of the provisions in a range of scenarios before that issue is determined, in the way such evidence might be filed in the context of a judicial review. However, the effect of our decision on the ultra vires issue is that it is not necessary to address the alternative argument under Article 6. I will therefore not comment on it further.

The construction issue

33. As already indicated, the UT concluded that the relevant provisions of the 2002 Act should be construed as not excluding a right of appeal where HMRC have decided that the period to apply for a review should not be extended under s.21B. In reaching its conclusion the UT relied on *CJ*. In *CJ* the UT had determined that a right to appeal to the FTT was not excluded where the DWP had declined a late request for mandatory

reconsideration of a refusal of employment support allowance. In this case the UT observed that s.38(1A) of the 2002 Act had the same purpose of creating a stage prior to an appeal for reconsideration, with a view to reducing the number of appeals. It determined that "carrying out a review" under s.38(1A) should be treated as including considering whether to extend time to carry out a review (paragraph 27 of the UT's decision).

34. As Simler LJ said when granting permission to appeal in this case, the decision in *CJ* is based on legislation which is materially different to the terms of s.38(1A) of the 2002 Act. The 2012 Act considered in *CJ* permitted regulations to be made to the effect that a right of appeal lay "only if the Secretary of State has considered whether to revise the decision". The relevant regulation was in materially identical terms. In *CJ* the UT concluded that the concept of considering whether to revise the decision could be read as extending to a consideration of whether to extend time to apply for a revision, and (having regards to principles of legality, fairness and access to justice) that it should be interpreted in that manner.

35. The decision in *CJ* was subsequently considered by Swift J in *R (Connor) v Secretary of State for Work and Pensions* [2020] EWHC 1999 (Admin) ("*Connor*") at [26]. He described the outcome that the Secretary of State "had not assumed a role as gatekeeper for the First-tier Tribunal" as "clearly the preferable" one.

36. In contrast, I consider s.38(1A) to be clear and to leave no scope for the sort of approach adopted in *CJ*. It expressly requires both a) that a review "has been carried out" under s.21A and b) that "notice of the conclusion on the review" has been provided under s.21A(3). Section 21A(3) in terms applies only when a review has in fact been carried out. If a late request is made and time is not extended under s.21B then the result is that there has been neither a review nor notice of a conclusion of any review. The strength of these points is reflected in the approach to submissions before us. Mr Burton did not seek to defend the UT's decision on the construction issue and focused entirely on the issues raised by the Respondent's notice. He was right to do so.

37. It follows that the UT made an error of law. Whether it follows that the conclusion it reached was wrong as a result of that depends on the resolution of the ultra vires issue. That issue requires consideration of the proper approach to the interpretation of s.124 FA 2008 as well as the amendments made to the 2002 Act by the 2014 Order.

Approach to interpretation

"Henry VIII" powers

38. Section 124 FA 2008 is an example of what has come to be referred to as a "Henry VIII power", meaning a provision of primary legislation which permits subordinate legislation to be used to amend primary legislation.

39. It is now well established that any genuine doubt about the scope of the power conferred by such a provision should be resolved in favour of a restrictive approach. The leading authority is *R (on the application of Public Law Project) v Secretary of State for Justice* [2016] UKSC 39, [2016] AC 1531 ("*Public Law Project*"), where the Supreme Court decided that a proposed order amending the Legal Aid, Sentencing and Punishment of

Offenders Act 2012 ("LASPO") to restrict legal aid by reference to a residence requirement was ultra vires the power accorded to the Lord Chancellor by that Act.

40. After referring to the distinction between primary and subordinate legislation, including the lower level of Parliamentary scrutiny accorded to the latter, Lord Neuberger (with whom other members of the court agreed) described the ultra vires principle as follows:

> "23. Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is ultra vires, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.
> 24. Normally, statutory provisions which provide for subordinate legislation are concerned with subsidiary issues such as procedural rules, practice directions, and forms of notice; hence statutory instruments are frequently referred to as Regulations. However, such statutory provisions sometimes permit more substantive issues to be covered by subordinate legislation, and, as is the case with section 9(2)(b) of LASPO, they sometimes permit subordinate legislation which actually amends the statute concerned (or even another statute), by addition, deletion or variation.
> 25. As explained in *Craies on Legislation*, 10th ed (2012), ed Daniel Greenberg, para 1.3.9: "The term 'Henry VIII power' is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation." When a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament.
> 26. The interpretation of the statutory provision conferring a power to make secondary legislation is, of course, to be effected in accordance with normal principles of statutory construction. However, in the case of an "amendment that is permitted under a Henry VIII power", to quote again from *Craies*, para 1.3.11:
>
> > "as with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words used by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation."
>
> 27. In two cases, *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198, 204 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 382, the House of Lords has cited with approval the following observation of Lord

Donaldson of Lymington MR in *McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133, 140, which is to much the same effect:

> "Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach."

28. Immediately after quoting this passage in the *Spath Holme* case, Lord Bingham of Cornhill went on to say "Recognition of Parliament's primary law-making role in my view requires such an approach". He went on to add that, where there is "little room for doubt about the scope of the power" in the statute concerned, it is not for the courts to cut down that scope by some artificial reading of the power."

Exclusion of rights of appeal

41. Mr Burton also relied on the existence of a presumption that rights of appeal will not be excluded where they would be otherwise available. In *R v Emmett* [1998] AC 773, 781-782 the House of Lords had to consider whether a reference to an acceptance of an allegation as "conclusive" in s.3(1) of the Drug Trafficking Offences Act 1986 meant for all purposes, including an appeal against a confiscation order. Lord Steyn said:

> "There is a strong presumption that except by specific provision the legislature will not exclude a right of appeal as of right or with leave where such a right is ordinarily available: *Reg. v Cain* [1985] A.C. 46, 55G-56D, per Lord Scarman. The starting point is that, unless section 3(1) expressly or by necessary implication excludes a right of appeal, there is as a matter of jurisdiction a right of appeal against a confiscation order in all cases."

It was held that a right of appeal to the Court of Appeal was excluded neither expressly nor by necessary implication.

42. The context there was a criminal appeal. However, similar principles have been applied elsewhere. For example, in the earlier case of *R v Secretary of State for the Home Department Ex p. Leech (No.2)* [1994] QB 198, a provision in the prison rules was held to be ultra vires so far as it impeded correspondence with legal advisers about contemplated proceedings.

43. *R v Secretary of State for Home Department, Ex parte Saleem* [2001] 1 WLR 443 ("*Saleem*") concerned rights to asylum, and specifically provisions of the procedural rules which purported conclusively to deem notice of an adjudicator's determination to be received on the second day after posting, so triggering a strict five day time limit for an appeal to be made to the Immigration Appeal Tribunal.

44. Roch LJ, with whom Mummery LJ agreed, described the right of appeal from an adjudicator to the tribunal at p.449 as "a basic or fundamental right" which was "akin to the right of unimpeded access to a court", such that "infringement of such a right must

be either expressly authorised by Act of Parliament or arise by necessary implication from an Act of Parliament", citing the speech of Lord Wilberforce in *Raymond v Honey* [1983] 1 AC 1, 12-13. Roch LJ went on to say at p.450 that even if the need for infringement does arise by necessary implication, the rule will still be ultra vires if it is unreasonable, in the sense of being "wider than is necessary; if it infringes the fundamental right to a greater extent than is required". Although certain alternative remedies were available in that case they were not as effective as an appeal. The rule in issue went beyond regulating the exercise of rights of appeal (which is what the primary legislation authorised) and was not reasonable.

45. In her judgment Hale LJ expressly rejected an argument that a right of access to a tribunal was not in the same category as a right of access to the court, saying at p.458:

> "In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts."

Hale LJ added that:

> "… the more fundamental the right interfered with, and the more drastic the interference, the more difficult it is to read a general rule or regulation making power as authorising that interference."

Further, it may not matter whether the analysis proceeds in terms of necessary implication or the "reasonable contemplation of Parliament". Hale LJ went on to draw an analogy with the principles established under Article 6 of the Convention.

46. The significance of rights of access to the courts was considered in depth in *R(UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 ("*UNISON*"), which concerned a purported exercise of powers under the Tribunals, Courts and Enforcement Act 2007 to levy fees on appeals to the Employment Tribunals. The Supreme Court concluded that the relevant order effectively prevented access to justice and was unlawful at common law. This was despite the fact that the primary legislation permitted fees to be prescribed.

47. Lord Reed stressed at [66] that:

> "The constitutional right of access to the courts is inherent in the rule of law."

Lord Reed went on to explain the significance of the rule of law and the role of unimpeded access to the courts to ensure that laws do not become a "dead letter" (para [68]). He gave a number of examples of:

> "… judicial recognition of the constitutional right of unimpeded access to the courts… which can only be curtailed by clear statutory enactment." (para. [76])

He described the court's approach as:

> "… to ask itself whether the impediment or hindrance in question had been clearly authorised by primary legislation." (para [79])

Further, citing among other cases *ex p Leech*:

> "Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question." (para. [80])

48. Lord Reed referred at [88] to an implied limitation on primary legislation authorising an intrusion on rights of access to justice, such that "the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve". At [89] he drew an analogy with the principle of proportionality as developed in the case law of the European Court of Human Rights, and stated that the position at common law was that:

> "… even an interference with access to the courts which is not insurmountable will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective."

Ultra vires issue: discussion

49. It is common ground that the internal review procedure introduced by the 2014 Order had as its aim a reduction in the need for appeals, by providing an opportunity for the claimant to provide further information and for HMRC to correct mistakes. That is of course an entirely legitimate aim. Indeed, Parliament had already approved the adoption of a similar procedure in a social security context. An extension to tax credits was no doubt considered to be logical.

50. The aim is evident from the Explanatory Memorandum to the 2014 Order, which was laid before the House of Commons. The purpose is described as follows:

> "This instrument amends legislation so that a person will need to ask HMRC to reconsider its decisions on tax credits, child benefit or guardian's allowance awards before making an appeal to the tribunal, similar to the process for universal credit. It also repeals and revokes legislation setting time limits for making an appeal, and requiring notices starting an appeal to be sent to HMRC."

Under the heading "Policy background":

> "7.1 The changes being made are primarily the introduction of a new stage in the decision making process called Mandatory Reconsideration before Appeal. This new process will apply to child benefit and guardian's allowance decisions, and align the tax credits process to that already introduced by the Department for Work and Pensions (DWP) for universal credit.
>
> 7.2 The changes made in this Order introduce a reconsideration process which requires a person to first ask HMRC to reconsider its decision before making an appeal directly to the First-tier Tribunal.
>
> 7.3 This change aims to give a person a more independent opinion of the original decision with a different officer taking a fresh look at the decision, as well as a clear justification for the original decision. Also, that having

> followed the reconsideration process, a person will either decide that their disagreement has been satisfactorily resolved, or if not, that it will be for them to make a positive choice to appeal directly to the tribunal. This new system improves the decision making process, limits the number of appeals going forward to the tribunal and brings consistency in the handling of appeals across HMRC and DWP.
>
> 7.4 Associated changes remove the rules in Great Britain about time limits and the process for starting an appeal with the First-tier Tribunal. These rules will be replaced by Tribunal Procedure Rules."

The memorandum also referred to a public consultation, which had resulted in feedback that was "mainly positive" but had led to the introduction of mandatory reconsideration being postponed until 2014 to allow an HMRC backlog to be addressed.

51. While the aim of the 2014 Order was legitimate, and indeed followed a public consultation, there is a difficulty. Unlike the changes made to the social security regime made pursuant to the 2012 Act, Parliament did not pass primary legislation to enable the new procedure to be adopted for tax credits. Rather, the enabling legislation that the Treasury sought to use was s.124 FA 2008, which had been enacted some four years before Parliament even considered the topic of mandatory reconsideration in the different context of social security reforms.

52. On a literal interpretation of s.124, it might be read as permitting the introduction of a mandatory review process in the manner provided for by s.38(1A) of the 2002 Act. This is because it permits provision to be made "for and in connection with reviews" and "in connection with appeals" (sub-section (1)). Further, sub-section (2)(a)(ii) expressly permits "provision about the circumstances in which, or the time within which … an appeal may be made". However, I am persuaded that such an interpretation would not be correct.

53. As Lord Neuberger explained in *Public Law Project*, the delegation of power to modify primary legislation is an exceptional course. Any real doubt about the scope of the power must be resolved by a restrictive approach. Lord Neuberger also approved a statement in *Craies on Legislation* that the more general the words used "the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation". It is undeniable that the words used in s.124 are general in nature.

54. The Explanatory Notes to what became s.124 FA 2008 say nothing either about mandatory reviews, or about the potential for a right of appeal to be lost if a review is not sought on a timely basis. The stated aim was to "streamline appeals administrative processes" in readiness for the introduction of the new tribunal system, including aligning differences of approach by "giving taxpayers the right to a formal review of appealable HMRC decisions" (see [21] above, emphasis supplied).

55. It is well-established that Explanatory Notes may be used "to ascertain the context of the provision and the mischief which it addresses as aids to purposive interpretation": *McDonald v Newton* [2017] UKSC 52 per Lord Hodge at [30]; see also *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. at 24.14. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home*

Department [2022] UKSC 3, [2022] 2 WLR 343 at [29]-[30], Lord Hodge emphasised the primacy of the statutory language, read in its context, but added that Explanatory Notes "may cast light on the meaning of particular statutory provisions". Indeed, in *R (on the application of PACCAR Inc & others) v Competition Appeal Tribunal and others* [2023] UKSC 28 at [42], Lord Sales went further and referred to the potential use of an Explanatory Note to resolve a specific ambiguity.

56. In this case the relevant Explanatory Notes refer only to a right of review: see paragraphs 1 and 15. There is no suggestion that such a review might be mandatory, and certainly no hint that a right of appeal might be lost if the time limit for such a review was missed. This is reflected in s.124 itself. Both s.124(2)(a)(i) and (3)(a) refer expressly to "a right to a review". This is suggestive only of a new right being conferred, not of curbs on existing rights.

57. Reflecting its intended scope, s.124 FA 2008 was used to introduce changes to Part V of the Taxes Management Act 1970 ("TMA") which gave appellants who wished to bring appeals under the Taxes Acts the right, but not the obligation, to require a prior review by HMRC: see ss.49A-49I TMA, introduced by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, SI 2009/56. This review mechanism was however not incorporated into the tax credit system. Instead, appeals continued to be made direct to the FTT pursuant to s.63(2) of the 2002 Act.

58. The effect (or purported effect) of the introduction of s.38(1A) by the 2014 Order is radical. It not only requires a review to be conducted but does so in a manner which excludes the right of recourse to the FTT that previously existed in circumstances where a decision is challenged late and HMRC refuse an extension of time. Before the 2014 Order was made the FTT had the power to extend time for an appeal by up to 12 months where a late appeal was made, pursuant to the FTT rules. Although that power remains, s.38(1A) precludes an appeal altogether unless a review has been carried out and its outcome has been notified. In contrast, ss.21A and 21B, which were also introduced by the 2014 Order, present no difficulty by themselves. Their effect, read without s.38(1A), is simply to confer a time-limited right to require HMRC to review a decision of a kind falling within s.38(1).

59. *Saleem* and *UNISON* both emphasise the importance of unimpeded access to courts and tribunals and the need to adopt a strict approach in determining whether a restriction on access has been authorised by Parliament. As Lord Reed explained in *UNISON*, the right of access may only be curtailed if it is clearly authorised by primary legislation, and only to the extent that is "reasonably necessary to fulfil the objective of the provision in question".

60. I accept that *Saleem* was an extreme case, in that it was apparent that Parliament intended there to be a right of appeal if the individual was dissatisfied with the determination, but the effect of the rule in issue was that that right could not be exercised if the relevant notice was not received, such that dissatisfaction was impossible. Its effect was to remove the possibility of appeal altogether rather than simply regulate its exercise via a strict time limit. Nonetheless, the principles discussed in that case and in *UNISON* – where the facts were less extreme – apply equally in this case. They add further weight to the requirement that would in any event exist to adopt a restrictive approach to interpreting the power conferred by s.124 FA 2008 to amend primary legislation.

61. The purpose of s.124 FA 2008, as is clear from the Explanatory Notes to the Bill, was to facilitate the transition to the new tribunal system and allow the introduction of a right to a formal review. That is very different from a mandatory review on terms that excludes the FTT's ability to determine whether to entertain a late challenge. There is nothing in s.124 FA 2008 that makes clear that it authorises a provision which has the effect of making the decision maker the effective gatekeeper of appeals to the FTT in the event of a late challenge, subject only to the possibility of judicial review. Although s.124(2)(a)(ii) permits provision about the "circumstances in which" an appeal may be made, that is insufficiently clear to permit HMRC to become the gatekeeper. While I understand HMRC's argument that s.38(1A) simply regulates the exercise of a right of appeal rather than excluding it as in *Saleem*, I cannot accept it. In substance and in reality, the effect of s.38(1A) is to remove a right of appeal where time is not extended by HMRC under s.21B.

62. *ToTel* concerned the use of s.124 to amend VAT legislation to exclude a right of appeal to the Upper Tribunal from a decision of the FTT on a hardship application, namely an application that a VAT appeal should be heard without the prior payment of tax that is usually required, on grounds of hardship. This court decided that the relevant provision was ultra vires s.124 because the phrase "in connection with appeals" presupposed that a right of appeal existed. Moses LJ applied the strict approach mandated by the *Spath Holme* case referred to by Lord Neuberger in *Public Law Project* (see [40] above). He observed at [22] that:

> "…a provision which revokes or removes a right of appeal does not seem to me properly to be described as a provision about the circumstances in which an appeal may be made… A provision in relation to the circumstances in which an appeal may be made pre-supposes the existence of a right of appeal not its abolition."

Moses LJ supported his conclusion by contrasting the reference in s.124(1)(a) to "for and in connection with" reviews with the omission of the word "for" in s.124(1)(b) (at [23]) and explained at [26] that the need for clear words precluded a benevolent construction.

63. This was sufficient to conclude that the relevant provision was ultra vires. On the facts of that case Moses LJ rejected an alternative argument for the taxpayer that the effect of the provision was to deprive it of a fundamental right of appeal. This was because what was excluded was a right of appeal from the FTT only with permission and only on a point of law. In circumstances where judicial review was available ToTel was "not deprived of a very great deal" (paragraph [32]).

64. Ms Smyth relied on Moses LJ's reference at [21] of *ToTel* to a provision requiring payment of tax in dispute before an appeal may be entertained as an example of a provision governing the "circumstances in which … an appeal may be made", within s.124(2). She submitted that there was no material difference between that and requiring a review to have been conducted. Both were simply conditions that needed to be met before a right to appeal could be exercised, rather than provisions which removed a right of appeal.

65. There are two responses to that. First, and in contrast to s.38(1A), the example given by Moses LJ is explicitly recognised in s.124(3). Secondly, and more fundamentally, the effect of s.38(1A) is not simply to mandate a review to be conducted first as a condition

of bringing an appeal. Rather, its effect is to exclude the possibility of a late challenge where HMRC do not agree to extend time. In essence, it excludes the jurisdiction of the FTT to determine whether to entertain a late appeal.

66. Further, that is not analogous to excluding the limited right of appeal considered in *ToTel*. That was a right of appeal only on a point of law and with permission, in circumstances where the taxpayer had already had recourse to the FTT to determine whether the requirement to pay tax would cause hardship. As Moses LJ explained at [22], the FTT's decision in *ToTel* was not itself a decision on an appeal. It determined on a de novo basis whether the hardship condition was met, rather than merely reviewing HMRC's earlier conclusion that it was not. In contrast, s.38(1A) entirely excludes the right that Parliament contemplated and that existed before the 2014 Order took effect, namely a right of recourse to an independent and impartial tribunal which could consider the facts and decide whether, in all the circumstances of the claimant's case, to allow an extension of time. That is different in nature to a judicial review of a decision taken under s.21B as to whether "special circumstances" made it not practicable to seek a review on a timely basis.

67. Ms Smyth also submitted that striking down s.38(1A) would undermine the legitimate aim of the 2014 Order, because it would remove any sanction from a failure to apply for a review before an appeal was lodged. That is so, but the submission misses the point. The question is not whether the 2014 Order had a legitimate aim, but whether Parliament had passed the necessary enabling legislation. I should add that I do not understand HMRC's further submission that the ultra vires challenge was really an attack on ss.21A and 21B. As already noted, those provisions confer a right of review which can operate independently of s38(1A). The time limits set by those provisions are inoffensive in themselves, when divorced from the right to appeal to the FTT. What is problematic is the terms of s.38(1A).

68. HMRC's further written submissions also maintained that the decision in *Connor* supported their case. I disagree. The context there was employment support allowance, where the decision in *CJ* had already determined that a right of appeal to the FTT was not precluded by a refusal to extend time for a review: see [34] and [35] above. The actual decision in *Connor* addressed a different aspect of the reconsideration process, namely its impact on the payment of benefits while a review was being undertaken. The relevant regulation was found to be unlawful insofar as it applied to claimants who would otherwise be entitled to receive payment pending appeal.

69. HMRC further relied on the fact that the 2014 Order was approved by the House of Commons under the affirmative procedure required by s.124(8) FA 2008. However, as is clear from the citation by Lord Neuberger in *Public Law Project* at [27] (set out above), approval whether by negative or affirmative resolution does not immunise secondary legislation from an ultra vires challenge. I would further observe that there is no indication that the impact of the 2014 Order on claimants in Mr Arrbab's position was considered.

70. Finally, it is not irrelevant to consider the reality that many tax credit claimants will be vulnerable in some respect. They may also, like Mr Arrbab, not be native English speakers. Official documents may not readily be comprehended and the importance of acting quickly may not be appreciated. Further, HMRC's continued reliance on Mr Arrbab's failure to respond to the s.17 notice as causative of the problems in his case

suggests that the difficulties that many claimants have may be insufficiently appreciated by HMRC decision makers.

71. The facts of Mr Arrbab's case are an unfortunate illustration of the reality that only a right of recourse to an independent tribunal may provide effective protection against failures of administration, including a failure to recognise that time ought to be extended. This reinforces the need for a clear indication that Parliament intended to remove that right, leaving only the possibility of a judicial review of HMRC's decision-making. Section 124 FA 2008 does not provide such an indication.

Remedy

72. One of the areas on which we invited further written submissions was the appropriate course of action should we determine that s.38(1A) is ultra vires. There are two aspects to this. The first relates to the substantive impact of that conclusion on the operation of the legislation. The second relates to the nature of our jurisdiction and the appropriate course of action in this particular case.

73. As to the substantive impact, Mr Arrbab's primary case is that s.38(1A) should be treated as struck out on the basis that it is ultra vires. The logical effect of this would be to leave in place the review procedure in s.21A, including HMRC's ability to extend time for that purpose under s.21B, but to remove any compulsion on the part of the claimant either to seek or obtain a review before appealing to the FTT. As a result claimants would be able to insist on a review if they made an in-time application under s.21A, because s.21A would impose an obligation on HMRC to undertake it, but HMRC could not require a review to be undertaken and a claimant could simply appeal to the FTT without seeking a review or, if a review was sought, waiting for its outcome.

74. This is somewhat different from the effect of the UT's decision. The effect of the UT's decision would be to recognise that s.38(1A) requires a prior application for a review, but to treat a refusal by HMRC to extend time as sufficient to permit an appeal to the FTT to proceed on the merits if the FTT was prepared to extend time.

75. Both parties made further written submissions about whether there was any alternative to treating s.38(1A) as wholly invalid, by some form of severance of its text. In *DPP v Hutchinson* [1990] 2 AC 783, 804 Lord Bridge explained that a court has no power to modify or adapt an invalid provision to bring it within the law-maker's power, and described the power to sever in the following terms:

> "What is involved is in truth a double test. I shall refer to the two aspects of the test as textual severability and substantial severability. A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains of the text is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect."

After reviewing the authorities Lord Bridge then said this at p.811:

> "The test of textual severability has the great merit of simplicity and certainty. When it is satisfied the court can readily see whether the omission

> from the legislative text of so much as exceeds the law-maker's power leaves in place a valid text which is capable of operating and was evidently intended to operate independently of the invalid text. But I have reached the conclusion, though not without hesitation, that a rigid insistence that the test of textual severability must always be satisfied if a provision is to be upheld and enforced as partially valid will in some cases, of which *Dunkley v. Evans*[1] and *Daymond v. Plymouth City Council*[2] are good examples, have the unreasonable consequence of defeating subordinate legislation of which the substantial purpose and effect was clearly within the law-maker's power when, by some oversight or misapprehension of the scope of that power, the text, as written, had a range of application which exceeds that scope. It is important, however, that in all cases an appropriate test of substantial severability should be applied. When textual severance is possible, the test of substantial severability will be satisfied when the valid text is unaffected by, and independent of, the invalid. The law which the court may then uphold and enforce is the very law which the legislator has enacted, not a different law. But when the court must modify the text in order to achieve severance, this can only be done when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision."

At p.813 Lord Bridge approved the approach taken by Australian authorities of asking, when textual severance is impossible, whether the provision:

> "… with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it…"

76. While I am satisfied that the challenge to the invalidity of s.38(1A) has no impact on the validity of the review mechanism contained in ss.21A and 21B, I do not consider that any form of severance can be applied within s.38(1A) in a way that could satisfy this test. Section 38(1A) can neither be textually severed, nor can it be modified without changing its "substantial purpose and effect". The sole purpose of s.38(1A) is to ensure that a review must be carried out under s.21A before an appeal can be brought. But that is the very thing that, when read with HMRC's role as arbiter of time limits under ss.21A and 21B, falls outside the enabling power.

77. I would therefore accept Mr Arrbab's primary case, namely that s.38(1A) (and the cross-reference to it in s.38(1)) should be treated as struck out as ultra vires.

78. An issue was also raised about the effect of our decision on the time limits for appeal in the FTT rules, which refer to mandatory reconsideration (see [18] above). The existence or otherwise of a problem under those rules could not affect the issue of whether s.38(1A) was intra vires or not, but in any event I do not perceive a real difficulty. First, "mandatory reconsideration" is defined by rule 22(9) in a way that encompasses any appeal against a "decision made by" HMRC (that is, not limited to a decision following a review). Secondly, if that was not correct the default time limit in paragraph 5 of

[1] [1981] 1 WLR 1522

[2] [1976] AC 609

Schedule 1 would in any event allow an appeal within one month of a notice of decision being sent, subject to an extension of time of up to 12 months.

79. Turning to this case and the nature of our jurisdiction, this is a statutory appeal against the UT's decision. Having determined that the UT made an error of law, this court has power to set aside that decision. If it does so it must either remake the decision or remit the case: s.14(2)(b) Tribunal, Courts and Enforcement Act 2007. If a decision is re-made, this court has power to make any decision which the UT or FTT could make if it were re-making the decision: s.14(4)(a). Neither party suggested that we had any broader jurisdiction, for example to make a declaration of invalidity.

80. We clearly have jurisdiction to determine that the UT made an error of law in deciding that the legislation could be construed in the same manner as the legislation considered in *CJ*, and to set its decision aside for that reason. The conclusion that s.38(1A) is ultra vires is strictly relevant to the next step, remittal or re-making.

81. Given that the appeal is academic, nothing is to be gained from remitting the appeal. In my view the proper course is to re-make the decision by allowing the appeal against the FTT's decision, reflecting the fact that the appeal should not have been struck out for want of jurisdiction, but without the remittal to the FTT on the terms ordered by the UT. It will however obviously be open to the parties to agree that the appeal will not be pursued and to inform the FTT accordingly, or alternatively Mr Arrbab may simply discontinue his appeal.

Conclusion

82. In conclusion, therefore, HMRC succeed on the construction issue but fail on the ultra vires issue. Section 38(1A) of the 2002 Act is ultra vires the enabling legislation. The FTT should not have struck out Mr Arrbab's appeal.

Lord Justice Snowden:

83. I agree.

Lord Justice Baker:

84. I also agree.