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UT (Tax & Chancery) Case Number: UT/2022/000073

Upper Tribunal
(Tax and Chancery Chamber)

The Rolls Building, London

INCOME TAX – statutory residence test – taxpayer exceeding 45 days in the UK – whether taxpayer would not have been present at the end of each extra day but for exceptional circumstances beyond her control which prevented her from leaving the UK – HMRC's appeal allowed

Heard on 20 June 2023
Judgment given on: 28 July 2023

Before

MR JUSTICE MICHAEL GREEN
DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

A TAXPAYER

Respondent

In accordance with the Directions issued by Judge Thomas Scott on 16 August 2022, no one shall publish or reveal the name or address of the Taxpayer or any member of her family who is referred to in these proceedings, or publish or reveal any information which would be likely to lead to the identification of the Taxpayer or any such family member in connection with these proceedings.

Representation:

For the Appellants: Christopher Stone and Sam Way of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

For the Respondent: James Kessler KC and Rebecca Sheldon of Counsel, instructed by Andrew Cole CBE

DECISION

INTRODUCTION

1. This judgment decides a dispute between HM Revenue & Customs ("HMRC") and an individual whose identity has been anonymised following directions given by Judge Thomas Scott. The hearing was in private in accordance with the same directions.

2. In the First-tier Tribunal ("FTT") decision, which was also anonymised, the individual is called "the Appellant". She succeeded before the FTT, see *A Taxpayer v HMRC* [2022] UKFTT 00133 (TC), and in these proceedings is therefore the Respondent. In this judgment, *w*e have called her "the Taxpayer", and for consistency have also amended the citations from the FTT decision so they too refer to her as "the Taxpayer". Our cross-references to the FTT decision are prefixed by §, and internal cross-references are prefixed by ¶.

Summary

3. On 4 April 2015, the Taxpayer moved from the UK to Ireland. During the following tax year, 2015-16 ("the relevant year"), the Taxpayer's husband transferred shares to her on which she received approximately £8 million of dividends.

4. The Taxpayer completed her 2015-16 self-assessment ("SA") tax return on the basis that she was not UK resident. HMRC opened an enquiry into that return and decided she had exceeded the permissible number of days in the UK, and so was resident in the UK for tax purposes. HMRC subsequently closed the enquiry and issued an amendment to the Taxpayer's return on the basis that additional tax of £3,142,550.58 was due. The Taxpayer appealed to the FTT.

5. It was common ground before the FTT and before us that the Taxpayer had been in the UK for 50 nights in the relevant year, which was five days more than the 45 days allowed by the statutory residence test ("SRT") in the Finance Act 2013 ("FA 2013"), Schedule 45 ("Sch 45"). It was also common ground that the Taxpayer would be UK resident for the relevant year unless the extra five days satisfied Sch 45, para 22(4) ("para 22"), which provides that a day is ignored for the purposes of the SRT day count in relation to a person ("P") if:

> "(a) P would not be present in the UK at the end of that day but for exceptional circumstances beyond P's control that prevent P from leaving the UK, and
>
> (b) P intends to leave the UK as soon as those circumstances permit."

6. The Taxpayer's main ground of appeal before the FTT was that, for all the extra days, she was in the UK because her twin sister, who suffered from alcoholism and depression, had threatened to commit suicide; that this constituted "exceptional circumstances beyond her control"; and that she was prevented from leaving the UK until the sister was "in a place of safety". The FTT rejected this ground of appeal on the facts, finding that the Taxpayer's evidence as to the risk of the sister committing suicide lacked credibility.

7. The Taxpayer had also appealed to the FTT on the basis that her sister was unable to care for her two minor dependent children, so that the Taxpayer was also prevented from leaving the UK until appropriate care had been arranged for those children.

8. The FTT allowed the Taxpayer's appeal on that ground, finding that:

> "the combination of the need for the Taxpayer to care for her twin sister and, particularly, for her minor children at a time of crisis caused by the twin sister's alcoholism does constitute exceptional circumstances for the purposes of paragraph 22(4)."

9. HMRC appeal the FTT decision. The only issue before us is whether, as the FTT found, the Taxpayer satisfied the conditions set out in para 22(4), or whether HMRC are correct that the FTT decision contained one or more errors of law.

10. For the reasons set out below, we allow HMRC's appeal on each of their grounds. We remake the decision and dismiss the Taxpayer's appeal. She was thus tax resident in the UK during the relevant year.

The Statutory Residence Test

11. The SRT was introduced by FA 2013, s 218 and Sch 45. A person's residence status had previously been determined by case law and HMRC guidance; for many years the latter was contained in booklet IR20; with effect from 6 April 2009, this was replaced by booklet HMRC6.

12. The FTT accurately summarised the key SRT provisions as follows (the paragraph references are to Sch 45):

> (1) A person is resident in the UK for a year if either the automatic residence test or the sufficient ties test is met.
>
> (2) The automatic residence test requires a person to meet none of the automatic overseas tests, and at least one of the automatic UK tests (para 5).
>
> (3) Many of the automatic overseas tests (paras 12, 13 and 14), and the automatic UK tests (paras 7 and 8) depend on the number of days the person spends in the UK.
>
> (4) If the automatic residence test is not met, the "sufficient ties" test applies.
>
> (5) Under the sufficient ties test, a person's residence is determined by a combination of (a) the number of UK ties and (b) the number of days the person spends in the UK.
>
> (6) The number of ties sufficient to make a person UK resident depends on (a) whether the person was resident in the UK for any of the previous three tax years, and (b) the number of days the person spends in the UK in the tax year in question (para 17(3)).
>
> (7) The combinations of days spent in the UK and the number of ties are set out in Tables at paras 18 and 19.

Para 22

13. As can be seen from the above summary, the concept of "day counting" is important both for the automatic residence test and the sufficient ties test. That key question – the number of days a person spends in the UK – is determined by para 22. This reads as follows (where "P" means the person in question):

> "(1) If P is present in the UK at the end of a day, that day counts as a day spent by P in the UK.
>
> (2) But it does not do so in the following two cases.
>
> (3) The first case is where—
>
> (a) P only arrives in the UK as a passenger on that day,
>
> (b) P leaves the UK the next day, and
>
> (c) between arrival and departure, P does not engage in activities that are to a substantial extent unrelated to P's passage through the UK.
>
> (4) The second case is where—

(a) P would not be present in the UK at the end of that day but for exceptional circumstances beyond P's control that prevent P from leaving the UK, and

(b) P intends to leave the UK as soon as those circumstances permit.

(5) Examples of circumstances that may be "exceptional" are—

(a) national or local emergencies such as war, civil unrest or natural disasters, and

(b) a sudden or life-threatening illness or injury.

(6) For a tax year

(a) the maximum number of days to which sub-paragraph (2) may apply in reliance on sub-paragraph (4) is limited to 60, and

(b) accordingly, once the number of days within sub-paragraph (4) reaches 60 (counting forward from the start of the tax year), any subsequent days within that subparagraph, whether involving the same or different exceptional circumstances, will count as days spent by P in the UK."

The Taxpayer's position

14. The following was common ground:

(1) The Taxpayer had left the UK on 4 April 2015 and moved to Ireland.

(2) Her residence for 2015-16 was to be determined in accordance with the SRT.

(3) She was neither automatically resident in the UK nor automatically non-resident.

(4) For the purposes of the "sufficient ties" test, she had three UK ties: family, accommodation and 90 day. She was also resident in the UK in at least one of the previous three tax years.

(5) In accordance with the Table at para 18, she was therefore:

(a) resident in the UK for 2015-16 if she spent 46 days or more here; and

(b) non-resident if the number of days was 45 days or fewer.

(6) In 2015-16 the Taxpayer was present in the UK "at the end of the day" on 50 occasions; and whether she was resident or non-resident for that year depended on whether she met the conditions set out in para 22(4).

(7) The Taxpayer had the burden of proving that she satisfied para 22(4).

THE FTT JUDGMENT

15. We begin by summarising the background facts and evidence as set out in the FTT judgment, followed by the Taxpayer's main case and her secondary case, and the FTT's conclusions on each.

BACKGROUND FACTS

16. On 4 April 2015, the Taxpayer moved from the UK to the Republic of Ireland; her husband remained in the UK, living in the family home near Manchester.

17. During 2015-16, the Taxpayer's husband transferred shares to her, on which she received approximately £8 million of dividends. The Taxpayer completed her 2015-16 SA return on the basis that she was not resident in the UK for that tax year. She had received advice from KPMG on the SRT and on the related day count requirements, and was aware when she moved to Ireland that:

(1) if she stayed in the UK for 46 nights or more she risked becoming UK resident, which would defeat the purpose of her move to Ireland;

(2) the law included an exemption for exceptional circumstances; and

(3) she had to keep a record of where she was each day.

The sister

18. The Taxpayer has a non-identical twin sister ("the sister" or "the twin sister"), with whom she had a close emotional bond. There were three other siblings: a brother who had committed suicide in 1996; an elder sister who was estranged; and another brother ("the brother") who lived some 20 miles from the twin sister.

19. The sister's marriage broke down in 2011, and she moved from the south of England to an area outside Manchester around six or seven miles from the Taxpayer's family home; her husband remained in the south of England.

20. The sister had two children aged 11 and 13, who were living with her during the relevant year. From at least December 2015 to April 2016 (and possibly subsequently) the sister had a partner: he was anonymised in the FTT decision as "Mr X" and we have adopted the same approach.

21. For several years, the sister had been suffering from alcohol addiction and depression but during the relevant year the brother kept "a close eye" on her, and she also had two very good friends who checked up on her and the children several times a day.

The Visits

22. The appeal focused on two visits the Taxpayer made to the UK, one in December 2015 and one in February 2016. We have called these "the First Visit" and "the Second Visit", because the Taxpayer's previous visits to the UK during the relevant year were not in issue.

23. In relation to the First Visit, the Taxpayer travelled from Dublin to the UK on 18 December 2015; she left on 20 December 2015. For SRT purposes she therefore spent two nights here on 18 and 19 December 2015. She accepted in cross-examination that she knew when she made this Visit that she had already used up 44 days of the 45 day allowance, and that she also knew she would be seeking to rely on the "exceptional circumstances" exemption in para 22(4), although this was not "at the forefront of her mind" at that time.

24. In relation to the Second Visit, the Taxpayer flew from Rome to Manchester on 15 February 2016 and from Manchester to Dublin on 19 February 2016; she thus spent a further four nights in the UK. The Taxpayer had the use of a private jet (with pilots on standby), and all the above journeys were made by that jet.

The following tax year

25. On 16 April 2016, after the end of the relevant year, the Taxpayer came to England and found her sister in such a state that she called an ambulance. The sister was committed, initially to an NHS hospital and then to a residential mental health hospital, the Priory, where she spent 30 days being treated for severe alcohol and drug misuse, anxiety, depression and a number of physical symptoms. The Taxpayer and Mr X accompanied the sister when she was admitted, and the Taxpayer subsequently visited her at the Priory in May 2016. She and her husband provided financial support whilst the sister was receiving medical care.

26. On being discharged, the sister relapsed and before July 2016 apparently made four suicide attempts. She was again admitted to hospital and spent the following six days in residential care undergoing detox.

THE EVIDENCE

27. The Taxpayer and her husband gave evidence. At §162, the FTT described the Taxpayer as "defensive and vague" when under cross-examination, and said the husband was "unable to give any detail as to what the Taxpayer did" during either Visit, see §163.

28. The FTT recorded at §176 that the Taxpayer did not call the brother as a witness because she "considered him to be a vulnerable personality"; that the sister was not called because of her "fragile mental state"; and Mr X was also not called, apparently on the basis that he was only a "short-term" partner.

29. Although the Taxpayer was aware she would be relying on the exceptional circumstances test, she did not make any record of what she had done on each day of the Visits "even in outline", or why she had concluded at the end of each day that the sister's condition was such that she was prevented from leaving the UK. Despite possessing detailed itemised telephone records, none was provided in evidence, and she did not retain her text messages. Various credit card records had been disclosed to HMRC, so were in evidence, but the Taxpayer was unable to remember anything about her use of the cards during the Visits. Although she had spent some nights at the sister's house, and some nights with her husband at the family home, she could not remember which nights she had spent in each.

30. The sister was aware of HMRC's enquiry into the Taxpayer's affairs, and provided the Taxpayer with a copy of her file from the Priory; this was therefore in evidence at the hearing. The Taxpayer said she had not asked her sister for earlier GP notes or other hospital admission records because this would have made her aware of the "extent" of the Taxpayer's dispute with HMRC, and this would have caused her "distress"; she said the effect would be "shocking" and "catastrophic". The Taxpayer distinguished the Priory records on the basis that she had told her sister HMRC needed those documents because the Taxpayer had paid the bill for her medical care.

THE TAXPAYER'S MAIN CASE: RISK OF SUICIDE

31. The Taxpayer's main case as put to the FTT was that, on both Visits, the risk that the sister would commit suicide constituted "exceptional circumstances", and the Taxpayer was prevented from leaving the UK until the sister was "in a place of safety".

The FTT's findings

32. The FTT rejected the Taxpayer's evidence on this issue as not credible, for the following reasons:

> (1) The sister had been under the care of a particular consultant psychiatrist since 16 April 2016. A report from that consultant dated 21 June 2016 specifically referred to the sister having no "suicidal ideation". The FTT found that there was "no indication in the medical records that between April 2016 and June 2016 that the Taxpayer's twin sister was threatening suicide".
>
> (2) Although the Taxpayer's husband suggested in correspondence that the sister's suicidal ideation may have been concealed from the Priory, the FTT rejected that suggestion. It was not in the husband's witness statement; and the FTT held that it was "improbable" that the Taxpayer would have concealed "such a serious aspect of [the sister's] condition" from the Priory medical staff on admission.
>
> (3) The Taxpayer did not seek medical psychiatric assistance for the sister during either Visit. The FTT found this "strange and implausible", noting that threats of suicide are "an extreme situation" and that the Taxpayer and her husband "could have afforded private medical care" or "sought urgent care from the NHS", but had done neither.

(4) The Taxpayer had given evidence that in February 2016 she had changed her plans and visited her sister in Manchester after having received a call from her brother who was worried the twin sister was suicidal and "he thought the worst". This evidence was contradicted by (a) a letter the Taxpayer had previously written on 22 October 2018 in which she said it had always been her intention to visit her sister, and (b) the itinerary prepared for her trip to Rome, which also showed there had been no change of plan. In addition, there was also no evidence to support the Taxpayer's statement that she had been telephoned by her brother before she left Rome, as no phone records had been provided and her brother was not called as a witness.

(5) The evidence from the Taxpayer's credit cards showed that, within two hours of her arrival at Manchester on 15 February 2016, she had paid for a meal at a restaurant called Gusto at 2.53pm, and on the same day, had spent £239 at Vision Express. When cross-examined, the Taxpayer "had no memory of and could not explain why she had visited Gusto and Vision Express on the afternoon of [the] day that she arrived back in the UK to care for her sister who was, she said, threatening suicide". The FTT said that "the restaurant visit and the visit to the optician suggest a leisurely approach and one inconsistent with a picture of the desperate straits of a suicidal sister which the Taxpayer sought to paint and which she said her brother had described". The FTT said that "the Taxpayer's account of her visit in February 2016, therefore, did not ring true".

(6) The Taxpayer's credit card records also showed that on 17 February 2016, she withdrew £400 from a cash machine in the children's ward of Manchester Hospital. The Taxpayer had no recollection of visiting that hospital, and in particular could not recall why she was there or who she was with. The FTT said this was an example of the Taxpayer being "vague in relation to details" about the Visits.

33. The FTT concluded at §178 that:

> "Drawing these threads together, the Taxpayer has not satisfied us that, on the balance of probabilities, she came to and remained in the UK in December 2015 and February 2016 because her twin sister had threatened to commit suicide."

34. The Taxpayer did not challenge that finding in a Respondent's Notice. We are therefore only required to consider whether the FTT had been correct in relation to the Taxpayer's secondary case, to which we now turn.

THE TAXPAYER'S SECONDARY CASE

35. The Taxpayer's grounds of appeal said that "over and above" the suicide risk, the sister "was unable to care for her minor dependent children", and the Taxpayer was "unable to leave the UK and forced to stay until such time as her sister [was] in a place of safety and appropriate care arranged for her 2 children".

The FTT's findings of fact

36. The FTT found at §184 that:

> "The Taxpayer's evidence, which we accept, was that when she arrived at the twin sister's house in December 2015 and February 2016, she found a dysfunctional household in which her twin sister was drunk and incapable of caring for herself or her children. When the Taxpayer arrived at her twin sister's house, she found both her sister and her children were unkempt and in need of care. The house was filthy. There was nobody else who could provide the care needed."

37. The FTT did not explain why, having disbelieved the Taxpayer on the key issue in dispute, it nevertheless accepted her evidence on the secondary issue. We note in particular that the FTT accepted that "nobody else…could provide the care needed" despite also finding that:

(1) the sister's two friends visited "several times a day" to "check up on" her;

(2) her brother was "keeping a close eye on her"; and

(3) when the Taxpayer left after the First Visit, she put in place no arrangements relating to her sister or her children, so the existing care provided by the friends and the brother continued; there is no evidence or findings that the position was any different after the Second Visit.

38. The FTT also accepted that "the house was filthy" on the basis of the Taxpayer's evidence and that the house "needed professional cleaners to sanitise the interior and make it habitable", although she could not recall when the cleaners had come or how they were paid (see §66).

39. In addition, the FTT found as a fact that the Taxpayer "spent her time keeping her sister occupied and looking after the children", despite also accepting that on the First Visit she had spent £76 at a cafe in Alderley Edge and on the Second Visit had found time to go to a restaurant, an optician and a children's hospital, and been unable to explain why she had visited those locations.

40. We consider that the FTT ought to have explained why it felt able to accept the Taxpayer's evidence on the secondary case after completely rejecting her evidence on the main case.

The FTT's judgment on the secondary case

41. The FTT held at §150:

> "The word 'prevent' can encompass all manner of inhibitions – physical, moral, conscientious or legal – which cause a taxpayer to remain in the UK."

42. At §179, the FTT said:

> "We consider that, to the extent that the Taxpayer's visits to the UK in December 2015 and February 2016 were occasioned by the need to care for the consequences of her twin sister's alcoholism and depression, this does not, of itself, constitute exceptional circumstances for the purposes of paragraph 22(4). Alcoholism and depression are not in themselves uncommon or unusual illnesses. It is true that both conditions cause much suffering and distress both for the individual concerned and for that individual's family. We do not, however, consider that they are exceptional circumstances."

43. They continued at §180:

> "We have also considered whether the fact that the twin sister had minor children, for whom the Taxpayer also cared, alters the position. We consider this a more difficult and finely balanced question, but in our view it does change the position."

44. At §181 they said that:

> "Moral obligations and obligations of conscience – including those arising by virtue of a close family relationship – can qualify as exceptional circumstances and those obligations may be strong enough to prevent a taxpayer leaving the UK."

45. This was immediately followed by §182, which reads:

> "In our view, the combination of the need for the Taxpayer to care for her twin sister and, particularly, for her minor children at a time of crisis caused by the twin sister's alcoholism does constitute exceptional circumstances for the purposes of paragraph 22(4)."

46. That finding was repeated and expanded at §185:

> "The immediate need to seek to establish a stable household in which the minor children could be cared for does seem to us to be an exceptional circumstance outside the Taxpayer's control. We accept that the Taxpayer would not have been in the UK at the end of each day relevant to this appeal but for the fact that she needed to care for both her twin sister and her minor children. We further accept that this need prevented the Taxpayer from leaving the UK until such time as she had stabilised the situation and that she intended to leave the UK as soon as possible once those circumstances permitted."

47. In the following paragraph, §186, the FTT said:

> "In that context, we accept that the Taxpayer could not remember in any detail what she was doing on each day that she was present in the UK. Her evidence was that she spent her time keeping her sister occupied and looking after the children. We accept her evidence and do not consider that an itemised timeline for each day, as was suggested by HMRC, was necessary. Instead, we accept Mr Kessler QC's submission that if the reason for the Taxpayer remaining in the UK was the same each day and if that reason constituted exceptional circumstances, then that reason remained valid for each relevant day."

THE GROUNDS OF APPEAL

48. HMRC appeals on the basis that the FTT erred on the following grounds:

(1) in deciding, at §150, that the requirement that the circumstances prevented the Taxpayer from leaving the UK could be met by a moral or conscientious inhibition on the Taxpayer leaving the UK, and in applying that test to the facts of the Taxpayer's case;

(2) in failing to apply each element of the statutory test to each individual day;

(3) in finding that there were "exceptional circumstances" in the Taxpayer's case; and

(4) having found that there were exceptional circumstances, failing to consider whether those circumstances satisfied the remaining elements of the statutory test.

GROUND 1: THE STATUTORY TEST AND "PREVENT"

49. We begin our discussion of this ground by considering whether the para 22(4) requirements are objective and what is meant by "exceptional circumstances".

The objective nature of the test

50. The FTT correctly held at §133 that para 22(4) "contained a number of cumulative conditions, all of which must be satisfied", and that these were as follows:

(1) the circumstances were exceptional;

(2) the circumstances were beyond the person's control;

(3) the person would not be present in the UK at the end of the day but for those circumstances;

(4) the circumstances prevented the person from leaving the UK; and

(5) the person intended to leave the UK as soon as those circumstances permitted.

51. Mr Christopher Stone, who appeared with Mr Sam Way on behalf of HMRC, submitted that a person had to show that each of the above elements were objectively present (and not that the person believed, reasonably or not, that they were present).

52. The position of Mr James Kessler KC, appearing with Ms Rebecca Sheldon on behalf of the Taxpayer, was less clear cut. In relation to the "prevented from leaving the UK" requirement, his skeleton argument said it was "for the Tribunal to decide, applying an objective test to the facts of the case, whether a person is prevented from leaving", and he added that the facts were therefore "objectively verifiable".

53. However, Mr Kessler also referred to the criminal law test for duress, which provides a defence to a crime "where a person of reasonable firmness, sharing the characteristics of [the person in question], would have responded to the situation by acting as [that person] did". He said it would be "strange" if "circumstances which constitute a defence to a serious crime did not satisfy the SRT test of exceptional circumstances". This was, in terms, a submission that the para 22(4) requirements are similar to those for reasonable excuse, where the starting point is the position of the particular taxpayer. In the course of his oral submissions, however, Mr Kessler wisely withdrew his analogy with duress.

54. In our judgment, the para 22(4) requirements are not similar to a reasonable excuse test but are instead entirely objective, for the following reasons:

(1) The statutory provisions make no reference to the person acting "reasonably", or having "a reasonable excuse", so as to require a tribunal to consider his particular circumstances, such as his belief, experience, relevant attributes and his situation at the relevant time.

(2) Para 22(4) is also followed by para 22(5), which provides two examples of "exceptional circumstances": national or local emergencies such as war, civil unrest or natural disasters; and a sudden or life-threatening illness or injury. All these scenarios are objectively verifiable; they do not depend on the taxpayer's reasonable belief.

(3) Further support is provided by the government's response to the consultation on the SRT, cited by the FTT at §128, which said (our emphasis) that the purpose of the new provisions was to "introduce a statutory definition of tax residence (statutory residence test) that is transparent, objective and simple to use".

The meaning of "exceptional circumstances"

55. The term "exceptional circumstances" is not defined in Sch 45. In the course of the FTT hearing, both parties referred to the judgment of Lord Bingham in *R v Kelly* [2000] QB 198 at 208 ("*Kelly*"), in which he considered the meaning of the same phrase, albeit in a different context. He said:

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

56. The FTT held at §144 that this definition "provides helpful guidance", while recognising that the meaning has to be construed in its statutory context. We agree, noting in particular that para 22(4) is followed by the statutory examples in para 22(5). National or local emergencies such as war, civil unrest or natural disasters, and sudden or life-threatening illnesses or injuries are all "out of the ordinary course, or unusual, or special, or uncommon" or satisfy more than one of those descriptors; none are "regularly, or routinely, or normally encountered". We find that the meaning of "exceptional circumstances" given by Lord Bingham in *Kelly* provides a good working definition of the same term in para 22(4).

The importance of the "prevented from leaving the UK" requirement

57. Mr Stone submitted that when interpreting para 22(4), it was essential not to disregard the requirement that the exceptional circumstances "prevent P from leaving the UK". He correctly pointed out that this approach was consistent with the statutory presumption that "every word in an enactment is to be given meaning" see *Bennion, Bailey and Norbury on Statutory Interpretation* at Chapter 21.2.

58. Mr Stone added that it would have been possible for Parliament to have omitted the phrase "prevented from leaving the UK", and that, had it done so, para 22(4) would have read as follows:

> "(a) P would not be present in the UK at the end of that day but for exceptional circumstances beyond P's control, and
>
> (b) P intends to leave the UK as soon as those circumstances permit."

59. We agree with Mr Stone that this formulation both makes grammatical sense, and mirrors the previous non-statutory wording in HMRC's earlier guidance in para 2.2 of IR20, which read:

> "Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or a member of your immediate family, are not normally counted for this purpose."

60. That passage was subsequently updated in HMRC6 at para 8.9 to read:

> "Any days that you spend in the UK because of exceptional circumstances beyond your control, for example an illness which prevents you from travelling, are not normally counted for this purpose."

61. Before the enactment of the SRT, there was thus no requirement that the person in question be prevented from leaving the UK. Although HMRC6 refers to "an illness which prevents you from travelling", this was simply an example of "an exceptional circumstance beyond your control"; it was not a condition which applied in all cases.

62. Mr Stone went on to submit that Parliament intended the "prevent" part of the test to "have meaning and add something to the other elements of the test". Mr Kessler accepted this was correct, saying that "the meaning [of para 22(4)] would be different" had these words been omitted.

63. In our judgment, the requirement that the exceptional circumstance "prevent P leaving the UK" is an important additional condition which must not be glossed over or ignored.

The meaning of "prevent"

64. It was common ground that the word "prevent" in para 22(4) is an ordinary English word with no special or technical meaning. The Oxford English Dictionary ("OED"), in addition to many obsolete and archaic usages, says "prevent" means "to stop, keep, or hinder (a person or thing) from doing something", and also means:

> "To preclude the occurrence of (an anticipated event, state, etc.); to render (an intended, possible, or likely action or event) impractical or impossible by anticipatory action; to put a stop to."

65. Mr Kessler emphasised that the OED meanings include "hinder" and "render… impracticable". Mr Stone placed less weight on the OED, preferring to rely on earlier case law which had considered the meaning of "prevent", including the judgment of Lord Hamblen and Lord Leggatt (with whom Lord Reed agreed) in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649 ("*Arch*") at [151]. Their Lordships said:

> "We agree with Arch that prevention means stopping something from happening or making an intended act impossible and is different from mere hinderance."

66. Mr Kessler submitted that *Arch* had been decided in the "materially different context" of insurance policy wording, and should be disregarded.

67. Having considered the parties' submissions and the statutory context, we find as follows:

(1) Although we were not referred to the OED definition of "hinder", it is "to keep back, delay, or stop an action; to put obstacles in the way of; to impede, deter, obstruct, prevent".

(2) The Supreme Court decided *Arch* following a "leapfrog" appeal from the High Court, see *FCA v Arch* [2020] EWHC 2248 (Comm), where Arch's counsel had submitted (see [315]) that "hindrance meant that access to the premises was rendered more difficult, but prevention means that access was stopped, effectively prohibited". The Supreme Court accepted that difference in meaning.

(3) Parliament could have used the word "hinder" in para 22(4), but instead used "prevent".

(4) Para 22(4) already contains the separate requirement that the person "would not be present in the UK at the end of that day *but for* exceptional circumstances" (our emphasis). In other words, the person is here *because of* the circumstances, and for no other reason. It will often (if not invariably) be an inherent element of such circumstances that they make it *more difficult* for the person to leave the UK. If "prevent" in para 22(4) meant "hinder", it would add little if anything to the "but for" condition.

68. Having taken all the above points into account, and recognising that the statutory context is different from that considered by the Supreme Court in *Arch,* we similarly find that in para 22(4) the word "prevent" means "stopping something from happening or making an intended act impossible" and that it is "different from mere hinderance".

How the "prevent" part of the statutory test operates

69. Para 22(4)(a) reads (our emphasis):

> "P would not be present in the UK at the end of that day *but for exceptional circumstances* beyond P's control *that prevent P from leaving the UK…"*

70. It is thus absolutely clear from the statutory wording that it is the "exceptional circumstances" which must "prevent P from leaving the UK".

71. As we have already noted, the FTT held at §150:

> "The word 'prevent' can encompass all manner of inhibitions – physical, moral, conscientious or legal – which cause a taxpayer to remain in the UK."

72. However, the statutory question is not whether a person is prevented by an inhibition from leaving the UK, it is whether *exceptional circumstances* prevent the person leaving. The FTT sought to deal with this by saying, in the same paragraph:

> "It could hardly have been Parliament's intention to have required the 'exceptional circumstances' test to be failed if, for example, a taxpayer thought it necessary to be present because of serious illness or at the death bed of a close relative."

73. This is to reverse the statutory test. It is not correct to say that (a) because a person genuinely thinks it necessary to be in the UK because a relative is ill or dying, then (b) exceptional circumstances exist. Serious illness and death are, themselves, not "exceptional"; the former is commonplace and the latter universal. It is also not "out of the ordinary course, or unusual, or special, or uncommon" for a person to have a sense of moral obligation towards a relative in that position. Objectively commonplace circumstances, such as serious illness, cannot be converted into exceptional circumstances by adding a moral obligation.

74. The FTT sought to justify its reading of para 22(4) by saying that "Parliament intended to avoid injustice in the application of the SRT by excluding exceptional circumstances beyond a taxpayer's control".

75. However, as Mr Stone pointed out, the FTT's formulation is incomplete, because it makes no reference to the statutory requirement that the circumstances must "prevent" the person leaving the UK. It is instead similar to pre-SRT wording contained in HMRC's guidance booklets. We agree with Mr Stone that Parliament's intention must be established by construing *all* the statutory words, and that in this passage the FTT ignored the final part of para 22(4)(a).

76. We thus find that HMRC are correct to submit, under Ground 1, that the FTT:

> "erred in law in deciding, at (§150), that the requirement that the circumstances prevented the Appellant from leaving the UK could be met by a moral or conscientious inhibition on the Appellant leaving the UK."

77. We consider that the FTT were similarly incorrect to say, at §181, that:

> "Moral obligations and obligations of conscience – including those arising by virtue of a close family relationship – can qualify as exceptional circumstances and those obligations may be strong enough to prevent a taxpayer leaving the UK."

78. In this passage, the FTT went further than in §150, holding that moral obligations taken alone can constitute exceptional circumstances, irrespective of any other objectively assessed facts. However, moral obligations are not themselves exceptional circumstances; they are shaped by society and the subjective feelings of an individual. Where a person feels a moral obligation towards (say) a relative whose circumstances are exceptional, the moral obligation does not form part of those circumstances. Accordingly, the person is not prevented *by exceptional circumstances* from leaving the UK; he is instead prevented by his sense of moral obligation.

79. As Mr Stone pointed out, a person who comes to the UK because he "thought it necessary to be present because of serious illness or at the death bed of a close relative" is able to do so. However, if that person has already used up his available UK days, that extra visit will cause him to be UK resident for tax purposes.

Application to the facts of the Taxpayer's case

80. Ground 1 ends by saying that the FTT also erred when applying the "prevented from leaving the UK" part of the statutory test to the facts of the Taxpayer's case. We agree. Since (a) it is the exceptional circumstances which must prevent the person leaving the UK, and (b) moral obligations are not themselves exceptional circumstances, it follows that the FTT was wrong to find that the Taxpayer's sense of moral obligation towards her sister and her children prevented her from leaving the UK.

81. We consider later in our judgment (see ¶116.) the interaction between this error of law and Ground 3, where HMRC challenge the FTT's finding that there were "exceptional circumstances" in the Taxpayer's case.

Conclusion on Ground 1

82. We allow HMRC's appeal on Ground 1 for the reasons set out above.

GROUND 2: THE DAY-BY-DAY TEST

83. As we noted at ¶50., para 22(4) contains five conditions. The FTT held at §135 that each of those conditions "must be applied each day at the time the [person] stayed in the UK and at the end of the relevant day". There was no dispute that this was correct, and we agree. By Ground 2, HMRC appeal on the basis that the FTT failed to follow that approach.

Mr Stone's submissions

84. Mr Stone said that:

> (1) since each part of the para 22(4) test must be applied on a daily basis "it was incumbent on the FTT to make factual findings as to whether each of these elements… was met on each individual day";
>
> (2) the burden was on the Taxpayer to provide the evidence sufficient to allow the FTT to make those factual findings; and
>
> (3) if the FTT was unable to make those findings because the Taxpayer had failed to provide the necessary evidence, it should have dismissed the appeal.

85. He went on to submit, by reference to both Visits, that the FTT had not taken that approach.

Mr Kessler's submissions

86. In his skeleton argument, Mr Kessler said that HMRC's challenges to the FTT's failure to make detailed findings were "mere nit-picking". During the hearing he rephrased this submission, and said the FTT was entitled to "look at the broad picture" and did not need to make separate or specific findings either on a day-by-day basis, or in relation to each of the requirements in para 22(4).

Discussion and analysis

87. Our starting point is that the person claiming that para 22(4) applies has the burden of proving that each of the statutory conditions is satisfied for every one of the days in issue. If the person fails to provide evidence sufficient for the FTT to make those findings of fact, the appeal must be dismissed. That does not mean, as the FTT rightly said at §186, that a taxpayer has to produce "an itemised timeline for each day", but there must be sufficient evidence to allow a tribunal to make findings about each of the five parts of the statutory test, for each of the days in issue.

88. That was not the position here. Instead, the FTT found that the Taxpayer "could not remember in any detail what she was doing on each day that she was present in the UK"; the Taxpayer herself described the whole week of the Second Visit as a "blur", saying only that it

had taken her "a few days" before "matters were stabilised". The FTT filled part of the resulting evidential lacuna by relying on this submission from Mr Kessler (our emphasis):

> "…*if* the reason for the Taxpayer remaining in the UK was the same each day and *if* that reason constituted exceptional circumstances, then that reason remained valid for each relevant day."

89. We accept that it is possible for a person to meet each condition on each day for the same reason: for example, a person may break a leg and be unable to leave the UK for a number of days. However, it is still necessary to find the facts for each of the conditions and each of the days, based on evidence.

90. The consequences of the FTT's failure to follow that approach are most evident in relation to the condition that "the circumstances prevented the person from leaving the UK", which we next consider.

The First Visit

91. Mr Stone submitted that there was no evidence before the FTT to support its conclusion that the Taxpayer was "prevented from leaving the UK" on 18 or 19 December 2015 because she "needed to care for both her twin sister and her minor children".

92. We agree. The *only* evidence before the FTT about the reason why the Taxpayer considered she was unable to leave before 20 December 2015 was that "it took her three days to reach a point where she was satisfied that her twin sister was no longer at risk of taking her own life and that was the first opportunity that she could return to Dublin". However, as explained above, that evidence was rejected by the FTT.

93. The FTT's finding about the First Visit was thus not based on any evidence, and so constitutes an error of law.

The Second Visit

94. In relation to the Second Visit, the Taxpayer's evidence (see §167) was that:

> "I now had 2 priorities, my sister and her children…I knew I could not return to Dublin until matters were stabilised and the risks sufficiently mitigated. Once again it took me a few days to reach a point in time where I was satisfied that [the twin sister] was no longer at risk of taking her own life. I returned to Dublin at the first opportunity."

95. However, there was no evidence as to what the Taxpayer had done, or when, so as to "stabilise" the position; why she was "prevented" from carrying out those steps sooner, or from outside the UK; or as to what had changed so as to allow her to leave on 19 February 2016.

96. One of the very few specific points about which the Taxpayer did give evidence was that the sister's house "needed professional cleaners", but she could not recall when the cleaners had come or how they were paid, and was thus unable to show she was prevented from leaving at least in part because it was not possible to organise the cleaning from outside the UK, for example by calling a professional cleaning firm from Dublin and/or by liaising with her brother, who lived 20 miles from the sister.

97. Given the lack of evidence, the FTT was unable to make findings of fact on a day-by-day basis that "the circumstances prevented the Taxpayer from leaving the UK" on each of 15, 16, 17 and/or 18 February 2016. The failure to make findings of fact sufficient to support their conclusion was a further error of law.

Conclusion on Ground 2

98. For the reasons set out above, we allow HMRC's appeal on Ground 2.

GROUND 3: EXCEPTIONAL CIRCUMSTANCES

99. Ground 3 was made up of two parts: that the FTT's decision on exceptional circumstances was internally contradictory and so "perverse", and that the circumstances were not "exceptional".

Internal contradiction?

100. As recorded above, the FTT had found at §179 that "the need to care for the consequences of her twin sister's alcoholism and depression" did not constitute exceptional circumstances, because they were not "in themselves uncommon or unusual illnesses", and that this remained the position taking into account that it was "true that both conditions cause much suffering and distress both for the individual concerned and for that individual's family".

101. Mr Stone said that, when applied to the facts of this case, "the individual's family" must encompass the sister's two children, but that the FTT nevertheless went on to decide at §182 that:

> "the combination of the need for the Taxpayer to care for her twin sister and, particularly, for her minor children at a time of crisis caused by the twin sister's alcoholism does constitute exceptional circumstances."

102. Mr Stone submitted:

> "If alcoholism does not constitute an exceptional circumstance notwithstanding the consequences it has for an individual and her family members, being in the UK to deal with those same consequences cannot amount to exceptional circumstances. The FTT's conclusion was internally inconsistent."

103. It was not possible for the Taxpayer to rebut that submission on the basis that the FTT's finding at §179 was incorrect, because that challenge would have had to be made by way of a Respondent's Notice, and no such Notice had been filed.

104. Mr Kessler instead argued that there was no inconsistency, because the position of the Taxpayer and her family "went beyond mere alcoholism". He said that it "was not often that you go into a house and find squalor like this", where by "this" we understood him to be referring to the condition of the sister's house, as described by the Taxpayer.

105. However, as Mr Stone submitted, the FTT made no finding that the degree of suffering and distress caused by the sister's alcoholism and depression was more than that which commonly arises in families who are affected by those conditions. There was also no evidence to that effect (such as from an expert familiar with the impact that the combination of alcoholism and depression has on such families). We agree with Mr Stone that we cannot infer from the FTT decision that the "suffering and distress" caused by the Taxpayer's alcoholism and depression were worse than that commonly experienced as the result of those conditions.

106. It follows that we also agree with Mr Stone that these two passages of the FTT judgment are inconsistent, and that this constitutes an error of law. The FTT could not reasonably find both:

(1) that alcoholism and depression did not constitute exceptional circumstances, even taking into account that they "cause much suffering and distress both for the individual concerned and for that individual's family"; and

(2) that "the combination of the need for the Taxpayer to care for her twin sister and, particularly, for her minor children at a time of crisis caused by the twin sister's alcoholism does constitute exceptional circumstances".

Whether there were "exceptional circumstances"?

107. HMRC's second point under this heading was that there were no "exceptional circumstances" in the Taxpayer's case. Mr Stone said:

(1) The FTT had found as a fact at §179 that "alcoholism and depression are not in themselves uncommon or unusual illnesses" and had gone on to find that:

(a) they were therefore not "exceptional circumstances", and

(b) this remained the case when the consequential suffering and distress were taken into account.

(2) It must therefore follow that the suffering and distress occasioned to the sister and her children were not "exceptional circumstances", and it was an error of law for the FTT to find that the Taxpayer's "need to care" for her sister and her children, and/or her need to "to establish a stable household" did not change the position."

108. Mr Kessler put forward four submissions in response, which we consider in turn.

Findings of fact?

109. Mr Kessler submitted that:

> "The FTT was entitled on the evidence to conclude that the circumstances were exceptional. That is a finding of fact which could only be challenged on *Edward v Bairstow* principles."

110. We disagree. Whether or not the circumstances were "exceptional" is a mixed question of fact and law. This Tribunal cannot interfere with the findings of fact made by the FTT unless there was no evidence to that effect. However, whether one or more findings of fact mean that the Taxpayer's circumstances were "exceptional" is a question of law.

The second statutory example?

111. Mr Kessler also submitted that the Taxpayer's circumstances were similar to those in the second of the statutory examples at para 22(5), namely "a sudden or life-threatening illness or injury". He said the circumstances were plainly "serious", and although there was no finding in the FTT decision that they were "sudden", the FTT could have found this to be the position as "there was evidence to that effect".

112. In order for Mr Kessler to be correct that the Taxpayer's circumstances were similar to those in para 22(5)(b), the circumstances would need to have been either "life-threatening" or "sudden". Since the sister was not at risk of suicide, the circumstances were not life-threatening. As to whether they were sudden, the FTT found at §185:

> "We think it more probable than not that, when coming to the UK in December 2015 and February 2016, the Taxpayer did not appreciate the seriousness of the situation (i.e. the extent to which the twin sister was no longer able to cope with running her household and looking after her children), until she actually arrived. Although she was aware that her twin sister was an alcoholic, she did not appreciate the extent to which her twin sister was incapable of coping with the running of the household and the care of her minor children."

113. It is thus true that the FTT held that the Taxpayer only realised the seriousness of the situation after she arrived in December and February, but this is not the same as a finding that

the sister's illness was itself "sudden". The Taxpayer's own evidence (see §29) was that the sister's "problems with alcohol and mental health issues" began in 1996, and the medical notes from the Priory say that the sister's "alcohol use disorder" had "probably started" in 2009, and that she had suffered from "alcohol dependency" for the three years before her admission in April 2016, see §92-93. We thus reject Mr Kessler's submission that the Taxpayer's position was similar to that in the second of the two statutory examples.

Distinguishable from the usual case?

114. Mr Kessler also said that the Taxpayer's position was distinguishable from the usual case, because:

(1) the sister's house was in a disgusting state, to the extent that it needed professional cleaners to sanitise the interior and make it habitable; and

(2) the "children were in a dreadful state and crawling with nits" and had "clearly not been cared for".

115. We accept that the FTT found as facts that the house was "filthy"; the children "unkempt and in need of care"; and that the "twin sister was drunk and incapable of caring for herself or her children". However, the FTT did not find that this was any different from the suffering and distress commonly caused to the families of those suffering from alcoholism.

The moral obligation

116. Mr Kessler asked us to confirm the FTT's finding that the Taxpayer's "need to care" for the sister and her children converted the situation from one which was not uncommon to one which was exceptional.

117. We have already found (see ¶78.) that moral obligations are not in themselves exceptional circumstances; they are instead part of normal social and familial interaction. Objectively commonplace circumstances do not become "exceptional" by adding a moral obligation. The FTT was therefore wrong to find that the Taxpayer's sense of obligation and/or her "need to care" for her sister and the children changed the position.

Conclusion on Ground 3

118. We allow HMRC's appeal on Ground 3, because:

(1) the FTT's findings on "exceptional circumstances" were inconsistent and thus perverse;

(2) the circumstances which the Taxpayer found when she visited her sister in December 2015 and January 2016 did not constitute "exceptional circumstances".

GROUND 4: COMBINATION OF CIRCUMSTANCES

119. HMRC explained Ground 4 as follows (italics in original):

> "The FTT found that it was only the *combination* of the need for the Respondent to care for her sister and her sister's children that caused the circumstances to amount to exceptional circumstances. The FTT expressly found that the Respondent's need to care for her sister alone would not have constituted exceptional circumstances (§179). Having reached that conclusion as to the precise nature of the exceptional circumstances, the FTT was required to apply the other elements of the statutory test to those particular circumstances. The FTT failed to do so."

120. Mr Stone emphasised that the statutory test requires a person to show, for each of the days in question, that (1) the circumstances were outside that person's control, and (2) the circumstances prevented the person leaving the UK.

121. However, in relation to those two points:

(1) the FTT had failed to make findings that on each day *both* the need to care for her sister, *and* the need to care for the children, were outside the Taxpayer's control; and

(2) the FTT had not made findings to show that the need to care for the sister *and* the need to care for her children prevented her leaving on *all* of the days until her actual departure.

122. Mr Kessler's response was that the FTT was entitled to take a broad view of the matter.

123. We have already found that the FTT failed to show that each part of the statutory test was satisfied on each of the days in question. Ground 4 exemplifies some of the consequential lacunae in the FTT's conclusions: the failure to consider whether the circumstances were under the Taxpayer's control; and whether both elements of the identified combination of circumstances prevented her from leaving on 18 or 19 December 2015, and/or on 15, 16, 17 and/or 18 February 2016. Thus, even if the Taxpayer's need to care for her sister and for her children *had* constituted exceptional circumstances, the FTT made a further error of law by failing to consider whether this was the case on each of the relevant days.

124. HMRC's appeal on Ground 4 is therefore also allowed.

SUGGESTED APPROACH TO PARA 22(4)

125. Since this is the first appeal to the Upper Tribunal about the meaning and effect of para 22(4), we thought it helpful to summarise the approach which could usefully be taken by the FTT when deciding appeals under that paragraph:

(1) Consider separately each of the days for which the taxpayer is claiming to have met the para 22(4) requirements.

(2) For each of those days:

(a) Establish the facts which the taxpayer asserts relate to each of the five elements of the statutory test, the burden being on the taxpayer, namely that:

(i) the circumstances were exceptional;

(ii) the circumstances were beyond the taxpayer's control;

(iii) the taxpayer would not have been present in the UK at the end of that day but for those circumstances;

(iv) the circumstances prevented the taxpayer from leaving the UK; and.

(v) the taxpayer intended to leave the UK as soon as those circumstances permitted.

(b) Establish the facts which the taxpayer asserts show that the circumstances changed so as to allow the taxpayer to leave the UK after the end of the relevant day or days; this will shed light on whether the taxpayer was previously prevented from leaving by the exceptional circumstances.

(c) Consider which facts are objectively proven, either by documents or credible oral evidence, or by both.

(d) In the light of those proven facts, decide whether each of the statutory requirements has been satisfied.

DISPOSITION

126. We allow HMRC's appeal on all four Grounds and set aside the FTT decision. Section 12 of the Tribunals, Courts and Enforcement Act 2007 allows us either to remit the case to the FTT with directions for a rehearing, or to re-make the decision.

127. We decided it was in the interests of justice to take the latter course. We are able to do so on the basis of (a) those findings of fact in the FTT decision which have not been set aside by this judgment, and (b) our analysis of the legal provisions. Remaking the decision also avoids the delay and the additional costs which would be incurred were the case to be remitted, and it makes proportionate use of the resources of the tribunal system.

128. We find as follows:

(1) the circumstances of the First and Second Visits were not "exceptional"; and

(2) the Taxpayer was not "prevented from leaving" the UK on 18 or 19 December 2015, or on any of the dates 15, 16, 17 and 18 January 2016 by exceptional circumstances.

129. We therefore dismiss the Taxpayer's appeal. It follows that she was tax resident in the UK during 2015-16.

130. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application, as required by Rule 10(5) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE MICHAEL GREEN
JUDGE ANNE REDSTON

Release date: 28 July 2023