Neutral Citation Number: [2025] EWCA Civ 106

Case No: CA-2023-002240

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Michael Green and Deputy Upper Tribunal Judge Anne Redston
[2023] UKUT 00182 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 February 2025

Before :

LORD JUSTICE MALES
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between :

A TAXPAYER	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

James Kessler KC and Rebecca Sheldon (instructed by **direct access**) for the **Appellant**

Christopher Stone KC and Sam Way (instructed by **HMRC Solicitor's Office**) for the **Respondents**

Hearing date: 28 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the Upper Tribunal (Tax and Chancery Chamber) (**"the UT"**) concerns the question whether the Appellant taxpayer was resident in the United Kingdom for the purposes of UK income tax in the tax year 2015/16, that is the year ended 5 April 2016. She received a large dividend in that year but claimed that she was not taxable in the UK on it as she was not resident in the UK but in the Republic of Ireland.

2. That turns on the application of detailed and prescriptive rules, known as the statutory residence test, contained in sch 45 to the Finance Act 2013 (**"FA 2013"**). We were told that this is the first (and so far only) case in which the statutory residence test has fallen to be considered. In the particular circumstances applying to the Appellant, the rules had the effect that she would be resident in the UK for 2015/16 if she spent more than 45 days in the year in the UK.

3. Normally if a person is present in the UK at the end of a day that counts as a day spent by him or her in the UK. In the year 2015/16 the Appellant was in fact present in the UK at the end of the day on a total of 50 days. But she relied on para 22(4) of sch 45 to FA 2013 (**"para 22(4)"**) which provides that a day does not count for these purposes if the person would not be present in the UK at the end of that day but for exceptional circumstances beyond their control which prevent them from leaving the UK, and if they intend to leave as soon as those circumstances permit. Her case was that for the last 6 of the days when she was in fact present at the end of the day (2 in December 2015 and 4 in February 2016) she was compelled to stay in the UK to help her sister who was suffering from alcoholism, was suicidal and was failing to look after her own children.

4. The Respondents, the Commissioners for His Majesty's Revenue and Customs, (**"HMRC"**) did not accept that these amounted to exceptional circumstances, or that she had been prevented from leaving the UK, and issued a closure notice amending her tax return to include the dividend.

5. She appealed to the First-tier Tribunal (**"the FTT"**). In a decision handed down on 21 April 2022 at [2022] UKFTT 133 (TC) the FTT (Judge Guy Brannan and Ms Ann Christian) allowed her appeal, finding that there were exceptional circumstances on each of the 6 days in question.

6. HMRC appealed to the UT. In their decision, released on 28 July 2023 at [2023] UKUT 00182 (TCC), the UT (Michael Green J and Deputy Upper Tribunal Judge Anne Redston) set aside the FTT's decision and re-made it in HMRC's favour, holding that there were no exceptional circumstances. I will refer to paragraphs of the FTT decision and UT decision as **"FTT [x]"** and **"UT [x]"** respectively.

7. The Appellant now appeals to this Court and seeks to have the decision of the FTT restored.

8. The appeal was very well argued on both sides, by Mr James Kessler KC, who appeared with Ms Rebecca Sheldon, for the Appellant, and by Mr Christopher Stone KC, who

appeared with Mr Sam Way, for HMRC. For the reasons that follow, I prefer the submissions of Mr Kessler and would allow the appeal and restore the decision of the FTT.

Sch 45 to the FA 2013

9. It is convenient next to set out the legislation. As already referred to, this is found in sch 45 to FA 2013 (given effect to by s. 218 FA 2013). All references below to the provisions of this schedule are to the form in which it stood at the relevant time.

10. Part 1 of sch 45 (paras 1 to 20) is headed "The Rules" and para 1(1) explains that Part 1 sets out the rules for determining for the purposes of relevant tax whether individuals are resident or not resident in the UK, while para 1(2) provides that the rules are referred to collectively as "the statutory residence test". Para 1(4) explains what "relevant tax" is, which by subpara (a) includes income tax; and para 2(1) that references in enactments relating to relevant tax to an individual being resident (or not resident) in the UK are references to being resident (or not) in accordance with the statutory residence test.

11. Paras 3 and 4 set out what is referred to as "the basic rule" which is that an individual ("P") is resident in the UK for a tax year if either of two tests, referred to as "the automatic residence test" and "the sufficient ties test", is met for that year; and if neither test is met P is not resident for that year.

12. Paras 5 to 16 contain detailed provisions in relation to the automatic residence test. It is not necessary to refer to them as it is not suggested that the Appellant met that test.

13. Paras 17 to 20 concern the sufficient ties test. Para 17(1) provides that the sufficient ties test is met for year X if P has sufficient UK ties for that year. By para 17(3) what is "sufficient" for these purposes varies, depending on (a) whether P was resident in the UK for any of the previous 3 tax years to year X and (b) the number of days that P spends in the UK in year X.

14. Paras 18 and 19 contain tables showing how many ties are sufficient in each case. Para 18 contains the table for the case where P was resident in any of the previous 3 tax years to year X. This is the relevant one in the present case as the Appellant was resident in the UK in the previous tax year (2014/15). Under the table in para 18, if P spends more than 15 and not more than 45 days in the UK in year X, then at least 4 UK ties are needed for there to be sufficient ties; but if P spends more than 45 days and not more than 90 days, 3 UK ties are sufficient.

15. Part 2 of sch 45 (paras 21 to 38) is headed "Key Concepts". Paras 31 to 38 explain what ties count as a UK tie, and contain detailed provisions in relation to them. It is not necessary to refer to them as in the Appellant's case it is not disputed that she had 3 UK ties in 2015/16 (a "family tie", an "accommodation tie" and a "90-day tie"). The effect of that, read with the table in para 18, is that if she spent 45 days or less in the UK in that year, she did not have sufficient UK ties and was therefore not resident in the UK for income tax in that year; whereas if she spent 46 or more days in the UK in that year, she did have sufficient UK ties and was resident in the UK for income tax in that year.

16. The critical question therefore is how many days she spent in the UK in 2015/16. The question of what counts as a day spent in the UK is addressed in para 22. At the relevant time this provided as follows (under the heading "Days spent"):

> **"22**
>
> (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 sub-paragraph, whether involving the same or different exceptional circumstances, will count as days spent by P in the UK."

17. The Appellant was in fact present in the UK at the end of the day on 50 days in 2015/16. The effect of para 22(1) is that each of these *prima facie* counted as a day spent by her in the UK (in which case she would have spent more than 45 days in the UK in the year). But she relies on para 22(4). She says that of the 50 days, 6 do not count as they

satisfy the requirements of para 22(4), namely that each of the 6 days was one where she would not have been present in the UK at the end of the day but for exceptional circumstances beyond her control that prevented her from leaving the UK.

Facts

18. I have taken the facts from the decision of the FTT. There was considerable factual dispute before the FTT, and the Appellant and her husband, who gave oral evidence before the FTT, were each cross-examined. As appears below the FTT did not entirely accept her evidence; moreover the findings of the FTT were also criticised by HMRC in their appeal to the UT. It will be necessary to look in due course at what the FTT's findings were, and what the UT had to say about them. But with those caveats the facts are as follows.

19. The Appellant is married with two daughters. Up to and including the tax year 2014/15 the Appellant lived with her husband and their children in the UK and was resident in the UK for tax purposes. On 16 September 2014 her husband transferred a shareholding to her. In the accounting period ended 31 March 2016 she received dividends on this shareholding of approximately £8m.

20. In her tax return for 2015/16 she declared herself non-UK resident under the statutory residence test, having moved to Ireland on 4 April 2015 just before the start of the tax year. She set up home there with her younger daughter, who went to school in Dublin. Her husband remained in the family home in England (her older daughter was at university in England), but they were not separated, and it was the Appellant's evidence that her husband intended to retire in a couple of years and join her in Ireland. It would seem a reasonable inference that she moved to Ireland just before receiving the £8m dividends precisely so as to avoid paying UK income tax on them, and Mr Kessler did not suggest otherwise, but the FTT was not asked to make any such finding, and nothing in the present case turns on such a question: it is common ground that the statutory residence test has to be applied in the same way whatever her motivation for moving abroad.

21. The Appellant was originally one of 5 siblings. She had an older sister, two older brothers, and a twin sister. Her older sister had, according to her, "decided not to be part of their lives" and does not feature in the events referred to below; and one of her brothers committed suicide in New York on 20 December 1996 at the age of 29 (he had a history of drug misuse, addiction and mental health issues).

22. The Appellant however was in regular contact with her surviving brother, and had a close emotional bond with her twin sister. The latter had been based in New York when her brother committed suicide, and had had the task of identifying his body. The Appellant's evidence was that her sister found the experience distressing and that this marked the beginning of her problems with alcohol and mental health issues; and that in particular she struggled at the time of the anniversary of their brother's death.

23. The Appellant's twin sister was formerly married, and had two children, but the relationship broke down in 2010 and she left her husband, relocating in 2011 with her children from the south of England to live near Manchester, about 6 or 7 miles from the home of the Appellant and her husband. Her children, a girl and a boy, were then quite young (they were aged 13 and 11 some 4 or more years later at the material time in

December 2015). Over the course of 2015 she became involved in an acrimonious custody dispute with her ex-husband.

24. The twin sister's mental and physical health had gradually worsened over time but the Appellant's evidence was that in 2015 matters worsened dramatically and her plunge into drug and alcohol addiction accelerated at a sudden and alarming rate; the Appellant said that with hindsight she realised that until then her sister had been a functioning alcoholic who was adept at hiding this illness from her and others, and that when she moved to Dublin her sister appeared to be coping both emotionally and financially.

25. In November 2015 however a representative from the firm of solicitors representing her sister in her custody dispute telephoned the Appellant to alert her to the fact that they were becoming increasingly concerned as to her well-being. Then in December 2015, according to the Appellant, her surviving brother contacted her expressing grave concerns for her sister's welfare as she had been talking about ending things; she considered that her brother (who lived about 20 miles from the twin sister) was not strong enough to cope and had therefore turned to her because he feared that the twin sister was suicidal (although see below on the FTT's conclusion on this).

26. The Appellant considered she had no option but to travel from Dublin to the UK. She and her husband had the use of a private jet, and she flew to Manchester Airport on the afternoon of Friday 18 December with her younger daughter. She returned on the evening of Sunday 20 December and so *prima facie* spent 18 and 19 December in the UK for the purposes of the statutory residence test. She had already before this spent 44 days in the UK of the 45 day allowance for the year.

27. Her evidence was that she found her sister in a dreadful and agitated state; she shared her brother's concerns over her sister's mental health and suicidal tendencies, heightened by the anniversary of her deceased brother's death. She said that she had had no idea what she would find when she arrived and whether she would be able to return to Dublin the same day; but any thought of returning immediately to Dublin was soon put to the back of her mind because the care and welfare of her sister and her children were her priority. She said that it took three days to reach a point where she was satisfied that her sister was no longer at risk of taking her own life and that was the first opportunity that she could return to Dublin.

28. Once she returned, she said, she maintained regular contact with her sister, and also kept in constant touch with her brother. He had helped out during the visit, and she had agreed with him that if circumstances worsened she would return.

29. She said that after her return to Dublin life seemed to level out for her sister but by February 2016 her brother was again at the end of his tether. She knew she had to travel to the UK again because her twin sister was, she said, displaying suicidal tendencies. She and her husband were then in Rome. On the morning of Monday 15 February 2016 they flew to Manchester. This was as had been intended, but she initially said that the original plan was for her husband to be dropped off and for her then to fly on to Dublin. However in oral evidence she accepted that she had always intended to visit her sister on the way back from Rome, although she said she had not intended to stay the night in the UK. In the event she stayed until Friday 19 February when she flew back to Dublin in the evening. She therefore *prima facie* spent another 4 days (15, 16, 17 and 18 February) in the UK for the purposes of the statutory residence test.

30. The Appellant's evidence was that in the few days that she was with her twin sister, she was shocked at her sister's obvious decline. The house was neglected and needed professional cleaners; the children were in a dreadful state, crawling with nits and had clearly not been cared for. She said she could not return to Dublin until matters were stabilised and the risks sufficiently mitigated: it took her a few days, she said, before she was satisfied that her sister was no longer at risk of taking her own life and she then returned to Dublin at the first opportunity.

31. Her recollection of both visits (December 2015 and February 2016) was that on arrival she found a completely dysfunctional family household. Her sister was drunk and incapable of caring for herself or her children. Having cleaned and sobered her up, the Appellant checked for any obvious means by which she could cause harm to herself; she said that she sought to understand from discussions with her sister why she felt suicidal. She also spent time reassuring and calming her sister's children who were very distressed and deeply concerned for their mother: they needed practical support, including cleaning, feeding, comforting and schooling. The Appellant said that it was only after stabilising the family household and satisfying herself that her sister no longer posed a suicide risk that she was able to return to Dublin.

32. By April 2016 the Appellant's sister was, as the Appellant claimed, "again in the depths of despair". The Appellant discovered that her sister's children had been removed from her – the FTT said that it appeared that her ex-husband had obtained custody. On 16 April 2016 (that is in the next tax year) the Appellant came over from Dublin and found her sister in such a state that she called an ambulance and she was committed, initially to an NHS hospital and then to The Priory, a mental health institute, where she was treated for severe alcohol and drug misuse, anxiety, depression and physical symptoms. She was discharged in May 2016 and between then and July 2016 made four attempts at taking her own life.

33. On this material (and taking into account the evidence of the Appellant's husband and various other matters) the FTT made the following findings:

    (1) They readily accepted that the Appellant's sister had severe problems with alcoholism, dating back to 2009. There was medical evidence from June 2016 that the sister was suffering from alcoholism and associated depression.

    (2) There was, however, apart from the evidence of the Appellant and her husband, no evidence that her sister was threatening to commit suicide or that there was a real prospect that she would. There was no corroborative evidence and taking account of all the evidence, the FTT said that the Appellant had not satisfied them, on the balance of probabilities, that she came to and remained in the UK in December 2015 and February 2016 because her sister had threatened to commit suicide.

    (3) To the extent the Appellant's visits were occasioned by the need to care for the consequences of her sister's alcoholism and depression, the FTT considered that this did not, of itself, constitute exceptional circumstances: alcoholism and depression are not uncommon or unusual illnesses. Both conditions cause much suffering and distress for the individual concerned and their family; but they are not exceptional circumstances.

(4) On the other hand the fact that the sister had minor children, for whom the Appellant also cared, did in their view change the position.

34. Although it is quite a lengthy passage, I think it helpful to set out their reasons for this conclusion in their own words:

> "181. It is clear that the Appellant was under no legal obligation to care for her twin sister's minor children. As we have concluded earlier, however, we do not consider it necessary for there to be a legal obligation in order for there to be an exceptional circumstance or one which prevents a taxpayer leaving the UK. 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.
>
> 182. In our view, the combination of the need for the Appellant 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).
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> 183. As we have already observed, there were a number of flaws in the Appellant's evidence. For example, we did not find her evidence concerning the twin sister's threats to commit suicide credible. In addition, we were not convinced by her claim that she and her husband only discovered the extent of her twin sister's alcoholism when the twin sister was admitted to The Priory in April 2016 for the reasons put to her in cross-examination (summarised above at paragraph 84 above). We have also commented that in a number of respects the Appellant's evidence was vague in relation to details. Nonetheless, we do consider her evidence concerning the state of affairs which she found upon her arrival at her twin sister's house in December 2015 and February 2016 convincing.
>
> 184. The Appellant'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. We do not think that it was realistic to expect the twin sister's two friends to devote the kind of care and attention which the children and the twin sister plainly needed. The role of the twin sister's friends was described as one of checking up on the twin sister several times a day. We do not consider that there was any evidence that their role extended beyond that or embraced the more hands-on care which the Appellant gave to her twin sister and her minor children.

> 185. We think it more probable than not that, when coming to the UK in December 2015 and February 2016, the Appellant 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. 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 Appellant's control. We accept that the Appellant 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 Appellant 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.
>
> 186. In that context, we accept that the Appellant 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 Appellant 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.
>
> 187. The Appellant accepted in cross-examination that, contrary to her witness statement, she had not researched obtaining private care, nursing care or assistance for someone with alcoholism. However, the Appellant's evidence was that she believed that she was the only person from whom her twin sister would accept help and guidance. We accept that evidence, which was based on the exceptionally close relationship between the twin sisters. We also anticipate that there may have been significant practical difficulties in obtaining outside household help in circumstances where the twin sister was an alcoholic with periods when she was non-functioning. In that respect, we consider that the circumstances were beyond the Appellant's control."

They therefore allowed the appeal.

The decision of the UT

35. HMRC put forward four Grounds of Appeal to the UT, each of which was accepted by the UT. They were as follows:

    (1) Ground 1 was that the FTT erred in deciding that the requirement that the

circumstances prevented the Appellant from leaving the UK could be met by a moral or conscientious obligation.

(2) Ground 2 was that the FTT erred in failing to apply each element of the statutory test to each individual day.

(3) Ground 3 was that the FTT's decision on exceptional circumstances was internally contradictory and perverse, and that the circumstances were not exceptional.

(4) Ground 4 was that the FTT erred in that having found that there were exceptional circumstances in the Appellant's case, they failed to consider whether those circumstances satisfied the remaining elements of the statutory test.

36. The UT therefore allowed HMRC's appeal and set aside the FTT's decision. That meant that they could either remit the case to the FTT or re-make the decision. They decided to re-make the decision and found that (i) the circumstances of the two visits were not "exceptional" and (ii) the Appellant was not "prevented from leaving" the UK on any of the 6 days in question by exceptional circumstances, with the result that the Appellant was tax resident in the UK for 2015/16.

Grounds of Appeal

37. The Appellant now appeals to this Court with the permission of Falk LJ. The Appellant initially put forward 6 Grounds of Appeal, but in the event it was agreed that Ground 2 (which was put forward on a contingent basis) did not arise and we heard no argument on it.

38. The remaining grounds were that the UT erred:

(1) in its approach to the test as to whether the Appellant was "prevented" from leaving the UK (Ground 1);

(2) in holding that whether circumstances were "exceptional" was a matter of law (Ground 3);

(3) in holding that moral obligations cannot be or cannot be part of the exceptional circumstances (Ground 4);

(4) in holding that the FTT made contradictory findings on the "exceptional circumstances" issue (Ground 5); and

(5) in holding that the FTT had no evidence to support their finding that the para 22(4) conditions were met on each day (Ground 6).

The statutory conditions

39. Before coming to each of these grounds, it is helpful to look at para 22(4) in more detail. I have set it out at paragraph 16 above, but repeat it here for convenience:

> "(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."

40. On this wording, there are 5 conditions, all of which need to be fulfilled before para 22(4) applies. This has been common ground throughout (and accepted by the FTT and UT at FTT [134] and UT [50] respectively). The 5 conditions are as follows:

    (1) the circumstances are exceptional;

    (2) the circumstances are beyond P's control;

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

    (4) the circumstances prevent P from leaving the UK; and

    (5) the person intends to leave the UK as soon as those circumstances permit.

    It may also be noted here that it is common ground that para 22(4) applies to a particular day, and so must be applied to each day in question, and at the end of the relevant day.

41. In the present case, it is not disputed that conditions (3) (the Appellant would not have been present at the end of the day but for the circumstances) and (5) (she intended to leave the UK as soon as the circumstances permitted) were satisfied on each of the 6 days in question. Mr Kessler accepted that HMRC has never formally conceded that condition (2) (the circumstances were beyond the Appellant's control) was also met on each day, but we heard no substantive argument on it. The significant areas of contention are condition (1) (were the circumstances exceptional?) and condition (4) (did they prevent the Appellant from leaving the UK?).

Ground 1 – prevention

42. Although Mr Kessler first addressed Grounds 3 and 4 on exceptional circumstances, I prefer to start with Ground 1 on what is required before a taxpayer (or P, to use the statutory language) can be said to have been "prevented" from leaving the UK.

43. Before the FTT HMRC argued that para 22(4) did not apply where a person came to the UK under a moral obligation or obligation of conscience to care for a family member or other person. It only applied where a person was under a legal obligation (eg to care for their minor child) or was physically prevented from leaving the UK (eg by a volcanic eruption which made flights impossible): the word "prevent" should be construed so as to preclude a moral obligation or an obligation of conscience: FTT [149]. The FTT rejected that submission. Having concluded that Parliament intended by para 22(4) to avoid injustice in the application of the statutory residence test by excluding exceptional circumstances beyond the taxpayer's control, they said that it would be hard to imagine a more unjust conclusion than that advocated by HMRC. They continued (FTT [150]):

> "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. The word "prevent" can encompass all manner of inhibitions – physical, moral, conscientious or legal – which cause a taxpayer to remain in the UK. To read in the restriction that HMRC suggests, is not an exercise in statutory interpretation (purposive or otherwise) but rather an exercise in reading words into a statute which are not there."

44. The UT disagreed. It was, they said, common ground that "prevent" was an ordinary English word with no special or technical meaning: UT [64]. They then considered *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649, and concluded that "prevent" means "stopping something from happening or making an intended act impossible" and that it is "different from mere hinderance": UT [68]. At UT [70] they said that it was clear from the statutory wording that it is the exceptional circumstances that must prevent P from leaving the UK, and after referring to what the FTT had said in the first sentence quoted above from FTT [150], continued (UT [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."

They therefore concluded at UT [76] that HMRC were correct to submit that the FTT erred in deciding that the requirement that the circumstances prevented the Appellant from leaving the UK could be met by a moral or conscientious inhibition on her leaving.

45. Before us, Mr Stone submitted that the UT was right. He did not go so far as to say that a person could only be said to be prevented from leaving the UK if they were legally or physically prevented from doing so. Thus he accepted that if a person broke their leg and was advised by their doctor not to fly, that could be a case of prevention even if it was physically possible to fly with a broken leg. But subject to matters like that, he submitted that if a person had a choice and either chose to come to the UK in the first place, or chose not to leave the UK, then the element of prevention was not met, and it did not affect matters that the choice might have been made because of a moral obligation or obligation of conscience.

46. I do not accept this submission. I agree that "prevent" is an ordinary English word; that it is a stronger word than "hinder"; and that the sense of it is well captured by saying it refers to stopping something or making it impossible rather than merely impeding it or making it more difficult. But where I differ from Mr Stone's submission is that I do not think that what prevents someone from leaving the country can be limited to certain defined categories: legal obligations, physical impossibility, medical advice and the like. There may be any number of reasons why a person in any particular case has to

stay in the UK, and as a matter of ordinary experience we can distinguish between cases where they are compelled or obliged to stay (and hence are prevented from leaving) and cases where they simply find it more convenient or attractive or otherwise preferable for them to stay.

47. Take for example the case of the person with the broken leg who is advised not to fly. In theory he has a choice whether to fly or not, but in practical terms we would readily accept that he could not really be expected to ignore his doctor's advice and so had no real choice. It would, as Mr Stone in effect accepted, be natural to regard his broken leg as preventing him from flying. Or, to take another example, suppose a Government minister whose plans for a holiday abroad are thwarted by some unexpected crisis which requires them to stay in the country. There may be nothing legally or physically stopping them from leaving the country, but in practical terms it would be impossible for them to do so, as we would readily accept. Again it would be natural to say that the crisis had prevented them from going on holiday.

48. Examples like this could be multiplied. But they illustrate that we have no difficulty in recognising that there may be many different types of constraint which oblige us to act in a certain way, or prevent us from doing something. And we also usually have no difficulty in distinguishing between a person being obliged to do something and merely choosing to do so: it is the difference between "P had to stay in the UK because …" and "P chose to stay in the UK because …". Of course there may be borderline cases in which different views could be taken, but this does not mean that there is no difference in principle between a case where a person is prevented from leaving, and one where they merely choose not to. Accepting fully that someone is only "prevented" from leaving the UK if they are stopped from doing so, it will be a matter for the FTT on the facts of a particular case whether they really are stopped from doing so (just as, to anticipate, it is a matter for the FTT to decide if the circumstances really are exceptional).

49. In those circumstances I agree with the FTT that one of the things that can prevent someone leaving the UK is a sufficiently compelling moral obligation or obligation of conscience, and that there is nothing in the statutory language of para 22(4) which suggests otherwise. If P is intending to travel but a member of their close family becomes ill and there is no-one else to care for them, it would be a natural use of language to say that they had to stay, or were prevented from travelling, because of family illness. No doubt in such a case P would be neither under any legal obligation to stay nor physically prevented from going, but that would not stop us from saying that P had no real choice in the matter and was in practical terms obliged to stay.

50. Mr Stone said that this was wrong, and that the circumstances that prevented P from leaving had to be objectively verifiable facts. He sought to uphold the UT who said that the requirements of para 22(4) were entirely objective, and who quoted from the government's response to consultation on the statutory residence test to the effect that the purpose of the new provisions was to introduce a statutory definition of tax residence that was "transparent, objective and simple to use": UT [54]. He relied on the statutory examples in para 22(5), which were examples of objectively verifiable facts, such as war, natural disaster, or sudden or life-threatening illness or injury. They were not concerned, he said, with such subjective matters as the reaction of P to the circumstances, or to the reasonableness of that reaction, or with P's state of mind at all.

51. As this illustrates, the question whether P can rely on a moral obligation as preventing P from travelling is tied up with the question whether a moral obligation can form part of the exceptional circumstances (which is Ground 4 and which I deal with below). In truth I do not think they can be kept distinct. But addressing the issue for the moment in terms of "prevention", I do not accept that matters can be as sharply divided into (objectively verifiable) circumstances and P's (subjective) reaction to the circumstances. Take the case of the illness of a close relative of P's. The illness, and how closely P is related to the ill relative, are no doubt objectively verifiable facts. But whether such illness compels P to stay will depend on whether P is in practical terms obliged to do so, which may well be a mix of the objective facts (does someone need to be there? is anyone else in a position to do so?) and of P's subjective sense of moral obligation or obligation of conscience. Unless one takes the austere position that Parliament did not intend para 22(4) ever to apply to a case where P's close relative is ill – no matter how sudden, unexpected and serious the illness, how close the relationship, or how unrealistic it would be in practice to expect anyone else to care for them – then P's reaction to the circumstances is necessarily part of the inquiry as to whether P is obliged to stay and prevented from leaving. But I think the FTT was right (at FTT [150]) that it can hardly be supposed – and there is nothing in the statutory language to suggest – that Parliament intended the para 22(4) test to be failed if P thought it necessary to stay because of the serious illness (or at the deathbed) of a close relative.

52. Indeed before the statutory residence test was enacted, residence was determined in accordance with the general law as elucidated in a series of cases. This was not however always easy to apply and to assist taxpayers and their advisers the Inland Revenue published a booklet known as IR20 which sought to give guidance on residence and non-residence in the context of taxation. As recorded by the UT at UT [59] one of the versions of IR20 included a statement that:

> "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."

That was later updated by HMRC (see UT [60]) 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."

In the first iteration this is clearly not limited to the illness of P himself, and if HMRC had intended in the second iteration to so confine it, one would have expected them to say so expressly. Similarly the statutory example in para 22(5) which refers to a "sudden or life-threatening illness or injury" is not in terms limited to P's own illness or injury, whereas given what was said in the earlier version of IR20 one might expect Parliament to have said so expressly had it intended that the illness of a member of P's immediate family should *not* be capable of qualifying under para 22(4). But once one admits that Parliament contemplated that the illness of someone else could be something that prevented P from travelling, then (save in the case such as that of a minor child where P has a legal duty to care for them) it must have been in the contemplation of Parliament that a moral or societal obligation could suffice. Put another way, Mr Stone's submission requires us to accept that the statutory example of

an illness or injury is limited to the injury or illness of P himself or of someone for whom P has a legal duty to care, but there is nothing in the statutory language to warrant these words being interpreted in such a narrow fashion.

53. In those circumstances I do not find the division into objectively verifiable facts and P's subjective reaction a helpful one. As is often the case I think the labels objective and subjective can serve more to obscure the issues than answer them. Some of the argument before us for example was concerned with taxpayers whose idiosyncratic views meant they felt obliged to stay in circumstances which most people would not regard as compelling, such as the taxpayer who felt obliged to stay to care for a pet tortoise, or to see their team play in a cup final. I agree that Parliament can scarcely have intended P to benefit from para 22(4) simply because they could honestly say they considered themselves (subjectively) compelled to stay if the circumstances would not (objectively) be generally regarded as compelling. But I do not think that accepting that moral obligations can prevent one from travelling leads to this consequence. If there is a dispute between P and HMRC whether para 22(4) applies, it is (as is common ground) for P to establish that it does; and in practice this requires P to make out his or her case to the satisfaction of the FTT. The FTT can be expected not only to judge the credibility of P's account, but to assess whether the facts as found by them do amount to circumstances that really prevented P from leaving. Accepting that moral obligations can be relevant to this question does not to my mind mean that the FTT is required to accept P's own view as to whether the circumstances were truly compelling.

54. It seems to me therefore that the position is this. The FTT is ultimately required, having found the primary facts, to make an assessment whether the circumstances prevented P from leaving the UK. That to my mind requires them to identify whether the circumstances were objectively compelling such as to prevent P from leaving. Those circumstances can include the reaction of P to such matters as the illness of a close relative, and other moral obligations operating on P in the circumstances, but the assessment whether such circumstances are really sufficiently cogent to amount to prevention is a value-judgement for the FTT, and can take into account such matters as whether P's reaction is reasonable and in accordance with ordinary societal expectations, or is unreasonable and idiosyncratic.

55. In those circumstances I accept that Ground 1 of the appeal is well-founded. The UT was wrong in my judgement to hold that the FTT erred in saying that moral inhibitions could not be what prevented P from leaving the UK.

Ground 4 – can a moral obligation be part of exceptional circumstances?

56. That leads on naturally to Ground 4, which is whether moral obligations can be part of the exceptional circumstances.

57. The FTT said (at FTT [181], set out at paragraph 34 above) that it was not necessary for there to be a legal obligation in order for there to be an exceptional circumstance or one which prevents a taxpayer leaving the UK; moral obligations and obligations of conscience can qualify as exceptional circumstances and those obligations may be strong enough to prevent a taxpayer leaving the UK.

58. The UT disagreed. They said at UT [77] that the FTT were incorrect to say this, and continued at UT [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."

59. When this is read with UT [73] (set out at paragraph 44 above) it can be seen how narrow a view was taken by the UT of what could constitute exceptional circumstances. According to the UT in these paragraphs read together, serious illness is not exceptional; nor is death (indeed it is universal); and such commonplace circumstances cannot be converted into exceptional circumstances by adding a moral obligation (UT [73]); moral obligations themselves are not exceptional, and indeed a moral obligation does not form part of the circumstances (UT [78]). But it has to be the exceptional circumstances which prevent P from leaving (UT [70]), so even if P is prevented from leaving the UK by his sense of moral obligation, that does not mean he is prevented by exceptional circumstances (UT [78]).

60. If this is right, then it would seem to prevent P from ever relying on the serious illness of a close relative (as the UT appears to have concluded at UT [79]); indeed it is difficult to see how P could rely on his own serious illness, unless perhaps it were an unusual one, as "serious illness and death are not, themselves, exceptional" and serious illness is "objectively commonplace" (UT [73]). But all this would appear to make a nonsense of the second statutory example in para 22(5).

61. In those circumstances I do not think the UT can be right. Their analysis depends on dividing up the circumstances into (a) objective matters that might be exceptional (but would not themselves prevent P from leaving the UK) and (b) moral obligations that might prevent P from leaving the UK (but cannot be part of the objective circumstances, nor indeed exceptional). But I think the position is rather simpler than that. The question to be asked under para 22(4) is whether there are "exceptional circumstances … that prevent P from leaving the UK", and, as Mr Stone himself said, this is a composite phrase that must be construed as a whole. What I consider it therefore requires the FTT to do (in a contested case) is (i) find as a fact what the circumstances are; (ii) decide whether those circumstances prevented P from leaving the UK; and (iii) decide whether they were exceptional. That to my mind requires the FTT to look at *all* the relevant circumstances, and ask whether those circumstances taken as a whole prevented P from leaving, and whether those circumstances taken as a whole were exceptional.

62. Read like this, para 22(4) works in a simple and straightforward way in the case where P's close relative is ill. Both the fact that the relative is ill, and any moral obligation that P has to care for the relative are part of the overall circumstances; and the FTT then has to consider whether those matters really do amount to sufficiently compelling circumstances as to prevent P from leaving, and whether the situation that P found himself or herself in was exceptional. To try to divorce the relative's illness from the consequences for P seems to me neither warranted by the statutory language nor to

make any sense, and to lead into the sort of difficulties that flow from the UT's analysis.

63. In my judgement therefore the moral or societal obligations which the illness of a relative – or any other situation – imposes on P form part of the overall circumstances, and can and should be taken account of in considering whether the circumstances as a whole qualify as exceptional. I would therefore accept that Ground 4 of the appeal is well-founded.

Ground 3 – is the question whether circumstances are exceptional a question of law?

64. At FTT [182] (set out at paragraph 34 above) the FTT found that:

> "the combination of the need for the Appellant to care for her twin sister and, particularly, for her minor children at a time of crisis caused by the twin sister's alcoholism"

constituted exceptional circumstances.

65. On appeal to the UT, HMRC challenged this conclusion by Ground 3 of their appeal. This was made up of two parts, both of which were accepted by the UT. The first was that it involved an inconsistency and hence was perverse. That is the subject of Ground 5 of the present appeal which I consider below. The second was that the circumstances found by the Appellant when she visited her sister in December 2015 and February 2016 were not exceptional.

66. In considering this latter point, Mr Kessler submitted that the FTT was entitled on the evidence to conclude that the circumstances were exceptional, and that that was a finding of fact that could only be challenged on *Edwards v Bairstow* principles (*Edwards v Bairstow* [1956] AC 14): UT [109].

67. The UT rejected this saying (at UT [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."

68. Mr Kessler submits that the UT was wrong about this, and that whether the circumstances were "exceptional" was indeed a question of fact. Mr Stone for his part said that although the UT was correct in its approach the question whether the issue was one of law or fact was academic in the present case as the FTT's decision was inconsistent and hence perverse, and that it might not be helpful to spend too much time on the question. In those circumstances it is not clear to me whether anything turns on the point.

69. But as we have heard argument on it I think it is worth considering. We were referred to a number of authorities, but I do not myself think the principles are significantly in dispute. They can be found in the classic statement by Lord Reid in *Cozens v Brutus* [1973] AC 854, which concerned the question whether Mr Brutus, who had disrupted a tennis match at Wimbledon, was guilty of "insulting behaviour". At 861C Lord Reid said:

> "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision."

That must now be read with the benefit of the commentary on it by Lord Hoffmann in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929 (***"Moyna"***) at [22]-[28].

70. Taking the two judgments together, one can extract the following principles:

(1) The meaning of an ordinary English word is a question of fact: *Cozens v Brutus* at 861C. The meaning of a word depends on conventions known to the ordinary speaker of English or ascertainable from a dictionary, and is not a question of law because it does not in itself have any legal significance: *Moyna* at [24].

(2) The proper construction of a statute however is always a question of law: *Cozens v Brutus* at 861C. This is so whether the statute uses simple words or difficult ones: *Moyna* at [23]. This is because when a person uses a word in a particular sentence, what they intend to convey depends not only on conventional meaning but on the syntax, context and background. So when a word is used in an Act, the intention to be ascribed to "the notional legislator" (what is often, if perhaps inaccurately, referred to as "the intention of Parliament") is a statement of law: *Moyna* at [24].

(3) If on its true construction a word used in an Act is intended to have its ordinary meaning, then it is a question of fact, not law, whether the facts as found do or do not come within the words of the Act as a matter of ordinary usage of the English language. This is what Lord Reid says in *Cozens v Brutus* at 861D, and is why he decided that since Parliament had given no indication that "insulting" was to be given any unusual meaning ("Insulting means insulting and nothing else"), it was for the magistrates, not for the Divisional Court or the House of Lords, to decide if Mr Brutus's conduct was insulting: *Cozens v Brutus* at 863A-B.

(4) Lord Hoffmann does not dispute this, although he clearly finds it a little odd that whether certain facts fall within some legal category is regarded as a question of fact rather than law: *Moyna* at [26]-[27]. But he accepts that there is a "good deal of high authority" (including *Edwards v Bairstow*) that whether facts as found fall one side or the other of a conceptual line drawn by the law is

indeed a question of fact: *Moyna* at [25].

(5) The practical effect is that an appellate court that can only hear an appeal on a point of law has a limited ability to disturb the decision of a fact-finding tribunal on such a question. There can be a question of law but only of a limited character: the question would normally be whether their decision was unreasonable in the sense that no tribunal could reasonably reach that decision: *Cozens v Brutus* at 861E. Or, as Lord Hoffmann puts it, such an appellate court will not hear an appeal unless the decision falls outside the bounds of reasonable judgment: *Moyna* at [25]. He does however say that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question: *Moyna* at [27].

71. Applying those principles here:

(1) The meaning of "exceptional" as an ordinary English word is a question of fact. In *R v Kelly (Edward)* [2000] QB 198, a case which concerned the meaning of "exceptional circumstances" in s. 2 of the Crime (Sentences) Act 1997, Lord Bingham of Cornhill CJ said at 208C:

> "We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance that 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."

No issue has been taken with that – nor do I think any could reasonably be – as an explanation of what "exceptional" (or "exceptional circumstances") means as a matter of ordinary English.

(2) The interpretation of para 22(4) is in principle a question of statutory construction and hence a question of law. As with any other question of statutory construction, its meaning can take into account both the context in which words are used, and the purposes of the statutory provisions in question. In particular, I accept, as Mr Stone submitted, that one has to read the word "exceptional" in para 22(4) not as an isolated one but as it appears in the composite phrase "exceptional circumstances beyond P's control that prevent P from leaving the UK". Moreover the use of the word can be elucidated by reference to the statutory examples in para 22(5). The very purpose of such examples is to illustrate circumstances that Parliament recognises to be exceptional. And one can take into account the evident purposes of the introduction of the statutory residence test as a whole, which was to produce a more prescriptive and predictable test for residence that was easier to apply than the somewhat uncertain test under the general law. All of this suggests that Parliament did not intend the exceptional circumstances test to be met too readily.

(3) But having said that, it has not been suggested that "exceptional circumstances" in para 22(4) has some special or unusual or technical meaning, or is a term of

art. Nor is it a case where rival constructions have been put forward and the Court is being asked to choose between them. So just as in *Cozens v Brutus* with the word "insulting", or as in *R v Kelly* with the very phrase "exceptional circumstances", there is no reason to think that Parliament used the word in any other than its normal meaning as an ordinary English word, albeit read in its context and informed by the statutory examples and statutory purpose.

(4) That means that whether the facts as found by the FTT do or do not fall within the words of para 22(4) is indeed a question of fact not law; and that an appellate tribunal, such as the UT, that can only hear appeals on a point of law, is limited to deciding whether the FTT reached a decision that no tribunal reasonably could.

72. The classic exposition of this last point is in *Edwards v Bairstow*. The question here was whether two individuals (Mr Bairstow and another) who had bought a spinning plant with a view to a re-sale were engaged in an "adventure … in the nature of trade" and hence taxable to income tax on their profits under Case 1 of Schedule D in the Income Tax Act 1918. The General Commissioners held that the transaction was not an adventure in the nature of trade, and this was upheld by Wynn-Parry J and again by this Court, who both took the view that the question was one of pure fact for the Commissioners. But the House of Lords held that they had erred in law.

73. The speech usually cited is that of Lord Radcliffe. At 33 he makes the point that the meaning of "trade, manufacture, adventure or concern in the nature of trade" in the Income Tax Act is a question of law, and it is for the courts to interpret this statutory phrase having regard to the context in which it occurs. But that marks out a wide field and if the facts of any particular case are capable of falling within it, it is a question for the Commissioners whether a trade does or does not exist. This is a question of degree and hence of fact. At 36 he considers the circumstances when the court can nevertheless interfere on the ground that the Commissioners' decision is erroneous in point of law. If the case (ie case stated, as the procedure then was) contains anything *ex facie* bad in law which bears on the determination it is obviously erroneous. But, he continues, even without any misconception appearing *ex facie*:

> "it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal."

In such a case too the court must intervene because it has no option but to assume there has been some misconception in law. He posits three ways of putting the test:

> "I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination."

He says that each phrase propounds the same test but he prefers the third; and says that on the facts found in the case before them that he could see "only one true and reasonable conclusion", namely that the profit from the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade.

74. It is also worth noticing Viscount Simonds' speech, which is to the same effect. He too makes the point that it is a question of law what the statutory language means, that is what are the characteristics which distinguish an adventure in the nature of trade (at 31); but that the Commissioners' finding, having found the primary facts, that the transaction was not such an adventure is an inference of fact (at 30). But it can nevertheless be challenged as erroneous in law if all the admitted or found facts point one way and the inference is the other way. In such a case the Commissioners must have misdirected themselves in law because their inference would be inexplicable on the assumption they had directed themselves correctly (at 30-31).

75. *Edwards v Bairstow* has stood for very nearly 70 years, and as far as I am aware has never been questioned or departed from; it is routinely applied by the UT in tax appeals from the FTT. When we asked Mr Kessler if there was any reason to think it was not still good law, he confirmed that as far as he was concerned it was. Mr Stone did not dissent from this, and I did not understand him to suggest that it was not.

76. He did however show us the judgment of Lord Carnwath in *HMRC v Pendragon plc* [2015] UKSC 37, [2015] 1 WLR 2838 (***"Pendragon"***) at [44ff]. Here Lord Carnwath referred to the role of the UT in the then new tribunal system as a specialist tribunal with the function of ensuring that FTTs adopted a consistent approach to the determination of questions of principle; and cited a previous statement of his own in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 AC 48 (***"Jones"***) at [41] to the effect that an important function of the UT was to develop structured guidance on the use of expressions central to a specialised statutory scheme. The question in *Pendragon* was whether the facts came within the European concept of "abuse of law", and at [50] Lord Carnwath said that it mattered little whether this was described as involving an issue of mixed law and fact or an evaluation in accordance with legal principle, and at [51] that it might not be productive for the higher courts to spend time inquiring whether a difference between the UT and the FTT was one of law or fact or a mixture of the two.

77. But I do not read Lord Carnwath's judgment in *Pendragon* (with which none of the other members of the Supreme Court expressly concurred) as departing from *Edwards v Bairstow*; and, as Falk LJ helpfully pointed out in argument, in *Degorce v HMRC* [2017] EWCA Civ 1427, [2018] 4 WLR 79 Henderson LJ, with the agreement of Longmore and Thirlwall LJJ, said at [75]:

> "The Upper Tribunal did not read this guidance [that is what was said by Lord Carnwath in *Jones* and *Pendragon*] as an indication that "the Upper Tribunal has some special exemption from the restrictions to which Lewison LJ referred", a comment with which I respectfully agree."

The reference to what Lewison LJ had said is to his oft-cited judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114] where he said:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them."

78. After this survey of the relevant authorities, I think the position in the present case can be summarised quite briefly. The meaning of para 22(4) is, like any other question of statutory construction, a question of law. But there is no reason to think that "exceptional circumstances" in that paragraph has any special meaning. It is a matter for the FTT as the fact-finding tribunal to consider whether the circumstances as found by them (as primary facts) do or do not qualify as exceptional. This is also a question of fact, albeit one of evaluation or assessment rather than of primary fact. The UT can only disturb their conclusion on this if it involves an error of law. That can be shown in accordance with *Edwards v Bairstow* principles if the "true and only reasonable conclusion" contradicts their determination.

79. In those circumstances I accept Mr Kessler's submission that the UT went too far in saying at UT [110] that "whether one or more findings of fact mean that the Taxpayer's circumstances were "exceptional" is a question of law"; he was in my judgement right to submit to the UT that the FTT's conclusion on exceptional circumstances was a question of fact that could only be disturbed on *Edwards v Bairstow* grounds. I would therefore accept that Ground 3 of the appeal is made out.

Ground 5 – inconsistent and perverse findings

80. I can deal with Ground 5 quite shortly. At FTT [179] the FTT said:

> "We consider that, to the extent that the Appellant'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."

81. At FTT [180] the FTT then said:

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

82. They then gave their conclusion at FTT [182] (set out at paragraph 34 above) to the effect that:

> "the combination of the need for the Appellant to care for her twin sister and, particularly, for her minor children at a time of crisis caused by the twin sister's alcoholism"

constituted exceptional circumstances.

83. The UT considered that there was an inconsistency between FTT [179] and FTT [182]. This is because they accepted a submission that if alcoholism is not exceptional notwithstanding the consequences that it has for an individual and her family members,

then being in the UK to deal with those same consequences cannot be exceptional circumstances either: UT [102], [106].

84. That seems a surprising conclusion. It is not as if the two paragraphs from the FTT's decision are found in different parts of the decision. It does sometimes happen in lengthy decisions or judgments that paragraphs that are widely separated, and may have been drafted at different times, turn out on close examination not to sit well together. But here the run of paragraphs from [179] to [182] are clearly intended to be read together, and show every sign of being drafted as a whole. So when the FTT says at [180] that they considered that the fact that the sister had minor children "for whom the Appellant also cared" changed the position, they evidently considered that this set of circumstances did differ from that they were considering in [179]. And, as the word "also" indicates, that must mean that in [179] they were looking at the position simply considering the need to care for the sister as an alcoholic. They cannot have meant that needing to "care for the consequences of her twin sister's alcoholism and depression" included the consequences in terms of the need to care for her children. That would make [180] nonsensical. Nor could they have meant in [180] that the minor children's need for care was to be equated with the suffering and distress often caused to an alcoholic's family. Again that would make a nonsense of the point they were making in [180] that the need to care for the minor children made a difference.

85. In oral argument Mr Stone accepted that if the Court considered that the FTT meant something different by their reference to the need to care for the children from the distress and suffering referred to in [179], then there would be no inconsistency. That does indeed seem to me, for the reasons I have given, to have been what the FTT must have meant. Mr Kessler emphasised the findings of the FTT which were in graphic terms: see the references to "a time of crisis" (FTT [182]), "dysfunctional household", "incapable of caring for herself or her children", "her sister and her children were unkempt and in need of care" and "the house was filthy" (FTT [184]). The FTT clearly thought that this level of neglect and its consequences for the children was indeed something over and above the "distress and suffering for the individual concerned and for that individual's family" which they had referred to in [179].

86. That seems to me the only sensible way to read these paragraphs together. It is well established that reasons given for a decision can always be better expressed, but that judgments and decisions should be read on the assumption that judges and tribunals know what they are doing unless they have demonstrated the contrary. In the same way I think a decision such as that of the FTT here should be read on the assumption that the FTT intended it to be rational, coherent and consistent unless one is driven to the conclusion that it cannot be so read.

87. I would therefore uphold Ground 5 of the appeal.

Ground 6: were the para 22(4) conditions satisfied on each day?

88. It is not disputed that para 22(4) applies to individual days. It determines whether a particular day on which P is in fact present in the UK at the end of the day counts as a day spent in the UK, and is drafted by reference to "that day": see para 22(1).

89. The relevant findings of the FTT are at FTT [185]-[187], set out at paragraph 34 above. Here they find (1) that the immediate need to establish a stable household in which the

minor children could be cared for was an exceptional circumstance that was outside the Appellant's control ([185]); (2) that the Appellant would not have been in the UK at the end of each day relevant to the appeal but for the fact that she needed to care for both her twin sister and her minor children ([185]); (3) that this need prevented her from leaving the UK until such time as she had stabilised the situation ([185]); (4) that she intended to leave the UK as soon as such circumstances permitted ([185]); and (5) the circumstances were beyond the Appellant's control ([187]). They also accepted that if the reason for the Appellant remaining in the UK was the same each day and if that reason constituted exceptional circumstances that that reason remained valid for each relevant day ([186]).

90. I consider that reading this passage as a whole the FTT did conclude that each of the 5 conditions was satisfied on each of the relevant days. Finding (2) expressly refers to the end of each day relevant to the appeal; and when read with (3) and (4) is to be understood as meaning that the FTT accepted that on each of the two visits she could not leave until she had stabilised the situation so that she was no longer needed to care for her sister and the children, and that that was not the case on each of the days in question. It is implicit in that that they accepted that she could not leave before she did, and that she left as soon as the situation had stabilised.

91. The UT held that there was no evidence to support the FTT's conclusions. At UT [93] they accepted in relation to the December 2015 visit a submission that there was no evidence that she was prevented from leaving the UK on 18 or 19 December, saying:

> "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."

92. Similarly in relation to the February 2016 visit, they referred to the Appellant's evidence that she could not return to Dublin until matters were stabilised, and that once again it took her a few days to reach a point in time when her sister was no longer at risk of taking her own life (UT [94]), but said that there was no evidence as to what she had done, or when, to stabilise the position; why she was prevented from carrying out those steps sooner, or from outside the UK, or what had changed so as to allow her to leave on 19 February (UT [95]). They then concluded at UT [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."

93. Mr Stone accepted that the "bar to establishing an error of law based on challenges to findings of fact is deliberately set high, and that is particularly so where the FTT is called on to make a multi-factorial assessment" as stated by the UT (Zacaroli J and Judge Thomas Scott) in *HMRC v Cook* [2021] UKUT 15 at [19], but said that HMRC had met it.

94. He relied on two points in particular. The first was that the Appellant's evidence was directed at the need for her to stay because her sister was suicidal, but this case had not been accepted by the FTT. That meant, he said, that there was no evidence that she needed to stay to meet the need which the FTT did find, that is to care for the children. The second was that she was unable to give a day-by-day account of what happened on each visit and hence could not explain why, for example, she was able to leave on 20 December but not on 19 December, or why she was able to leave on 19 February but not on 18 February.

95. There is to my mind some force in both points. Having rejected the Appellant's evidence that her sister was suicidal on each occasion, I think the FTT might have been sceptical whether the need which they did accept, that of stabilising the household and caring for the children as well as the sister, really did amount to exceptional circumstances that persisted for each of the 6 days, and really did constitute compelling circumstances that prevented her from leaving earlier than she did; and they might also have placed weight on the fact that they were not told in terms what had changed so as to enable the Appellant to leave on 20 December and 19 February respectively.

96. But the question is not of course whether we, or the UT, would have come to the same conclusions as the FTT did. The question is whether the FTT's conclusion is one that they were entitled to come to, and it can only be said that they were not so entitled if there was no evidence at all on which they could rely.

97. The FTT was well aware that there were flaws in the Appellant's evidence, and that in a number of respects she had been vague in relation to details (FTT [183]). But they nevertheless, as they were undoubtedly entitled to, accepted her evidence as to the state of affairs that she found on her arrival at her sister's house on each of the two visits, namely a dysfunctional household with her sister incapable of caring for herself or her children (FTT [183]-[184]). They also accepted that there was nobody else who could provide the care needed (FTT [184]). In relation to the December visit, they had evidence from the Appellant that there were many practical steps which she had to take in order to stabilise the position (FTT [48]). In relation to both visits, they had evidence from the Appellant that the children needed practical support, including cleaning, feeding, comforting and schooling (FTT [77]). In relation to the February visit, they had evidence that although the Appellant could not remember what she was doing on specific days – she described the period as a blur – the entire time was spent handling a critical situation (FTT [78]).

98. The FTT also had evidence from the Appellant that "it was only after stabilising the family household and satisfying herself that her twin sister no longer posed a suicidal risk that she was able to return to Dublin" (FTT [77]). That would obviously have posed some difficulties for the FTT in circumstances where they were not satisfied of the suicide risk, but were satisfied of the need to stabilise the household, but I think it was a matter for the FTT how to assess that evidence in the light of their findings. They also of course had the benefit of seeing the Appellant give oral evidence and be cross-examined. We do not have that advantage, nor have we seen any transcripts of that evidence. It is not clear whether the UT had them. Mr Stone thought they did not, and their reference to the evidence is to the evidence as recited by the FTT rather than to anything taken from a transcript. It is I think particularly difficult for an appellate tribunal to uphold an *Edwards v Bairstow* challenge on the basis of an absence of evidence in support of some finding without being put, so far as transcripts are able to

do so, in the complete picture.

99. In the end I am persuaded that this was a case where it could not properly be said that the FTT had *no* evidence in support of their conclusions. They were placed in a difficult position once they had decided not to accept the Appellant's evidence as to suicide risk, but I think there was sufficient material before them to conclude that the Appellant intended to leave as soon as circumstances permitted, and that the need for her to stay continued until she actually left on each occasion. That may have been a generous conclusion in her favour, but the assessment of whether the circumstances prevented her leaving on each of the days in question, and whether each of the other statutory conditions was fulfilled on each day, was a matter for them, and I do not consider the UT was justified in concluding that they had no material on which to reach conclusions in her favour.

100. I would therefore accept Ground 6 of the appeal.

101. We were invited to endorse certain guidance given by the UT at UT [125] as to how the FTT might usefully decide an appeal under para 22(4). I am a little reluctant to do so because it suggests that there is one preferred way of dealing with these cases, whereas what is required in any particular case will depend on the matters that are in dispute, and I am hesitant about being too prescriptive. It can generally be left to the good sense of the FTT to decide what they need to decide in each case. For example, it is true that para 22(4) has to be applied to each day in question. But sometimes it may be quite obvious that it is unnecessary to give separate consideration to each day. Take for example the case where P has a broken leg. If P is advised not to travel until the leg is out of plaster, that may be a period of several weeks: in principle the question is whether the statutory conditions are satisfied on each day during that period, but it may be evident that if they are satisfied on the first day, they will also be satisfied on each successive day until the plaster is removed.

102. On the other hand I do agree that it will usually be helpful for the FTT to consider what is said to have changed when P does leave the UK as this will, as the UT says, tend to shed light on whether P was until then prevented from leaving by exceptional circumstances.

Conclusion

103. I consider for the reasons I have given that each of the Grounds of Appeal advanced by Mr Kessler is well-founded. I would therefore allow the appeal and restore the decision of the FTT.

104. Mr Stone had a point that the Grounds of Appeal did not in terms challenge the UT's decision on Ground 4 of HMRC's appeal to it, nor the UT's decision on exceptional circumstances. But I agree with Mr Kessler that neither point arises. Ground 4 of HMRC's appeal to the UT was treated by them as consequential on their finding under Ground 2 of HMRC's appeal that the FTT failed to consider whether para 22(4) was satisfied on each day. If, as I would accept for the reasons given above, the FTT did in fact find, and was entitled to do so, that the para 22(4) conditions were satisfied on each day, then that is enough and I do not think any separate question arises out of what the UT said under Ground 4 of HMRC's appeal.

105. As to the UT's decision on exceptional circumstances, this only comes into play if they were justified in setting aside the FTT's decision and re-making it. If the decision of the FTT is restored, as I consider it should be, the question does not arise.

Lady Justice Falk:

106. I agree.

Lord Justice Males:

107. I also agree.