

CONSISTENTLY INCONSISTENT – APPEALS AGAINST FINDINGS OF FACT TO THE UPPER TRIBUNAL

By Michael Firth

As a rule, challenging a finding of fact made by the First-tier Tax Tribunal (FTT) on appeal to the Upper Tribunal is hard. It is supposed to be hard. Were it otherwise, every litigant would be tempted to seek a second bite of the cherry in the Upper Tribunal, meaning that (a) the Upper Tribunal would be overrun with challenges to findings of fact, and (b) rather less importance would be attached to the first-tier stage.

Appeals against decisions of the FTT are only permitted on points of law (TCEA 2007, s.11). This contrasts with appeals in the civil courts, which are permitted to be made on the basis that the decision is “wrong” (CPR 52.21(3)). Nevertheless, the Courts have, for a long time, managed to fit some apparent errors of fact within the concept of an error of law, using a little ingenuity:

“...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 those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination.” (*Edwards v. Bairstow* [1956] AC 14 at 36, Viscount Simonds).

The test that justifies this logic is demanding: it must be a case in which the true and only reasonable conclusion contradicts the determination. Examples of situations where it applies are (*Megtian Ltd v. HMRC* [2010] EWHC 18 (Ch), §11, Briggs J):

1. Findings based on no evidence at all;
2. Findings which, on the evidence, are not capable of being rationally or reasonably justified;
3. Findings that contradict all the evidence;
4. Inferences which are not capable of being reasonably drawn from the findings of primary fact.

Furthermore, the impugned finding of fact must be one that was significant in relation to the overall decision (*Reed Employment Plc v. HMRC* [2014] UKUT 160 (TCC), §176, Proudman J and Judge Herrington).

Would-be appellants who decide to challenge findings of fact are often reminded that the challenge must be specific and properly formulated:

“What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal’s conclusion was against the weight of the evidence and was therefore wrong.” (*Georgiou v. CEC* [1996] STC 463, 476, Evans LJ)

The above is clear in terms of the law on direct challenges to findings of fact made by the FTT. There is, however, an interesting and fundamental divergence in the Upper Tribunal authorities on the scope for indirect challenges to a finding of fact. In other words, if the appellant’s argument is simply that the finding of fact is wrong, the Upper Tribunal will ask whether the only reasonable conclusion is that the finding was wrong. That is a direct challenge. An indirect challenge arises where the appellant argues that something has gone wrong on the way to the Tribunal reaching the finding of fact, and that something undermines the finding of fact even if it is not necessarily outside the range of reasonable findings of fact (for example, a failure to take into account a relevant consideration). That is an indirect challenge, and some authorities indicate that such challenges are not permitted.

This is of vital importance, because if indirect challenges

to FTT findings of fact are not permitted (or only permitted on limited bases), it means that a Tribunal could follow an entirely defective process of reasoning in arriving at its decision of fact (for example, taking into account all manner of irrelevant considerations), but as long as the end result happens, by chance, to be within the range of reasonable conclusions, it is not open to challenge. In many cases, both the taxpayer's and HMRC's factual contentions are within the realms of reasonableness, which would mean that it actually would not matter whose case the Tribunal accepted or why, as far as an appeal was concerned. The Tribunal could flip a coin to decide the outcome.

In what follows, the authorities supporting the limited approach are considered, followed by the authorities supporting a broader array of indirect challenges to findings of fact. It is argued that the broader approach is plainly right.

The limited approach: direct challenges only

In *Charles v. HMRC* [2014] UKUT 328 (TCC), permission was given to the taxpayer to appeal an MTIC decision. Judge Berner, in giving permission, said that it was unclear on what basis the FTT had reached its decision on the factual question of whether the taxpayer's transactions were connected to fraud:

“It is clear that HMRC's case in respect of connection was challenged, and in those circumstances we consider that it was incumbent on the F-tT to explain with greater particularity than it did why it preferred one explanation (that there was a chain including EMS) to another (that this was a failed deal). It did not mention, still less address, the fact that two references, EMS 0036 and EMS 39, appear to have been used on the same day. It is also unfortunate that the F-tT made no mention of the report of the Tech Freight visit since it is not apparent whether it considered that the contents of the report did not undermine the conclusion it had reached about

connection from the remaining evidence or, instead, the F-tT simply overlooked it. It is, in addition, unclear whether any of the officers who gave evidence, whose names are listed without any elaboration, contributed to an understanding of the chain although it must be assumed that, as in other cases of this kind, HMRC officers can do little more, so far as identification of a chain is concerned, than produce documents they have obtained from the various traders.” (§31 of the final UT decision).

The Upper Tribunal referred to the duty to give reasons, but only on the basis that insufficient reasons would be a ground for granting permission to appeal – not for allowing the appeal itself. In a situation of inadequate reasons, it saw its task as being to examine the evidence before the FTT to decide whether the FTT’s factual conclusion was within the range of reasonable conclusions:

“The fact that it is impossible to understand why the judge reached his conclusion may, of itself, amount to a ground for giving permission to appeal for the very reason that it is impossible to determine, until the appeal has run its course, whether there was sufficient evidence to support the tribunal’s conclusions. The absence from the F-tT’s decision in this case of clear reasoning has, therefore, made it necessary for us to examine the evidence ourselves in some detail in order to determine what conclusions the F-tT could reasonably have drawn from it.” (§32).

The Upper Tribunal considered the evidence and concluded that there was evidence before the FTT from which it “could properly conclude” that connection to fraud had been established. This represents a very limited approach to challenging findings of fact: only direct challenges may be made. The duty to give reasons is viewed not as a means of testing whether the Tribunal has properly approached its

decision-making task, but as assisting the Upper Tribunal to check that the factual conclusion was within the range of reasonable conclusions.

On that view, it would not matter whether the FTT had taken into account all relevant considerations or relied on irrelevant considerations in reaching its decision. Indeed, the Upper Tribunal may never know due to the absence of reasons. Even if irrelevant considerations were taken into account, the decision would stand as long as it was within the reasonable range.

A similar issue arose in *Annova Limited v. HMRC* [2014] UKUT 28 (TCC), but in respect of a properly reasoned FTT decision. The taxpayer on appeal sought to attack two pillars of the FTT decision that it ought to have known of the connection to fraud. One of those challenges was well-founded:

“In these circumstances I consider that Annova’s first complaint is wellfounded. In the absence of evidence that an investigation of manufacturers’ accounts, trade magazines and websites available as at 11 April 2006 would in fact have revealed sales volumes of the relevant phone models, it was not open to the Tribunal to make the finding that it did.”

It followed that the FTT’s conclusion had been based, in part at least, on an irrelevant consideration/a consideration that should not be taken into account. The Upper Tribunal, however, asked itself whether, nevertheless, the FTT “would have been entitled” to reach the same conclusion:

“For the reasons given above, I have concluded that Annova’s first complaint is well-founded, but not its second. It follows that I must consider whether the Tribunal would have been entitled to conclude that Annova should have known that Deal 1 was connected with fraudulent evasion of VAT absent the impugned finding with regard to knowledge of sales volumes.” (§33).

It was held that the FTT would have been so entitled. Once

again, it can be seen that the only challenge permitted was a direct challenge. A decision that was reached by flawed reasoning was upheld because the end result of that flawed process was within the reasonable range.

A final example for present purposes is *Eyedial Ltd v. HMRC* [2013] UKUT 432 (TCC). That was also an appeal by a taxpayer against an adverse MTIC decision. At paragraph 84, the Upper Tribunal accepted that the FTT made an error in determining that the taxpayer had conceded the existence of fraudulent evasion of VAT and connection. The Upper Tribunal then went on to examine the evidence for itself in order to test whether there was “sufficient evidence on which the FTT could make such a finding” (§97).

Indirect challenges

Beyond these decisions, there are a large number of other decisions showing that a broad range of indirect challenges may be made to findings of fact on appeal, including:

- (a) Inadequate reasons
- (b) Failure to address a submission
- (c) Taking into account irrelevant considerations/failing to take account of relevant considerations.
- (d) Misunderstanding a party’s case on the evidence
- (e) Unbalanced assessment of the evidence/overplaying the evidence
- (f) Failure to give proper weight to a relevant factor

(a) Inadequate reasons

With regard to the duty to give reasons, the authorities go further than saying that inadequate reasons is a reason to give permission to appeal. Inadequate reasons also amount, on their own, to an error of law:

“The FTT’s support for inferences and other findings by reference to unspecified further facts is not a proper

exercise of the duty to give reasons and must be regarded as an error of law. A statement that the tribunal finds such facts as are necessary to support other findings or determinations is not itself a finding of fact at all and therefore contravenes the principles in Flannery.” (*HMRC v. Pacific Computers Ltd* [2016] UKUT 350 (TCC), §44, Mann J and Judge Berner).

There is authority (indeed high authority) that in an appropriate case a lower Court/Tribunal’s reasons need not be exhaustive and that appellate courts should not jump readily to the conclusion that the reasons are deficient. But equally, the authorities underscore the need for reasons as the gateway to checking the decision-making process:

“And, while it is important that an appellate court should not be over-critical of any judgment, it is equally important to bear in mind that one of the main purposes of requiring a judge to give reasoned judgments is to ensure that the parties and an appellate court can see why he reached the conclusion which he did, and can assess whether he made any errors of law or fact.” (*PMS International Group Plc v. Magmatic Limited* [2016] UKSC 12, §39, Lord Neuberger).

There is a spectrum as to what is required. Short practical questions call for short, practical answers (*Proctor & Gamble UK v. HMRC* [2009] STC 1990, §14 and §72 re: are Pringles similar to potato crisps?). Complex submissions may require a more reasoned rebuttal:

“...we reach the conclusion that the Judge has not given adequate reasons for rejecting HMRC’s submissions on this point. In particular, we conclude that: (1) the Judge’s treatment of HMRC’s alternative case was too brief; (2) the twenty points required much more by way of an intellectual exchange from the Judge than they received; (3) the twenty points did not receive a coherent reasoned

rebuttal from the judge; (4) Mr Attenborough’s evidence, even as explained by the F-tT, did not amount to a rebuttal, much less a reasoned rebuttal, of those points; (5) the Judge ought to have formed his own assessment of the alternative case and was not able to decline to do so on the basis that he did not have expert evidence to help him.” (*HMRC v. CCA Distribution (in administration) Ltd* [2015] UKUT 513 (TCC), §118, Morgan J and Judge Herrington).

Reasons challenged should be raised clearly in the permission to appeal application to allow the Tribunal the opportunity to rectify any omission; however, the Upper Tribunal is alert to the risk of ex post facto rationalisation (*HMRC v. CCA Distribution (in administration) Ltd*, §108).

(b) Failure to address a submission

Related to the duty to give reasons is the duty to consider and properly address all substantial submissions made by the parties:

“Where there is evidence, and it is evidence from which the tribunal is invited to make an inference, the tribunal must address that question and explain its reasons either for drawing an inference or refusing to do so. It is not sufficient simply to say that there was no evidence. The failure by the FTT properly to address the submissions of HMRC by reference to the available evidence was an error of law.” (*HMRC v. Pacific Computers Ltd* [2016] UKUT 350 (TCC), §82, Mann J and Judge Berner).

“In the circumstances the FTT failed to take into account a very important part of the appellant’s case, and erred in law. Without seeking to decide the point, I can safely say that it was a point with significant merit.” (*Projosujadi v. Director of Border Revenue* [2015] UKUT 297 (TCC), §31, Mann J).

(c) Taking into account irrelevant considerations/failing to take account of relevant considerations

Public authorities reaching decisions within their sphere of competence must take into account all relevant considerations and exclude all irrelevant considerations. The same applies to the FTT:

“We therefore conclude that HMRC has established that the Judge took into account an irrelevant consideration. The question as to Mr Trees’ knowledge was one of the central questions to be determined by the Judge. At [387], the F-tT stated that the case was a borderline case. In determining a central question in a borderline case, the Judge took into account, in favour of Mr Trees and CCA, an irrelevant matter...We consider that, on this ground alone, the Decision as to Mr Trees’ knowledge cannot stand.” (*HMRC v. CCA Distribution Ltd (in administration)* [2015] UKUT 513 (TCC), §§82...84, Morgan J and Judge Herrington).

“Clearly, Vital Nut’s prospects of establishing an Edwards v. Bairstow type of error of law were better if it was the Original Decision that was being appealed than if it was the Revised Decision that was the subject of the appeal. That is because, as we have noted, [55] of the Original Decision makes a statement about the evidence (“...there was no evidence before us ...”) that suggests that the FTT excluded from its consideration legally relevant and probative evidence that was undoubtedly before it. That, plainly, is very much Edwards v. Bairstow territory.” (*Vital Nut Co Limited v. HMRC* [2017] UKUT 192 (TCC), §43, Marcus Smith J and Judge Bishopp – on the facts the FTT sought to correct the error through the review procedure).

It is for the appeal Tribunal to decide what considerations were relevant:

“it is for the appellate tribunal to determine what considerations are relevant to the question at issue. It does not defer to the inferior tribunal in the selection or identification of these considerations.” (*Teinaz v. Wandsworth LBC* [2002] EWCA Civ 1040, §36, Arden LJ)

Where the Tribunal has taken into account an irrelevant consideration or failed to consider a relevant consideration, the decision will not stand, unless the Upper Tribunal concludes that it would inevitably have been the same:

“The words of paragraph [96] make clear that the considerations in [95] were material to the FTT’s conclusion. Thus we conclude that the FTT took into consideration a materially irrelevant factor. Accordingly its decision betrayed an error of law...It does not seem to us that this was a harmless error involving no prejudice to Mr Wright or that the FTT would inevitably have reached the same conclusion had it not taken this factor into account. Accordingly we set the decision aside.” (*Wright v. HMRC* [2013] UKUT 481 (TCC), §§47...48, Judges Hellier and Gort).

A conclusion that the decision would “most likely” have been the same is not sufficient (see, by analogy, *John Dee Ltd v. CEC* [1995] STC 941, at 953 per Neill LJ). This is fundamental to the adjudication process. If a Tribunal has wrongly excluded a relevant consideration, and its decision would not inevitably have been the same if it had not made that error, the formal decision reached by the Tribunal cannot be taken to represent that Tribunal’s decision on the actual question posed to it by the case. On appeal, a direct challenge to the finding of fact will only succeed if it is outside the reasonable range. One could thus perfectly well imagine a situation where an FTT would have reached a different decision if it had taken into account the relevant consideration,

but the actual decision is within the reasonable range. Without the irrelevant/relevant consideration test, a decision that does not represent the true decision of any Tribunal would be allowed to stand.

(d) Misunderstanding a party's case on the evidence

In order to reject a case on a factual issue, the FTT must first understand what that factual case was. If it turns out that the FTT has misunderstood a party's case on the evidence, that is an error of law:

“...we have reached the view that the FTT failed properly to examine the evidence before it. That failure, in our judgment, can be attributed to a number of factors. First, the FTT had effectively closed its mind to a material part of the evidence put forward by HMRC which was unchallenged; secondly, the FTT misunderstood the case as put by HMRC, and accordingly asked itself the wrong question in relation to the evidence of orchestration and contrivance; and thirdly, in considering the evidence put forward by PCL, the FTT failed to test that evidence by reference to the surrounding circumstances, including in particular the orchestrated and contrived nature of the fraud with which 5 PCL's transactions were connected...the FTT erred in law in failing properly to address HMRC's case on the evidence, and in failing to give proper reasons for certain of its conclusions.” (*HMRC v. Pacific Computers Ltd* [2016] UKUT 350 (TCC), §§75...85, Mann J and Judge Berner).

(e) Unbalanced assessment of the evidence/overplaying the evidence

It is often noted that the weighing of multiple factors when reaching an overall conclusion on a factual issue is pre-eminently a matter within the province of the FTT. Nevertheless,

there appear to be limits to the deference that the Upper Tribunal will show to the FTT. The first is where the FTT's assessment of the evidence appears unbalanced:

“There is force in the submission that the FTT overplayed the effect of the evidence. The statement that the consistent evidence of Mr Glyn and several of their friends was that his attendance at regular social Sunday dinners and other similar occasions “virtually ceased” does not stand well with his oral evidence that he saw “all of my friends whenever I could”. Nor does it stand well with the significant number of other formal social occasions, often more than one each month, attended by Mr Glyn during 2005/2006. The evidence overall might justify the conclusion that there was, as the FTT found, a very significant loosening of his social ties, but the assessment of the evidence for the purpose of reaching this conclusion is not balanced.” (*HMRC v. Glyn* [2015] UKUT 551 (TCC), §90, David Richards J).

In principle, such cases may be explained as instances where the Upper Tribunal infers that the FTT has not taken into account all relevant considerations.

(f) Failure to give proper weight to a relevant factor

Second, and related to the unbalanced assessment of the evidence, are cases where the FTT failed to give proper weight to a relevant factor. Traditional judicial review principles would indicate that such a complaint is well founded, if the decision-maker gave the factor a weight that no reasonable decision-maker could have given it. Upper Tribunal case law indicates a potentially broader and more intrusive approach:

“The FTT did not subject the evidence of PCL's witnesses to scrutiny by reference to the factual evidence produced by HMRC and the inferences which HMRC submitted ought to be made from that evidence as a counterweight

to the evidence of those witnesses. The failure to give proper weight to the evidence of the officers was, in our view, part and parcel of this overall failure in relation to the evidence.” (*HMRC v. Pacific Computers Ltd* [2016] UKUT 350 (TCC), §75, Mann J and Judge Berner, underlining added).

“The core of the FTT’s decision is contained in paragraph’s 127-174 of the Decision, under the heading “Our Decision – Applying the law to the facts”. They consider a number of factors, many of which are plainly relevant and significant, in particular whether Mr Glyn had made a distinct break involving a substantial loosening of his family, social and business ties. But, as explained above, they also took into account irrelevant factors and they failed to have regard, or sufficient regard, to certain relevant factors. The FTT itself considered this to be a “borderline” case (see the Reasons for refusing permission to appeal at [10]). In such a case, the errors of law which I have identified mean that the Decision cannot stand.” (*HMRC v. Glyn* [2015] UKUT 551 (TCC), §102, underlining added).

Conclusion

The statutory appeal mechanism places a lot of trust in the FTT by limiting appeals against their decisions to errors of law and, within that category, limiting direct challenges to findings of fact to cases where the finding is outside the reasonable range.

The appeal Courts/Tribunals themselves also place significant trust in the FTT by reading FTT decisions with the starting assumption that the Tribunal knew how to perform its role and what matters to take into account:

“It is unrealistic for an appellate court to expect a trial judge in every case to refer to all the points which

influenced his decision. As Lord Hoffmann said in *Pigłowska v Pigłowski* [1999] 1 WLR 1360, 1372, “reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account”. He also rightly said that an “appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself”...” (*PMS International Group Plc v Magmatic Limited* [2016] UKSC 12, §39, Lord Neuberger).

It is a crucial counterbalance to the above, however, that indirect challenges to findings of fact be permitted and taken seriously. Taking them seriously means that if it is apparent from the decision that in one or more ways the Tribunal has not performed its function correctly, the starting assumption must be disappplied and the decision must be set-aside unless the decision would inevitably have been the same. A successful indirect challenge thus reverses the burden of persuasion: rather than the appellant having to show that the finding of fact was outside the reasonable range, the question is now whether the only reasonable conclusion on the evidence was the one which the Tribunal reached. If it is not, the decision is unsafe and must be set aside.