[2017] AACR 3

(VK v Her Majesty's Revenue and Customs (TC)
[2016] UKUT 331 (AAC))

Judge Jacobs **CTC/5461/2014**
Judge Wikeley
Judge Mitchell
11 July 2016

Tax credits – power of First-tier Tribunal to admit late tax credits appeals

Tribunal procedure and practice – whether tribunal procedure rules may confer power to extend statutory time limit

On 29 March 2012 Her Majesty's Revenue and Customs (HMRC) decided that the claimant was not entitled to tax credits as a single person because she was a member of a couple. On 21 January 2013 she appealed against that decision, having lived alone since her husband left her in November 2008. HMRC rejected her appeal as being outside the 30 day time limit for bringing an appeal under section 39(1) of the Tax Credits Act 2002 (TCA 2002), and referred it to the First-tier Tribunal (F-tT) which also decided that the appeal was out of time and that it had no power to extend the time limits: *JI v Commissioners for Her Majesty's Revenue and Customs (TC)* [2013] UKUT 199 (AAC) applied. In *JI* the Upper Tribunal had held that (a) rules cannot confer power to extend time in the absence of a specific enabling provision in primary legislation permitting it, and (b) that there was no such provision in the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007): *Mucelli v Government of Albania* [2009] UKHL 2; [2009] 1 WLR 276 applied. The issues before the Upper Tribunal were whether a tribunal had power to extend the 30 day time limit set by section 39 of the TCA 2002 and whether, in principle, the rules of tribunal procedure were capable of providing for an extension of a time limit set by primary or other legislation.

Held, allowing the appeal, that:

1. paragraph 4 of Schedule 5 to the TCEA 2007 specifically authorised rules of the F-tT to make provision for time limits as respects initiating, or taking any step in, proceedings before the F-tT or the Upper Tribunal. Construing that power in the light of the TCEA 2007's purpose, the panel concluded that it authorised: (i) provision setting time limits where legislation conferring a right of appeal was silent about time limits; (ii) provision connected to existing time limits so long as it did not provide for extension or shortening of the time limit; and (iii) provision for extension of time limits set in other enactments (paragraphs 78 to 91);

2. the *ratio* in *Mucelli* was simply that statutory authority for extending a time limit must exist and did not depart from existing authorities that rules are capable of providing for extensions of time: *Reddy v The General Medical Council* [2012] EWCA Civ 310. Lord Neuberger's main doubt was whether rules could shorten, rather than extend, a time limit (paragraphs 65 to 69);

3. many other rules assume they can provide for extensions of statutory time limits and the Tax Chamber Rules clearly did so (paragraphs 33 to 58);

4. properly construed, the F-tT's power to extend time for complying with a rule extended to a time limit adopted in rules by reference. The wording used simply reflected the drafting style of the Tribunal Procedure Committee and did not exclude the power to extend time where a time limit was adopted by reference (paragraphs 93 to 103).

The panel set aside the decision of the F-tT and remitted the appeal to a differently constituted tribunal to be re-decided in accordance with its directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 14 July 2014 under reference SC242/14/02438) involved the making of an error on a point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted tribunal.

DIRECTIONS:

The tribunal must first decide whether Ms K's appeal was made late and, if it decides it was late, go on to consider whether to extend time and admit the appeal. If the tribunal admits the appeal, it must undertake a complete reconsideration of the issues that are raised by the appeal.

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REASONS FOR DECISION

INTRODUCTORY MATTERS

Abbreviations

CPR	Civil Procedure Rules
HMRC	Commissioners for Her Majesty's Revenue and Customs
TCA 2002	Tax Credits Act 2002
TCEA 2007	Tribunals, Courts and Enforcement Act 2007
TPC	Tribunal Procedure Committee
2008 Order	Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 (SI 2008/2683)
2009 Order	Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56)
Adesina	*Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818; [2013] 1 WLR 3156
JI	*JI v Commissioners for Her Majesty's Revenue and Customs (TC)* [2013] UKUT 199 (AAC)
JT	*JT v Commissioners for Her Majesty's Revenue and Customs (TC)* [2015] UKUT 81 (AAC)
Mucelli	*Mucelli v Government of Albania* [2009] UKHL 2; [2009] 1 WLR 276
Pomiechowski	*Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20; [2012] 1 WLR 1604

What this case is about

1. This case deals with a narrow issue and a wider one. The narrow issue is whether, for the period 3 November 2008 to 5 April 2014 inclusive, the Social Entitlement Chamber of the First-tier Tribunal had power to extend the 30 day time limit for appealing a HMRC tax credits decision set by section 39 of the TCA 2002. This has required us to consider the wider issue whether, in principle, rules of tribunal procedure are capable of providing for extension of a time limit set by primary or other legislation.

2. This, in outline, is our reasoning on the wider issue:

- A statutory time limit may be extended if there is authority to do so.
- That authority may be conferred by the Act that sets the time limit or another Act.
- Legislative provisions that confer authority to extend time do not have to be contained in an Act. In principle, they may also be contained in secondary legislation if its enabling powers permit such provision to be made.
- That legislation may be a tribunal's rules of procedure.

3. This, in outline, is our reasoning on the narrow issue:

- Section 39(1) of the TCA 2002 set a statutory time limit for appealing against a tax credits decision.
- For the period with which we are concerned, it did not confer power to extend time.
- Paragraph 4 of Schedule 5 to the TCEA 2007, properly interpreted, authorised rules of tribunal procedure to confer power on the First-tier Tribunal to extend time.
- The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), read as a whole, contained that power.

4. The TPC has made seven sets of procedure rules for the different Chambers of the First-tier Tribunal. The rules of procedure are, to a large extent, generic. The circumstances of the various jurisdictions may require the rules to be applied differently, but it cannot be right that the same language should have a different meaning in different contexts. The arguments put to us referred to some other rules of procedure. We have, of course, considered those arguments. We encourage representatives in future cases to take this approach when they seek to argue that a provision within one Chamber's rules bears a particular meaning. As a check on our reasoning, we considered whether the implications of our decision for Chambers other than the Social Entitlement Chamber might reveal flaws in our approach. Our overview of the body of First-tier Tribunal rules did not lead us to doubt our reasoning. Instead, it showed the TPC's understanding of the extent of its powers to be consistent with ours.

The three-judge panel

5. The Chamber President of the Administrative Appeals Chamber of the Upper Tribunal appointed a three-judge panel to hear this appeal in view of the importance of the issue – it affects a large number of cases currently before the Upper Tribunal and perhaps before the First-tier Tribunal as well – and of the fact that it involved a challenge to the decision of Upper Tribunal Judge Rowland in *JI*. We analyse that decision later. Here it is sufficient to say that Judge Rowland decided that the First-tier Tribunal had no power to extend time during the period with which we are concerned. A variety of legal arguments had been deployed before the First-tier Tribunal and, in turn, the Upper Tribunal in an attempt to avoid the consequences of that decision. This is the lead case selected to address many of those arguments.

6. We held a hearing on 20 June 2016. Ms K, the claimant, was fortunate to be represented by the Child Poverty Action Group, who instructed Mr Royston of counsel to appear on her behalf. Ms Ward of counsel appeared for HMRC. HMRC informed the Upper Tribunal that their submissions were made on behalf of those other parts of the UK Government who might have an interest in the proceedings (the issues arising on the appeal included the *vires* of secondary legislation made by the Secretary of State, the Treasury and the Lord Chancellor). We are grateful to both counsel for their assistance at and in preparing for the hearing.

The factual background

7. The factual background is not complex, although we observe there may be a factual disagreement over whether Ms K was notified of HMRC's decision.

8. On 29 March 2012 HMRC decided Ms K's entitlement to tax credits as a single person for the tax year 2010/11. Given under section 18 of the TCA 2002, HMRC's decision was that Ms K was entitled to neither child tax credit nor working tax credit for 2010/11. That decision rested on a finding that, during that tax year, Ms K was a member of a couple. In her notice of appeal to the First-tier Tribunal, Ms K argued that her husband left the matrimonial home in November 2008 and she had not been a member of a couple since then.

9. HMRC contend that Ms K did not appeal against their decision until 21 January 2013. If the time for appealing started to run on 29 March 2012, Ms K's appeal was well outside the 30 day primary time limit for bringing a tax credit appeal. At that time, section 39(1) of the TCA

2002 provided that "notice of an appeal … must be given to the Board [ie HMRC] … within the period of thirty days after the date on which notice of the decision was given."

10. HMRC assumed they had power to accept late appeals, but they refused to accept Ms K's appeal.

11. HMRC referred the matter to the First-tier Tribunal. Applying *JI*, on 14 July 2014 the Tribunal decided that Ms K's appeal was out of time and it had no power to extend time. The Tribunal refused to admit Ms K's appeal. In granting Ms K permission to appeal to the Upper Tribunal, District Tribunal Judge Poynter observed that uncertainty over the Tribunal's powers to extend time "is causing considerable administrative difficulty, at least in the South East Region of the Social Entitlement Chamber".

The arguments

12. The initial issues for resolution on this appeal are:

(1) whether the TCEA 2007 permits tribunal procedure rules to confer power on the First-tier Tribunal to extend time for appealing where some other enactment has already set a time limit for that type of appeal;

(2) if so, whether the rules for the Social Entitlement Chamber of the First-tier Tribunal, as they stood at the relevant time, did in fact confer power on the Tribunal to extend time for appealing against a tax credits decision.

Ms K argues the TCEA 2007 could, and did, give the Tribunal power to extend time. If she is right, the parties agree this appeal must be allowed and the matter remitted to the First-tier Tribunal for it to re-decide whether to admit Ms K's late appeal (by reference to the legislation applicable to HMRC decisions taken in March 2012). As we have already said, we have decided these issues in Ms K's favour.

13. If Ms K had not succeeded on the above grounds, the remaining grounds of appeal would have arisen for consideration. These were:

(3) whether Article 6(1) of the European Convention on Human Rights, as given effect by the Human Rights Act 1998, required the First-tier Tribunal, despite the loss of its express power to extend time, to decide applications to admit late appeals as if it had retained that power;

(4) whether the 2008 Order was *ultra vires* in so far as it purported to amend the Tax Credits (Appeals) (No.2) Regulations 2002 (SI 2002/3196) so as to omit the appeal tribunal's power to extend time for appealing;

(5) whether the 2009 Order was *ultra vires* in so far as it purported to amend section 63 of the TCA 2002 so as to omit power by regulations to apply, for tax credits purposes, the appeal provisions of the Social Security Act 1998.

In the event, those issues do not arise. We have, nevertheless, given some views briefly as a courtesy to counsel beginning at [105] below.

THE LEGISLATION

14. The Gordian knot of legislation that forms the backdrop to this appeal is set out in the Annex to this decision. The date on which the legislative picture became almost impenetrable was 3 November 2008 (the main implementation date for the TCEA 2007). We agree wholeheartedly with Upper Tribunal Judge Rowland's observation in *JI* that "it would be hard to devise a method of legislating more calculated to obscure the law from the sight of claimants and judges" (at [34]).

Rule-making powers under the TCEA 2007

15. Section 3(1) of the TCEA 2007 created the First-tier Tribunal "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". That provision anticipates, of course, functions being conferred on the Tribunal by and under the TCEA 2007 (including rules of procedure made under the TCEA 2007).

16. Section 7(1) of the TCEA 2007 authorises the Lord Chancellor, with the concurrence of the Senior President of Tribunals, to organise the First-tier Tribunal into separate Chambers. Article 6(c) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655) allocates the function of deciding tax credit appeals to the Social Entitlement Chamber of the First-tier Tribunal.

17. Previously, the multiplicity of tribunals in the UK meant multiple sets of tribunal procedure rules. It is not contentious that one driver of tribunal reform was the need for greater uniformity of tribunal procedure. Sir Andrew Leggatt's 2001 Report of the Review of Tribunals, some of whose recommendations the TCEA 2007 was enacted to implement, stated that users of citizen-state tribunals stood to gain the most from "the development of [the] consistent procedural approaches which we recommend" (paragraph 3.10). The subsequent White Paper *Transforming Public Services: Complaints, Redress and Tribunals* (July 2004, Cm 6243) stated:

> "7.2. At present tribunal rules can be complex, while the language used can be confusing to ordinary users. In addition, the work of those providing advice and support to users is made more difficult by the differences in procedure between tribunals. By simplifying rules and procedures, we can deliver real benefits …
>
> 7.3. Sir Andrew Leggatt recognised the need for simplification and overhaul of tribunal rules … There is a clear consensus amongst tribunal judiciary that while specialist rules, where they are necessary for the jurisdiction, can still be retained, a much clearer, codified system can be developed to cover many tribunals."

18. Section 22(1) of the TCEA 2007 provides:

> "(1) There are to be rules, to be called "Tribunal Procedure Rules", governing –
>
> (a) the practice and procedure to be followed in the First-tier Tribunal, and
>
> (b) the practice and procedure to be followed in the Upper Tribunal."

19. Power to make the rules is conferred on the TPC by section 22 of the TCEA 2007. Different rules may be made for different purposes, for example for different Chambers of the First-tier Tribunal (paragraph 19 of Schedule 5 to the TCEA 2007).

20. The TPC's membership is governed by Part 2 of Schedule 5 to the TCEA 2007. Judges form a majority of its members and are appointed or nominated by other judges. The Lord Chancellor appoints three members, after consultation with the Lord Chief Justice, but he may only appoint persons with experience of practice in tribunals or advising persons involved in tribunal proceedings. In other words, the TPC is a body whose members have expertise in the day-to-day administration of tribunal justice.

21. The rules must be agreed by the Lord Chancellor which reflects the executive's legitimate interest in the operation of tribunals, an interest which extends to the way in which tribunals connect with the substantive legislative schemes on which they adjudicate. Before making any rules, the TPC is required to consult such persons as it considers appropriate (paragraph 28(1) of Schedule 5). The rules are subject to Parliamentary oversight; they may be annulled by resolution of either House of Parliament. The rules take the form of a Statutory Instrument (paragraph 28(5) of Schedule 5).

22. In our view, the TCEA 2007's distribution of responsibilities for making tribunal rules reflects the observation made in Lord Rodger's (dissenting) opinion in *Mucelli*. His Lordship said:

> "5. … Parliament doesn't teach its grandmother to suck eggs: it proceeds on the assumption that the courts are experienced in matters of procedure and their rule-making bodies know best how they should be regulated. …"

23. The TCEA 2007 contains guiding principles for the TPC. Section 22(4) requires their rule-making powers to be exercised "with a view" to "securing" certain matters including "that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done" and "that the tribunal system is accessible and fair". The "tribunal system" is defined by section 22(5) as "the system for deciding matters within the jurisdiction of the First-tier Tribunal or the Upper Tribunal".

24. Section 22(3) of the TCEA 2007 introduces Schedule 5 to the Act, stating that Part 1 of the Schedule "makes further provision about the content of Tribunal Procedure Rules". The key provision within Part 1 of Schedule 5, for present purposes, is paragraph 4 which reads:

> "Rules may make provision for time limits as respects initiating, or taking any step in, proceedings before the First-tier Tribunal or the Upper Tribunal".

25. The TCEA 2007 rationalised and re-cast the legislative framework for the operation of tribunals. We note it did not concern itself with the subject matter of tribunal cases and left untouched the legislative schemes that generate "inputs" for tribunals whether by way of appeal, application, reference, notice or such like. However, the TCEA 2007 clearly was concerned with the way in which tribunals connect with the legislative schemes on which they adjudicate. This is shown by paragraph 4 of Schedule 5. Time limits for initiating proceedings are bound to enter a zone of activity within which the legislative schemes that confer rights of appeal may also operate.

26. The rule-making powers should be read as a whole. For that reason, we also note that paragraph 10(2) of Schedule 5 allows rules to "modify any rules of evidence provided for elsewhere, so far as they would apply to proceedings before the First-tier Tribunal". Here, at least, was a recognition that tribunal procedure rules might alter external legal rules.

The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685)

27. We describe here the form the rules took when the tribunal gave its decision in Ms K's case. The current rules differ as a result of the introduction of a pre-appeal mandatory reconsideration requirement as well as amendments made to the tax credits legislation with effect from April 2014. This is explained in more detail in the Annex to this decision. Generally, those changes only apply to HMRC decisions taken after the legislation was amended.

28. The Social Entitlement Chamber's Rules conferred on the tribunal a general power to regulate its own procedure. Contained in rule 5(1), it provided:

> "subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure".

Rule 5(3)(a) also conferred a general power to extend time in these terms:

> "In particular, and without restricting the [general power to regulate procedure], the Tribunal may … extend or shorten the time for complying with any rule, practice direction or direction".

29. Rule 23 dealt with time limits for most appeals within the tribunal's jurisdiction, including social security and tax credits appeals. Rule 23(2) required an appellant to start proceedings by "sending or delivering a notice of appeal to the decision maker so that it is received within the time specified in Schedule 1 to these Rules". The entry for tax credits appeals in Schedule 1 read "appeal under the Tax Credits Act 2002 – as set out in the Tax Credits Act 2002". This was a reference to section 39(1) of the Tax Credits Act 2002 which, as we have seen, provided:

> "Notice of an appeal … must be given to the Board [of the Inland Revenue] in the prescribed manner within the period of thirty days after the date on which notice of the decision was given …"

30. Rule 23(4) allowed the decision-maker (ie HMRC) effectively to waive compliance with the section 39(1) time limit ("if the decision maker does not object"). However, rule 23(5) also enacted that "no appeal may be brought more than 12 months after the time specified in Schedule 1".

31. On the face of the rules, the Tribunal had power to admit late appeals. Rule 21(7) provided:

> "The decision maker must refer the case to the Tribunal immediately if –
>
> (a) the appeal has been made after the time specified in Schedule 1 and the decision maker objects to it being treated as having been made in time; or
>
> (b) the decision maker considers that the appeal has been made more than 12 months after the time specified in Schedule 1."

32. The rules did not spell out what happened next, following the referral, but there must have been an implied obligation on the Tribunal to determine the reference. The referral could not just sit there within the tribunal system for ever. That would be contrary to the TCEA 2007's guiding principles for the making of rules and the rules should be read to conform with those principles if it is possible to do so. In other words, the Tribunal was required to decide whether to extend time and admit the late appeal.

How time limits are dealt with in the other Chambers' procedure rules

Common provisions

33. When originally enacted, all procedural rules for the various Chambers of the First-tier Tribunal contained (and still contain) the same general power to regulate procedure, conferred in these terms:

> "subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure".

34. Many have always contained this provision:

> "In particular, and without restricting the [general power to regulate procedure], the Tribunal may … extend or shorten the time for complying with any rule, practice direction or direction".

35. But, as we shall see, some Chambers' procedural rules have always expressly prevented the tribunal's power to extend time from being exercised inconsistently with an externally set time limit. Here, this formulation tends to be used (with our emphasis):

> "In particular, and without restricting [the general power to regulate procedure], the Tribunal may by direction –

(a) extend or shorten the time for complying with any rule, practice direction or direction, *unless such extension or shortening would conflict with a provision of another enactment setting down a time limit*".

Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699)

36. We mention these rules first, because they were relied on by Mr Royston. They qualify the general power to extend time in order to protect time limits laid down in other enactments. Rule 5(3)(a) contains the restriction set out in [35] above.

37. The form of rule 5(3)(a) is significant, because it shows an awareness by the TPC that there might be statutory time limits that should not be overridden by the rules. It can be dangerous to construe legislation by reference to the provisions of other legislation, but as all the 2008 rules were made at the same time, it is reasonable to infer that the TPC proceeded on the basis that, without the qualifying words, rule 5(3)(a) would, or probably would, allow external time limits to be extended.

38. For present purposes, we need not refer to any other of the other rules for this Chamber. We move on to consider the other Chambers' rules, which were not cited to us.

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273)

39. For present purposes, these Rules are interesting for a number of reasons. Even though HMRC were a party to this appeal, they did not draw them to our attention.

40. Rule 5(3)(a) provides:

"In particular, and without restricting [the general power to regulate procedure], the Tribunal may by direction –

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit."

As with the Health, Education and Social Care Chamber's Rules, the qualification to rule 5(3)(a) indicates that the TPC have taken the view that they have, or may well have, power to make provision about time limits for an appeal even though some other enactment has already set a primary time limit. Moreover, despite the qualification to rule 5(3)(a), subsequent Tax Chamber's rules, as we shall see, confer express power on the tribunal to extend a statutory time limit.

41. Rule 20(1) is the first of two rules dealing with time limits for appealing to the Tax Chamber. It concerns appeal proceedings "under any enactment". The rule requires proceedings to be started by sending or delivering a notice of appeal to the Tribunal. Rule 20 expressly integrates its time limit provision with external time limits. Rule 20(4) provides:

"If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal".

So, here, the rules are working with, rather than providing for extension of, time limits set in other enactments.

42. Rule 21 deals with time limits for another category of tax case. These are cases required by an enactment to begin with an "originating application or reference to the Tribunal". Here, the general rule is that the application notice or reference notice must be provided to the Tribunal "within any time limit imposed by that enactment" (rule 21(1)). However, the rule then goes on expressly to confer power on the Tribunal to extend that time limit. This is done by rule 21(3):

> "If the appellant provides the … notice … to the Tribunal later than the time required by paragraph (1) or by any extension of time under rule 5(3)(a) (power to extend time) –
>
> (a) the application notice or notice of reference must include a request for an extension of time and the reason why the application notice or notice of reference was not provided in time; and
>
> (b) unless the Tribunal extends time for the application notice or notice of reference under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application notice or notice of reference."

43. There is some jarring here with the wording of rule 5(3)(a), which ostensibly prevents an extension of time if that would conflict with an enactment setting a time limit. But the specific provision for extending time in rule 21 must have been intended to operate as an exception to the rule 5(3)(a) restriction.

44. Rule 21 excludes from is ambit "a CAA case" (Capital Allowances Act 2001 cases). Rule 21(3A) provides that "the power of the Tribunal under these Rules to extend time for starting proceedings shall not apply in a CAA case".

45. We do not know what types of case are begun by originating application or reference in the Tax Chamber. But the wording of rule 21 clearly shows the TPC intended the Tax Chamber to have power to extend time and admit an application or reference despite it having being made after expiry of a time limit set by an enactment.

46. This overview of the Tax Chamber's Rules shows a carefully constructed time limits regime operating by reference to time limits set by other enactments. In some cases, those time limits are protected but in others the rules confer power on the Tribunal to extend time beyond that set by some other enactment. It seems clear that, in making these rules, the TPC thought they had power to make rules conferring on the Tribunal a function of extending a primary time limit set by another enactment.

47. The Tax Chamber's Rules also disclose an assumption that a time limit for complying with a rule (ie the rule 5(3)(a) wording) includes a time limit that a rule specifies by repeating a time limit set in other legislation. That is shown by the way rule 21(3) identifies the function of extending a time limit set by external legislation as the function of extending time under rule 5(3)(a). The same assumption can be seen in other First-tier Tribunal Rules which expressly qualify the rule 5(3)(a) power so that it is subject to time limits set by other legislation. If those other time limits were not within the initial wording of rule 5(3)(a), they would not need to be excluded from its scope.

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169)

48. The Property Chamber's Rules are unique in that only they contain a general provision that makes them subject to other enactments. Rule 2 provides "nothing in these Rules overrides any specific provision that is contained in an enactment which confers jurisdiction on the Tribunal".

49. Rule 27 deals with time limits, opening with rule 27(1) which provides "this rule applies where no time limit for starting proceedings is prescribed by or under another enactment". Rule 27 goes on to set different time limits for different types of case without a time limit set by an enactment.

50. The Upper Tribunal (His Honour Judge Huskinson), in *O'Kane v Charles Simpson Organisation Ltd* [2015] UKUT 355 (LC), expressed the (*obiter*) opinion that the First-tier Tribunal had no power to extend the 21 day time limit for appealing against an owner's variation or deletion of a mobile home site rule. Here, the time limit was specified in regulation 10 of the Mobile Homes (Site Rules) (England) Regulations 2014. The Judge relied on *Mucelli* for that view. However, the decision does not indicate that the judge was referred to rules 2 and 27(1). Had he been, we respectfully suggest he may have given different reasons for his view.

Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976)

51. The General Regulatory Chamber's Rules are another example of Rules that qualify the First-tier Tribunal's rule 5(3)(a) power to extend time so that it is subject to time limits laid down in other enactments.

52. Rule 22(1) requires an appellant to start proceedings by sending or delivering to the Tribunal a notice of appeal. If a time limit is specified for a case in rule 22(6), the notice must be received within that time. Rule 22(6) contains different time limits for different types of case. For cases falling outside rule 22(6), the general time limit is 28 days from the date on which notice of the act or decision under challenge was sent to the appellant. By rule 22(4), the Tribunal must not admit a late appeal unless it has extended time.

Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604)

53. Rule 4(3)(a) of these Rules provides: "in particular, and without restricting the [general power to regulate procedure], the Tribunal may … extend or shorten the time for complying with any rule, practice direction or direction". The power to extend time is not expressly made subject to time limits set in other enactments.

54. Rule 19 contains time limits. An appellant must start proceedings by providing a notice of appeal to the Tribunal. The time limit is either 14 or 28 days after the appellant was sent notice of the decision under challenge.

55. Rule 20(1) confers powers on the Tribunal to admit a late appeal:

> "Where a notice of appeal is provided outside the time limit in rule 19, including any extension of time directed under rule 4(3)(a) (power to extend time), the notice of appeal must include an application for such an extension of time and the reason why the notice of appeal was not provided in time."

56. For "fast-track" appeals, different time limits apply. The primary time limit is two days and "the Tribunal must not extend the time for appealing unless it considers that it is in the interests of justice to do so" (paragraph 5(2) of the Schedule to the Rules).

The Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (SI 2008/2686)

57. The War Pensions and Armed Forces Compensation Chamber's Rules confer a general rule 5(3)(a) power to extend time, but it is not expressly made subject to time limits set in other enactments.

58. Rule 21(1) requires an appellant to start proceedings by "sending or delivering a notice of appeal to the decision maker so that it is received within 12 months after the date on which written notice of the decision being challenged was sent to the appellant". Rule 21(3) allows the decision-maker effectively to waive compliance with the 12 month rule ("if the decision maker does not object"). However, rule 21(4) then sets an outer time limit for starting proceedings: "no appeal may be made more than 12 months after the end of the 12-month period provided for in paragraph (1)". The Tribunal is given by rule 21(6) a similar function to that given to the Social Entitlement Chamber in relation to late appeal disputes. But rule 21(7) expressly prohibits the Tribunal from admitting an appeal made more than 12 months after expiry of the primary 12 month time limit.

THE CASE LAW

The House of Lords' decision in *Mucelli*

59. In these proceedings, Ms Ward for HMRC argues that *Mucelli* compels the Upper Tribunal to hold that rules under the TCEA 2007 cannot confer on the First-tier Tribunal power to extend time for appealing where a time limit has already been set by statute. Mr Royston, for Ms K, argues *Mucelli* can be distinguished. It is important to be clear about the context to *Mucelli* – so that it is not applied out of context – and about what it did and not decide.

60. *Mucelli* concerned time limits for appealing against extradition orders and decisions made under the Extradition Act 2003. In England and Wales, a right of appeal against an order lay to the High Court. Section 26(4) of the 2003 Act required the notice of appeal to be "given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made". The decision also concerned appeals to the High Court against a district judge's decision to send a case to the Secretary of State where the specified time limit was 14 days (section 103(9)).

61. The relevant part of the decision for present purposes was their Lordships' analysis of the scope of powers to extend time under the CPR. The appellants argued these powers permitted the High Court to extend time beyond the limits specified in the 2003 Act. They relied on CPR 3.1(2)(a), which allows a court to "extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)". Their Lordships also considered whether the High Court had power to dispense with service. CPR Part 6 contains rules about service, including the power to make an order dispensing with service. Rule 6.1(a), however, disapplies the Part 6 rules "where another Part, any other enactment or a practice direction makes different provision".

62. Lord Neuberger, with whom the majority agreed, held:

> "74. On the face of it, at any rate, there is a clear and unqualified statutory time limit, namely 7 days, and there would therefore seem to be no basis upon which it could be extended. In that connection, viewed from the English and Welsh perspective, I would refer to the CPR, which contain provisions whereby the court can extend time for the taking of any step, under CPR 3.1(2)(a), can make an order remedying any error of procedure, under CPR 3.10, or can make an order dispensing with service of documents, under CPR 6.9. However, these powers cannot be invoked to extend a statutory time limit or to avoid service required by statute, unless of course, the statute so provides. Apart from being correct as a matter of principle, this conclusion follows from CPR 3.2(a) which refers to time limits in 'any rule, practice direction or court order', and from CPR 6.1(a) states that the rules in CPR 6 apply, 'except where any other enactment … makes a different provision'."

In paragraph 75, Lord Neuberger went on to say that, for the High Court to be able to extend time, "it would be necessary to find some statutory basis for the court having power to extend time".

63. Lord Neuberger rejected the argument that the CPR supplied a power to extend time. Firstly, the 2003 Act's requirement for notice to be given in accordance with rules of court concerned the manner in which notice of appeal was to be given, not the time limit for giving the notice. Secondly, the CPR power to extend time was expressly subject to "any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal".

64. Lord Neuberger also considered whether it was possible for rules to shorten a statutory limit. His view was that it was not:

> "Section 26(4) requires the appellant's notice to be issued and served within 7 days, and I can see no warrant for the CPR being invoked to cut down that period. If a statute permits something to be done within a specific period, it is hard to see how that period can be cut down by subordinate legislation, as a matter of principle."

65. On our reading, Lord Neuberger did not conclude that subordinate legislation, such as rules of procedure, was simply prohibited from providing for *extension* of a time limit laid down in an Act. It is true that in paragraph 74 his Lordship said extending a statutory time limit was in principle wrong "unless the statute so provides". However, in the next paragraph he referred simply to "some statutory basis" for the power to extend time. If these paragraphs are read together, in our view they show that Lord Neuberger considered that a power to extend a time limit set by statute simply required "some statutory basis". He did not hold that a power to extend could only be conferred by the Act which set the primary time limit (or some other Act). This is unsurprising since such a limitation would be inconsistent with the doctrine of Parliamentary sovereignty (Parliament is of course free to confer power for secondary legislation to amend or modify the operation of primary legislation) and existing authorities.

66. To follow up that last point, we do not read *Mucelli* as departing from long-standing authorities that a court (or tribunal) may extend a statutory time limit if it has statutory authority to do so. As Grove J said in *Barker v Palmer* (1881), 8 QBD. 9 at 10:

> "Provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court."

67. That was qualified to an extent by the Court of Appeal in *Petch v Gurney* [1994] STC 689; [1994] 3 All ER 731, but not to undermine the principle that rules may confer power to extend a statutory time limit. Referring to Grove J's statement, Millett LJ said:

> "This probably cannot be laid down as a universal rule, but in my judgment it must be the normal one. Unless the Court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether; and it cannot be dispensed with altogether unless the substantive requirement itself can be dispensed with."

68. It is true that in *Mucelli* Lord Brown, in agreeing with Lord Neuberger, said:

> "…section 26 (4) is requiring the notice of any appeal to be both filed and served within the stipulated 7-day period and that this, being a statutory time limit, is unextendable. The rules of court are to dictate everything about the filing and serving of the notice save only the period within which this must be done; this is expressly dictated by the section itself. Whatever discretions arise under the rules are exercisable only insofar as is consistent with the filing and serving of the notice before the statutory time limit expires."

If Lord Brown's opinion is taken out of context, it might provide support for the view that, as a matter of principle, rules of procedure cannot provide for extension of time limits specified in other enactments. However, their Lordships heard extensive argument by reference to the provisions of the CPR. Lord Brown's opinion was relatively brief and given in support of Lord Neuberger ("no more than an echo", he said). In our view, Lord Brown did not consider that rules of procedure are, as a matter of general principle, prohibited from providing for the extension of a statutory time limit. Lord Brown considered the time limits under analysis in *Mucelli* were unextendable because the CPR conferred no power to extend time, not because procedure rules are incapable, no matter how broad their enabling powers, from providing for extensions of time.

69. *Mucelli* was applied by the Court of Appeal in *Reddy v The General Medical Council* [2012] EWCA Civ 310 in which the Court said "their Lordships [in *Mucelli*] also had to consider a second point, namely, whether the court had power to extend the time allowed for giving notice of appeal. They held that in the absence of some statutory power it did not". In our respectful view, that correctly states the *ratio* of *Mucelli* on this point.

The decisions in *JI* and *JT*

70. *JI* addressed the legal consequences of (a) the 2008 Order, the main purpose of which was to provide a legal bridge between the TCEA 2007 and the tribunal legislation it replaced and (b) the 2009 Order, one of whose purposes was to make permanent what had been a temporary transfer of the Tax Commissioners' function of deciding tax credits appeals. Upper Tribunal Judge Rowland decided that, as a result of these Orders, the power to extend time for appealing against a tax credits decision, conferred on an appeal tribunal by the Tax Credits (Appeals) (No.2) Regulations 2002 had disappeared by April 2009 at the latest. Neither party disputes the reasoning on points of statutory interpretation that led to that conclusion.

71. It is clear from Judge Rowland's decision that HMRC thought, and intended, that the First-tier Tribunal should have the same power to extend time as had been previously been enjoyed by the appeal tribunal it replaced in November 2008. And, as we have seen, the procedure rules for the new First-tier Tribunal did, on their face, permit the Tribunal to extend time for appealing against a tax credits decision (subject to the outer limit of 12 months from expiry of the primary 30 day time limit).

72. Judge Rowland found that the TPC's powers to make rules under the TCEA 2007 did not extend to making provision for the Tribunal to extend the time limit set by TCEA 2007. His reasoning was:

> "24. [Rule 5(3)(a)] does not permit the extension or shortening of the time for complying with a provision in primary legislation. It could not do so. Tribunal Procedure Rules cannot permit an extension or shortening of the time for complying with a provision in primary legislation unless there is a specific enabling provision in primary legislation permitting such a rule (*Mucelli v Government of Albania* [2009] UKHL 2; [2009] 1 W.L.R 287). There is no such provision in primary legislation relevant to the present case."

73. Upper Tribunal Judge Rowland re-visited the topic in *JT*. He accepted HMRC's concession that Article 6(1) of the European Convention on Human Rights called for a qualification to the *JI* ruling. In *Pomiechowski*, the Supreme Court applied the European Court of Human Rights' decision in *Miloslavsky v UK* (1995) 20 EHRR 442 that time limits for initiating proceedings must not impair the "very essence" of the Article 6(1) right to a judicial determination of civil rights. Lord Mance held that such restrictions on accessing a court or tribunal "must pursue a legitimate aim and there must be a reasonable relationship of

proportionality between the means employed and the aim sought to be achieved" (paragraph 22 of the decision). Lord Mance went on to say that, to avoid incompatibility with Article 6(1):

> "the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6(1) in *Tolstoy Miloslavsky* [(1995) 20 EHRR 442]".

74. The point has been made for Ms K that this is not a satisfactory outcome (in a practical sense). The requirement to show "exceptional circumstances" sets the bar far higher than if the First-tier Tribunal had a general discretion to extend time for appealing for up to 12 months from the expiry of the primary time limit.

ISSUE 1
May rules of tribunal procedure under the TCEA 2007 provide for a tribunal to extend a time limit set by other legislation?

Arguments

75. HMRC argue it is "plainly right" that the TCEA 2007 does not authorise tribunal procedure rules to provide for extension of time limits set in other legislation. In the light of *Mucelli*, a power to make "provision for" time limits for initiating proceedings cannot be construed as extending to provision conferring power to override a time limit for appealing set by other legislation.

76. Mr Royston, for Ms K, disagrees. He argues "provision for" time limits include power to make provision to extend statutory time limits. Mr Royston also draws our attention to section 124 of the Finance Act 2008, which HMRC assert extends to removing time limits, and says it is framed in very similar terms to the TPC's power in paragraph 4 of Schedule 5 to the TCEA 2007. Mr Royston also relied on the provision made by the Health, Education and Social Care Chamber's Rules which expressly restricts that Chamber's power to extend time to protect time limits set elsewhere. This shows the TPC proceeded on the basis that it had power to make provision in relation to existing time limits set elsewhere.

77. Mr Royston argues *Mucelli* can be distinguished. Their Lordships were concerned with different rules made under powers that, unlike the TCEA 2007, did not obviously extend to making provision for time limits. Mr Royston also argues *Mucelli* has been misread, to the extent that it is thought to prevent secondary legislation from ever conferring power to extend a time limit.

Conclusions

78. Time limits are of fundamental importance to the justice system and the parties to a legal dispute. Without time limits, there can be no legal certainty. The threat of legal proceedings would be ever present, inhibiting the confidence with which the citizen, the state and the justice system can plan for the future. That is why time limits for bringing legal proceedings are in the public interest. On the other hand, time limits may deny access to justice. An absolute time bar excludes a legal remedy no matter how strong the merits of a particular case.

79. Where, then, to draw the line? Our legal system often takes a two-pronged approach involving a fixed primary time limit alongside a judicial discretion to extend time. Until 3 November 2008, there was no doubt that the tax credits late appeals regime was of this type. However, the Upper Tribunal in *JI* concluded that the First-tier Tribunal ceased to have power to extend time as an unintended result of legislative changes made in 2008 and 2009. Whilst the

First-tier Tribunal's procedure rules appeared to confer power to extend time, in that respect the rules were disapplied as invalid.

80. We have had the benefit of fuller argument on the scope of the rule-making powers conferred by the TCEA 2007 than did Judge Rowland in *JI*. Only HMRC were professionally represented before him. We respectfully disagree with the Judge's finding that the TCEA 2007 does not permit the TPC to make rules that confer power on the First-tier Tribunal to extend the primary statutory time limit for appealing against a tax credits decision.

81. We do not agree with HMRC's argument that *Mucelli* effectively bans rules of procedure from providing for the extension of a time limit for appealing set by Act of Parliament. That is inconsistent with long-standing authorities that were not in our view cast into doubt by *Mucelli (*such as *Barker v Palmer* and *Petch v Gurney)*. Lord Neuberger did not hold that procedural rules are incapable of being authorised to extend time limits. If he had held that view, he would not have spent some time considering whether, in that case, a power to extend time could be found in the CPR. His Lordship did express very clear doubts as to whether rules could ever *shorten* a statutory time limit, but the same doubts were not expressed in relation to the extension of time limits.

82. Paragraph 4 of Schedule 5 to the TCEA 2007 specifically authorises rules of the First-tier Tribunal to "make provision for time limits as respects initiating, or taking any step in, proceedings before the First-tier Tribunal or the Upper Tribunal". For our purposes, the range of possible meanings of this phrase are:

(a) paragraph 4 only authorises: (i) provision setting time limits where legislation conferring a right of appeal is silent about time limits; and (ii) provision connected to existing time limits so long as it does not provide for extension or shortening of the time limit. Ms Ward contended for this meaning at the hearing;

(b) paragraph 4 authorises (a) and provision for extension of time limits set in other enactments; or

(c) paragraph 4 authorises (a) and (b) and provision for reduction of time limits set in other enactments.

83. The TCEA 2007 was extensive, reforming legislation with a clear aim of rationalising and simplifying the operation of tribunal justice. A proliferation of inconsistent time limits for initiating tribunal appeals clearly has the potential to militate against an efficient and accessible tribunal system. It invites mistakes on the part of users, representatives, tribunal staff and tribunals themselves. Legitimate systemisation is inhibited because, as time limits multiply, so do forms and processes and hence the potential for delay.

84. Of course, there are often good reasons for different time limits for different types of case. The appellant profile and urgency of the underlying subject matter means the general requirement for legal finality and certainty finds different expression in different types of case. But, without a good reason for different approaches to time limits, the aims of the TCEA 2007 will be served by ironing out those inconsistencies. For that reason, we conclude that Parliament intended the power in paragraph 4 of Schedule 5 to extend to provision for judicial extension of time limits set by other enactments including Acts of Parliament. This does not involve a strained or unnatural reading of paragraph since "provision for time limits as respects initiating … proceedings" is a broad term. Construing the power in the light of the TCEA 2007's purpose, we conclude it extends to meaning (b) as described above.

85. We do not accept that our decision invites a coach and horses to trample over Parliament's intentions in setting statutory primary time limits for various types of appeal. In enacting the

TCEA 2007 for the purpose of rationalising and simplifying the tribunal system, Parliament knew that purpose might be served by rationalisation and simplification of time limits. It delegated powers in this respect to the TPC, an expert legislator, comprised, as required by the TCEA 2007, mainly of judges who self-evidently are not motivated by political considerations. Parliament also conferred an effective right of veto over new rules on the Lord Chancellor, who is of course answerable to Parliament, and reserved to itself power to nullify procedure rules. These structural features indicate that Parliament took a considered decision, involving various checks and balances, to delegate certain powers in relation to extension of time limits set by other enactments to the TPC.

86. However, we do not think the TPC's powers extend to the effective re-writing of primary time limits set in other enactments. That would stray beyond the proper realm of procedural rules into matters of wider policy. The provision made in the 2008 Rules does not purport to re-write the primary time limit for appealing against a tax credits decision. It provides for case-by-case judicial determinations which are to be made by reference to the Rules' overriding objective of enabling the Tribunal to deal with cases fairly and justly.

87. Whilst the actions of a subordinate legislative body cannot define the ambit of its powers, we are fortified in our conclusions by the way in which the TPC has exercised its powers to date. As our overview of the First-tier Tribunal's Rules demonstrates, the Rules have in some cases made specific provision to preserve statutory time limits but, in other cases, have not.

88. We do not accept that the outcome in *Mucelli* dictates the outcome in the present case. Their Lordships were concerned with the CPR. The enabling powers for the CPR are contained in the Civil Procedure Act 1997.

89. The first reason why *Mucelli* does not determine the present outcome is that, as their Lordships partly relied on, the CPR included an express restriction on certain general powers to prevent their exercise contrary to provision in other enactments. Whilst some of the First-tier Tribunal's Chambers have procedural rules with a similar qualification, the Social Entitlement Chamber's rules do not.

90. The second reason why *Mucelli* does not determine the present outcome is that we are concerned with a different set of procedural rules made under different enabling powers. The Civil Procedure Act 1997 does not contain the same detailed specification of provision that rules may make as is found in the TCEA 2007. Section 1(1) provides "there are to be rules of court … governing the practice and procedure to be followed" in various civil courts. The Schedule to the 1997 Act makes further provision about the content of CPR but includes only seven entries none of which specifically authorise provision for time limits (the TCEA 2007's rule-making Schedule contains 19 entries and, as we have seen, specifically authorises provision for time limits for initiating proceedings).

91. Nailing down the exact scope of the powers to make civil procedure rules is not straightforward, due to the referential drafting used by the 1997 Act. Paragraph 1 of Schedule 1 to the Act provides that "among the matters which Civil Procedure Rules may be made about are any matters which were governed by the former Rules of the Supreme Court or the former county court rules (that is, the Rules of the Supreme Court (Revision) 1965 and the County Court Rules 1981)". We raised this issue at the start of the hearing. Admittedly, counsel had little time to research the point over lunch, but we were not drawn to, nor are we aware of, any provision of the 1965 or 1981 Rules that provided for the extension of time limits set by other enactments. It may be there was simply no authority for the CPR to confer power to extend a time limit set by an enactment.

ISSUE 2
Did the Social Entitlement Chamber's Rules in fact confer power to extend time?

Arguments

92. Ms Ward for HMRC points out that, on its face, the rule 5(3)(a) power only applies to extending time for complying with any rule, direction or practice direction. Plainly, she argues, this does not include a time limit set by primary legislation. Mr Royston argues for a pragmatic reading that takes into account that no one intended to deprive the First-tier Tribunal of its power to extend time for appealing a tax credits decision.

Conclusion

93. We acknowledge that in *Mucelli* their Lordships held that powers under the CPR to extend time for complying with a rule did not permit a court to extend time for complying with a time limit set by an Act. Our task, however, is to construe the Social Entitlement Chamber's Rules (in the light of the enabling powers conferred on the TPC by the TCEA 2007).

94. Section 39 of the TCA 2002 sets a time limit for tax credit appeals. It does not provide for or authorise extensions of time, but neither does it prohibit them.

95. As we have found, paragraphs 4 of Schedule 5 to the TCEA 2007 authorises rules to provide for extensions of time.

96. Rule 23 of the Social Entitlement Chamber's Rules deals with time limits. It imposed some directly and referred to others that are set elsewhere, such as by section 39.

97. If rule 23 stood alone, it could merely fulfil the function of a notice board, identifying to claimants the existence of the time limit in tax credit cases and its source.

98. Rule 23 does not stand alone. As with every rule, it must be read in the light of other case management powers. So the power to proceed in a party's absence under rule 31 does not preclude the exercise of the power to adjourn in rule 5(3)(h) (*MH v Pembrokeshire County Council (HB)* [2010] UKUT 28 (AAC)) and the right to an oral reconsideration of an application for permission to appeal to the Upper Tribunal is subject to the tribunal's case management power to strike out the proceedings (*Dransfield v Information Commissioner* [2016] UKUT (AAC) 273 (AAC)).

99. Rule 5 is one of those rules conferring case management powers on the First-tier Tribunal. Rule 5(3)(a) allows the tribunal to extend "the time for complying with any rule"; not, we note, "for complying with *the time limit set by* any rule". The language is wide enough to include a rule that incorporates a time limit set elsewhere.

100. In our view, the wording of rule 5(3)(a) simply reflects the drafting style of the TPC. In order to locate all powers to extend time in a single rule, that is rule 5(3)(a), the TPC repeated the section 39(1) TCA 2002 time limit in rule 23. As a result, the power to extend time for complying with a rule under rule 5(3)(a) could operate in relation to that time limit.

101. If rule 23 acted simply as a notice board, the TPC would have enacted a dead letter in ostensibly conferring power on the First-tier Tribunal to extend time for bringing a tax credits appeal. If it is possible to do so, we should avoid construing the rules to produce that result.

102. Provisions in other rules confirm that rules 5 and 23 operate together in this way. Mr Royston referred us to rule 5(3)(a) in the rules for the Health, Education and Social Care Chamber, which contains an express prohibition on extending an externally set time limit. We attach particular significance to that provision as it was made at the same time as the rules for the Social Entitlement Chamber. Why exclude a power that does not exist? Subsequently, Rules for other Chambers have taken the same approach. Rule 21(3) of the Tax Chamber's Rules, in

particular, can only achieve its intended purpose if the Rules are interpreted in the way we have identified.

103. Ms Ward also relied on rule 5(1). This renders the tribunal's general power to regulate procedure subject to the TCEA 2007 and other enactments. Even if the power to extend time under rule 5(3)(a) is an aspect of the general power, rule 5(1) does not have the result contended for. The Tribunal does not act incompatibly with the TCEA 2007 by exercising powers conferred by Rules that were duly made under the TCEA 2007. And the requirements of other enactments must themselves be read as subject to any modification of those enactments duly made by provision under the TCEA 2007. Any other result would defeat Parliament's purpose in authorising those modifications.

104. We therefore allow this appeal and remit the case to the First-tier Tribunal. The tribunal made an error on a point of law by proceeding, in accordance with *JI*, on the basis that it had no power to extend time.

THE OTHER ISSUES

Arguments

105. Had issues 1 and 2 not been decided in Ms K's favour, both Mr Royston for Ms K and Ms Ward for HMRC made common cause in arguing that Article 6(1) of the European Convention on Human Rights provided a ready-made solution. To be precise, they agreed on a human rights compliant outcome but to an extent had different views as to the process by which we should arrive at that solution.

106. There was no dispute that determination of a tax credits appeal involves a determination of civil rights for the purpose of Article 6(1). Article 6(1) provides:

> "In the determination of his civil rights and obligations … everyone is entitled to a … hearing … by [a] … Tribunal".

The parties also agreed that Article 6(1) required the First-tier Tribunal to proceed as if it had not lost its power to extend time for appealing against a tax credits decision.

107. In summary, Ms Ward's argument, building on HMRC's concession in *JT* (see [73] above), was that the absence of any power between November 2008 and April 2014 to extend time amounted to an interference with Ms K's Article 6(1) rights (see *Adesina*). The appropriate remedy was, relying on section 3 of the Human Rights Act 1998, to read into section 39(1) of the 2002 Act words such as those italicised below:

> "(1) Notice of an appeal under section 38 against a decision must be given to the Board in the prescribed manner within the period of thirty days after the date on which notice of the decision was given (or, in the case of a decision to which section 23(3) applies, the date of the decision) *or within such period in which the appeal would be admitted out of time under the Tax Credits (Appeals) Regulations 2002*."

108. Mr Royston did not as such oppose Ms Ward's submission that section 39(1) could be read down in this way so as to include the pre-existing power to extend time. However, his argument was more radical. On his analysis, the Article 6(1) problem was a stepping stone to a more ambitious argument that the 2008 and 2009 Orders were *ultra vires* insofar as they removed the Tribunal's previous power to extend time.

Analysis

109. With respect, we were not persuaded by either set of arguments. Ms Ward's submissions certainly enjoyed an attractive elegance and simplicity. However, we struggled to understand how, on the basis of her arguments, section 39(1) could be read down so as to incorporate the

full breadth of the discretion to extend time available under the Tax Credits (Appeals) Regulations 2002. Even if it is assumed the removal of the Tribunal's power to extend time was wholly accidental, it did not seem to us to follow that Article 6(1) necessarily mandated a return to the *status quo ante*. It was by no means obvious to us that a 30-day time limit with a power read in to extend on the basis of the principles set out in *Pomiechowski* (as applied by the Court of Appeal in *Adesina*) would represent an interference with the appellant's Article 6(1) rights.

110. We also had difficulties with Mr Royston's more radical arguments. An important plank in his submissions is that the present case was not on all fours with *Pomiechowski* and *Adesina* at all. His argument, as we understood it, is *not* that the failure of the tax credits appellate machinery between 2008 and 2014 to accommodate extensions of time impaired the "very essence" of the right under Article 6(1) to a judicial determination of civil rights (see *Pomiechowski*). Rather, his case is the complete absence of any legitimate basis for the (accidental) removal of the discretionary power to extend time was of itself sufficient both to involve a breach of Article 6(1) and to require a return to the previous position. This argument relies on the decision of the European Court of Human Rights in *Stubbings v UK* (1997) 23 EHRR 213, which concerned the fixed six year time limit for bringing an action in tort, with time running from the date on which the cause of action accrued. The action related to alleged psychological injury caused by childhood sexual and other abuse.

111. The relevant issues in *Stubbings*, according to the Court, were set out in paragraph 48 of its decision:

> "[The Court] must be satisfied that the limitations applied do not restrict or reduce the access [to a court or tribunal] in such a way or to such extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

Stubbings is said to compel the result described in paragraph 106 above since the loss of the First-tier Tribunal's power to extend time was due to a legislative oversight. If the First-tier Tribunal were to act in accordance with the apparent requirements of that inadvertent legislation it could not possibly be pursuing a legitimate aim. There was no aim at all, let alone a legitimate one, since this was all a mistake.

112. With respect, we think this argument overlooks that the two sentences of paragraph 48 of *Stubbings* cited above deal with subtly different matters. The first sentence is about the application of limitations and that involves claimant-specific factual considerations. The second sentence is about the limitations themselves. It seems to us that, assuming the 2008 and 2009 Orders were valid, the First-tier Tribunal would have been required by *Stubbings* to relax the 30 day time limit where, on the facts of a particular case, applying the time limit would impair the very essence of the right of access to a court or tribunal. The mechanism for doing so would have been the "reading in" of a limited power to extend time to secure Article 6(1) compatibility referred to by Lord Mance in *Pomiechowski* – and not necessarily to restore the previous broader discretion, as noted above.

113. We also bear in mind that the 2008 and 2009 Orders are a continuing part of the legal foundations for the current tribunal system. Mr Royston's arguments would necessarily involve some fairly substantial rewriting of those Orders and the Tax Credits (Appeals) (No. 2) Regulations 2002 with the potential for unintended and unfortunate consequences to emerge at some later date. Moreover, as a general rule, it would be unwise, unless it is absolutely necessary to do so, to express a view on the merits of arguments that legislative provisions are invalid. But, in any event, our finding that the Social Entitlement Chamber's Rules could, and did, confer power to extend time significantly changes the legal context to the arguments that the provision

made was not authorised by the Orders' enabling powers. Our finding suggests that the provision made by the Orders was not mistaken after all and the assumption of a mistake is a cornerstone of Mr Royston's arguments on these latter points.

ANNEX

Development of the Tax Credits Appeals Legislation

Phase 1 – the TCA 2002 as originally enacted

1. As originally enacted, section 38(1) of the TCA 2002 conferred a right of appeal against various tax credit decisions. It stated "an appeal may be brought" against those decisions. Section 39(3) provided that the right of appeal lay to a Commissioner appointed under the Taxes Management Act 1970.

2. Section 39(1) imposed an appeal time limit. Notice of appeal had to be given to the Board "within the period of thirty days after the date on which notice of the decision was given".

3. Appeal procedure was dealt with by section 39(6), but not on its face. Instead, it applied the legislation about mainstream tax appeals (in Part 5 of the Taxes Management Act 1970). But at the commencement of the 2002 Act this was a legislative smokescreen because appeal procedure was in fact dealt with by section 63 of the 2002 Act.

4. Section 63 was headed "Tax credit appeals etc.: temporary modifications". Section 63(1) provided that Part 1 of the Act, which included sections 38 and 39, "has effect" subject to certain modifications, including:

(a) with minor exceptions, that section 38 appeals lay "to an appeal tribunal (rather than to the General Commissioners or Special Commissioners)" (subsection (2)). "Appeal tribunal" was defined, in Great Britain, as an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998, more commonly known as a social security appeal tribunal;

(b) conferral on the Commissioners of Inland Revenue power to "apply any provision contained Chapter 2 of Part 1 of the Social Security Act 1998 (social security appeals: Great Britain)" in relation to tax credits appeals (subsection (8)). That included power to apply those provisions subject to modifications prescribed in the regulations.

5. Section 63 did not modify the 30 day time limit in section 39(1). Accordingly, this continued to apply to tax credits appeals made to an appeal tribunal (since section 63(1) provided that Part I had effect as enacted unless modified).

6. The Tax Credits (Appeals) Regulations 2002 (SI 2002/2926) applied, and modified, various provisions in Part 1 of the Social Security Act 1998.

7. Those Regulations applied section 12(7) with modifications so that, for tax credits purposes, it read:

> "Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought, and may in particular extend the time limit for giving notice of appeal specified in section 39(1) of the Tax Credits Act 2002".

8. No change was made to the identity of the legislator under section 12 of the 1998 Act. Accordingly, the power to make regulations under section 12(7) of the 1998 Act in relation to

tax credits appeals was vested in the Secretary of State. To help keep track, it is worth us noting that, by this stage, no substantive legislation had been made. This was simply an exercise in priming legislative powers created for one purpose so that they could be exercised for another purpose.

9. Those section 12 powers, as applied and modified, were exercised by the Secretary of State in the Tax Credits (Notice of Appeal) Regulations 2002 (SI 2002/3119). These prescribed the form of a tax credits notice of appeal.

10. The main legislative event was the enactment of the Tax Credits (Appeals) (No. 2) Regulations 2002 (SI 2002/3196). Made by the Secretary of State, in summary:

(a) required disputes as to whether an appeal was in-time to be referred for determination by a legally qualified panel member (LQPM) of the appeal tribunal (regulation 4(1));

(b) provided for applications for extensions of time, ie to extend the time for appealing beyond the 30 days specified in section 39 of the 2002 Act, were to be made to the Board of the Inland Revenue (regulation 6). Unless the Board considered that certain conditions were met, regulation 5(2) required the application to be determined by a LQPM (and impliedly, therefore, referred to the LQPM by the Board);

(c) made the Board's power to extend time subject to conditions in regulations 5(4)(b) to (8). While described as an "interests of justice" test, this was in fact a strict set out conditions given the way in which "interests of justice" was defined;

(d) where the lateness issue fell to be determined by a LQPM, authorised the LQPM to extend time on the same (strict) conditions as could the Board but, additionally, the LQPM could extend time simply because the appeal itself was considered to have reasonable prospects of success;

(e) imposed an ultimate, and immovable, time limit of 12 months from the expiry of the section 39(1) time limit.

Phase 2 – implementation of the TCEA 2007

11. On 3 November 2008, the main tribunal provisions of the TCEA 2007 came into force.

How the First-tier Tribunal attained its functions in relation to tax credits appeals

12. Most of the First-tier Tribunal's functions were transferred to it by orders made by the Lord Chancellor under section 30(1) of the TCEA 2007. That included functions previously conferred on the appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998. The transfer was effected by article 3 of the Transfer of Tribunal Functions Order 2008 (SI 2008/2833). Coming into force on 3 November 2008, article 3 provided that functions of the appeal tribunal "are transferred" to the First-tier Tribunal.

13. On 3 November 2008, the functions of the appeal tribunal included (a) its functions of determining tax credits appeals under Part 1 of the TCA 2002, as modified under section 63 of the 2002 Act; (b) its functions under the Tax Credits Appeals (No. 2) Regulations 2002 in relation to late appeals. Whilst the 2002 Regulations conferred this function on a LQPM, on transfer the function must have been intended to become a function of the First-tier Tribunal.

14. The Transfer of Tribunal Functions Order 2008 also amended section 63 of the Tax Credits Act 2002. What were the amendments? It is simplest to set out the relevant provisions of the section as amended, with the amendments underlined:

> "Section 63 – Tax credits appeals etc: temporary modifications
>
> (1) Until such day as the Treasury may by order appoint, Part 1 of this Act has effect subject to the modifications specified in this section; and an order under this subsection may include any transitional provisions or savings which appear appropriate.
>
> (2) … an appeal under section 38 is to an ~~appeal tribunal~~ the appropriate tribunal (rather than to the General Commissioners or Special Commissioners) …
>
> (5) So far as is appropriate in consequence of subsections (2) to (4) –
>
> (a) the reference to the General Commissioners or Special Commissioners in sections 19(10) and 39(5), and paragraphs 2 and 3(2) of Schedule 2 are to the ~~appeal tribunal~~ appropriate tribunal, and
>
> (b) subsections (3) and (4) of section 39 do not apply …
>
> (8) Regulations may apply any provision contained in –
>
> (a) Chapter 2 of Part 1 of the Social Security Act 1998 (c. 14) (social security appeals: Great Britain);
>
> (b) Chapter 2 of Part 2 of the Social Security (Northern Ireland) Order 1998 …; or
>
> (c) Section 54 of the Taxes Management Act 1970 (settling of appeals by agreement),
>
> in relation to appeals which, by virtue of this section, are to the ~~appeal tribunal~~ appropriate tribunal … but subject to such modifications as are prescribed …
>
> (10) 'Appropriate tribunal' means
>
> (a) The First-tier Tribunal, or
>
> (b) An appeal tribunal constituted under Chapter 1 of Part 2 of the Social Security (Northern Ireland) Order 1998."
>
> ~~"Appeal tribunal" means an appeal tribunal constituted~~
>
> ~~(a) In Great Britain, under Chapter 1 of Part 1 of the Social Security Act 1998~~, or
>
> ~~(b) In Northern Ireland, under Chapter 1 of Part 2 of the Social Security (Northern Ireland) Order 1998…"~~

15. Whether by way of the transfer of functions order or the amendment of section 63 of the TCA 2002, the First-tier Tribunal became the appeal tribunal for tax credits. If nothing more had been done, the status quo would have been unaltered. The modified power to make regulations under section 12(7) would have continued expressly to authorise regulations to extend time for bringing tax credits appeals. And while the Tax Credits (Appeals) (No.2) Regulations 2002 would have continued to refer to a legally-qualified panel member, the only sensible interpretation would have been that the LQPM's functions in relation to late appeals became functions of the First-tier Tribunal.

Supplementary legislative powers in connection with the establishment of and transfer of functions to the First-tier Tribunal

16. Orders under section 30(1) of the TCEA 2007 may include "provision for the purposes of or in consequence of, or for giving full effect to, a transfer" of tribunal functions (section 30(4)).

17. Exercise of the section 30 power activates another order-making power. Section 31(9) empowers the Lord Chancellor in connection with provision made in a section 30 order to "make by order such incidental, supplemental, transitional or consequential provision, or provision for savings, as the Lord Chancellor thinks fit".

18. Section 38 delimits the scope of the above powers. Provision in orders under those powers "may take the form of amendments, repeals or revocations of enactments". Enactment here includes an enactment contained in an Act of Parliament. That is as a result of the definition of enactment in section 38(2) as "any enactment whenever passed or made".

19. Section 145 also confers power on the Lord Chancellor by order to make "any supplementary, incidental, consequential, transitory, transitional or saving provision which he considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Act". That includes provision to "amend, repeal or revoke any enactment". The associated procedural provisions show that this, again, includes power to amend or repeal an enactment contained in Act of Parliament.

20. Section 36 also confers a power on the Lord Chancellor by order to transfer to himself or the TPC "any power to make procedural rules for a scheduled tribunal". We do not believe that power has ever been exercised in a way that might be relevant to this appeal.

Consequential provisions legislation

21. At the same time as the transfer of functions order, the 2008 Order also came into force. Its introductory words state it exercises powers under section 31(9) and 145 of, and Schedule 5(30) to, the TCEA 2007. Article 6 introduces what it describes as "consequential amendments" in Schedule 1.

22. This Order amended the Tax Credits (Appeals) Regulations 2002. To recap, these were the Regulations made under section 63 of the TCA 2002 to apply Part 1 of the Social Security Act 1998 to tax credits appeals. These:

(a) Omitted the redundant definition of "appeal tribunal" but without substituting a definition referring to the First-tier Tribunal;

(b) Amended the application of section 12 so that it referred to the right of appeal to the First-tier Tribunal;

(c) Did not affect the modified application of section 12(7) so that it continued to confer the following regulation-making authority:

"Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought, and may in particular extend the time limit for giving notice of appeal specified in section 39(1) of the Tax Credits Act 2002".

23. The 2008 Order also amended the Tax Credits (Appeals) (No. 2) Regulations 2002. These, it will be recalled, are the regulations which conferred power on an appeal tribunal to admit a late appeal. As amended, this read:

"Time within which an appeal is to be brought

4. – (1) Where a dispute arises as to whether an appeal was brought within the time limit specified in section 39(1) of the 2002 Act, the dispute shall be referred to, and be determined by, the First-tier Tribunal ~~a legally qualified panel member.~~

(2) The time limit specified in section 39(1) of the 2002 Act may be extended in accordance with regulation 5.

Late appeals

5. – (1) ~~The time within which an appeal must be brought may be extended~~ The Board may treat a late appeal as made in time where the conditions specified in paragraphs (~~2~~ 4) to (8) are satisfied, but no appeal shall in any event be brought more than one year after the expiration of the last day for appealing under section 39(1) of the 2002 Act.

~~(2) An application for an extension of time under this regulation shall be made in accordance with regulation 6 and shall be determined by a legally qualified panel member, except that where the Board consider that the conditions in paragraphs (4)(b) to (8) are satisfied, the Board may grant the application.~~

~~(3) An application under this regulation shall contain particulars of the grounds on which the extension of time is sought, including details of any relevant special circumstances for the purposes of paragraph (4).~~

(4) An appeal may be treated as made in time if the Board is satisfied that it is in the interests of justice.

~~An application for an extension of time shall not be granted unless –~~

~~(a) the panel member is satisfied that, if the application is granted, there are reasonable prospects that the appeal will be successful; or~~

~~(b) the panel member is, or the Board are, satisfied that it is in the interests of justice for the application to be granted.~~

(5) For the purposes of paragraph (4) it is not in the interests of justice to treat the appeal as made in time unless the Board are ~~grant an application unless the panel member is, or the Board are, as the case may be~~, satisfied that –

(a) the special circumstances specified in paragraph (6) are relevant ~~to the application~~ or

(b) some other special circumstances exist which are wholly exceptional and relevant ~~to the application~~,

and as a result of those special circumstances, it was not practicable for the appeal to be made within the time limit specified in section 39(1) of the 2002 Act.

(6) For the purposes of paragraph (5)(a), the special circumstances are that –

(a) the ~~applicant~~ appellant or a partner or dependant of the ~~applicant~~ appellant has died or suffered serious illness;

(b) the ~~applicant~~ appellant is not resident in the United Kingdom; or

(c) normal postal services were disrupted.

(7) In determining whether it is in the interests of justice to treat the appeal as made in time ~~grant the application~~, regard shall be had to the principle that the greater the

amount of time that has elapsed between the expiration of the time within which the appeal is to be brought under section 39(1) of the 2002 Act and the submission of the notice of appeal, the more compelling should be the special circumstances ~~making of the application for an extension of time, the more compelling should be the special circumstances on which the application is based~~.

(8) In determining whether it is in the interests of justice to ~~grant an application~~ treat the appeal as made in time, no account shall be taken of the following –

(a) that the applicant or any person acting for him was unaware of or misunderstood the law applicable to his case (including ignorance or misunderstanding of the time limit imposed by section 39(1) of the 2002 Act); or

(b) that the Upper Tribunal ~~a Commissioner~~ or a court has taken a different view of the law from that previously understood and applied.

~~(9) An application under this regulation for an extension of time which has been refused may not be renewed.~~

~~(10) The panel member who determines an application under this regulation shall record a summary of his decision in such written form as has been approved by the President.~~

~~(11) As soon as practicable after the decision is made a copy of the decision shall be sent or given to every party to the proceedings.~~

24. It is hard to avoid the conclusion that the drafter of the Order assumed that the new First-tier Tribunal Procedure Rules conferred power on the First-tier Tribunal to extend time for appealing and these amendments were simply intended to omit provisions that had become redundant.

Phase 3 – abolition of the Tax Commissioners

25. The next relevant phase arose almost incidentally, as a result of the abolition of the Tax Commissioners (whose functions principally became functions of the First-tier Tribunal (Tax Chamber)). We note that, by this date (1 April 2009), the Tax Commissioners had very few functions in relation to tax credits appeals. These had been transferred to the First-tier Tribunal by the 2008 Transfer of Functions Order. Our understanding is that all that was left were appeals against employer information penalties.

26. The relevant legislation in this phase was the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). These Regulations were made under enabling powers which included the following:

(a) section 30(1) of the TCEA 2007 which is a power to make "provision for the purposes of or in consequence of, or for giving full effect to, a transfer" of tribunal functions (section 30(4));

(b) section 30(4) of the TCEA 2007 which is a power to "make provision for the purposes of or in consequence of, or for giving full effect to, a transfer under [section 30(1)]";

(c) section 31(9) which authorises "in connection with provision made by order under section 30 … make by order such incidental, supplemental, transitional or consequential provision, or provision for savings, as the Lord Chancellor thinks fit";

(d) powers under section 124(1) to (7) of the Finance Act 2008.

Article 3 of the Order introduces a lengthy Schedule which makes numerous amendments to primary and secondary legislation. The effect was described as follows by Judge Rowland in *JI*:

> "42. Section 63 was simplified. The concept of 'appropriate tribunal' was removed. Instead, section 63(2) was amended so as to provide that appeals, other than those against employer penalties, are to the First-tier Tribunal in Great Britain and to the appeal tribunal in Northern Ireland and also so as to disapply section 39(6). Subsections (5)(b) and (9) of section 63 were repealed. Importantly, subsection (8) was amended so that it applied only in relation to appeals to appeal tribunals and Social Security Commissioners.
>
> 43. The effect of the amendment to section 63(8) was that the subsection ceased to apply in relation to appeals in Great Britain. Where an enabling power is repealed, subordinate legislation made under that power ceases to be valid unless preserved by a saving provision (*Watson v Winch* [1916] 1 K.B. 688). Therefore, the 2002 Appeals Regulations lapsed insofar as they applied to Great Britain and the 2002 Appeals (No.2) Regulations, which applied only in Great Britain, fell with them. In my judgement it is this, rather than the amendment made to regulation 2 of the 2002 Appeals Regulations in 2008, which is the reason why those Regulations no longer apply in Great Britain."

27. In other words, these amendments destroyed the legal edifice that had previously supported the regulations that conferred power on the First-tier Tribunal to extend time (the edifice being comprised of provision in section 63 for regulations to apply section 12 of the Social Security Act 1998, regulations that did so apply those provisions including powers to make regulations and, finally, regulations made under section 12 as applied).

Phase 4 – introduction of mandatory reconsideration and other April 2014 amendments

28. With effect from 6 April 2014, section 39(1) of the TCA 2002 was repealed in relation to Great Britain by article 2 of the Tax Credits, Child Benefit and Guardian's Allowance Reviews and Appeals Order 2014 (SI 2014/886). Had the setting of a time limit for appealing by the TCA 2002 prohibited tribunal procedure rules from conferring power to extend time, that prohibition would on this date have been lifted.

29. The 2014 Order also inserted new provisions in the TCA 2002 requiring tax credits decisions to be reviewed by HMRC before they can be appealed. New section 21A defines the content of the review that has become known as mandatory reconsideration. Section 21B confers a limited power on HMRC to accept a late application for review/mandatory reconsideration. Section 38 of the TCA 2002 has been amended so that it now provides that "an appeal may not be brought … against a decision unless a review of the decision has been carried out under section 21A and notice of the conclusion on the review has been given under section 21A(3)".

30. The amendments made by the 2014 Order are not retrospective. Article 1(5) of the Order provides that "any amendment made by this order only has effect in relation to an HMRC decision made on or after the amendment comes into force".

31. The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 had already been amended, in April 2013, to cater for appeals made following a process of mandatory reconsideration. A new rule 22 provided for the notice of appeal to be sent to the tribunal rather than the decision-maker. The primary time limit for appealing became specified in the rules, rather than in the TCA 2002. Rule 22(2) provided for the notice of appeal to be received by the tribunal within one month after the date on which the appellant

was sent notice of the result of mandatory reconsideration. Rule 22(8) conferred power on the tribunal to extend time for appealing in a "social security and child support case" but not by more than 12 months from the expiry of the primary time limit. The definition of "social security and child support case" in rule 1(3) included a tax credits case.