



**UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)**

Applicant: David Benson and others	Tribunal Ref: UT 2026-000034
Respondents: The Commissioners for His Majesty's Revenue and Customs	

RECONSIDERATION OF APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE

JUDGE VIMAL TILAKAPALA

1. David Benson and others (the “Applicants”) apply to the Upper Tribunal (Tax and Chancery Chamber) (the “UT”) for permission to appeal against the decision (the “Decision”) of the First-tier Tribunal (Tax Chamber) (the “FTT”) released on 26 November 2025 (TC/2022/02543) (the “Decision”).
2. The Applicants applied to the FTT for permission to appeal on nine grounds against the Decision but permission was refused by the FTT in a decision released on 6 March 2026.
3. The Applicants renewed their application for permission to appeal within the applicable time limit (the “Application”).
4. I granted permission to appeal on the papers on eight of the grounds identified by the Applicants (the “UT Papers Decision”). The Applicants applied for my decision on the refused ground to be reconsidered at a hearing.
5. The hearing was held on 24 September 2026 at which I heard from Ms Ximena Montes Manzano for the Applicants and Ms Sadiya Choudhury KC for HMRC. I also received from HMRC a skeleton argument and from the Applicants a skeleton argument together with an authorities bundle and extracts from the FTT hearing bundle. Written summaries of the parties’ oral submissions were subsequently provided on 30 September 2026 and have been taken into account in determining this application.
6. I am grateful to Ms Manzano and Ms Choudhury KC for their submissions.

7. References below in the form FTT [x] are to paragraphs of the Decision.

Background

8. The Applicants are lead appellants in a group of appeals concerning participation in a contractor loan scheme known as the "Rathowen Scheme" and the tax treatment of amounts received by them under that scheme. The arrangements in issue were promoted and administered by Montpelier, the promoter and organiser of the arrangements. The FTT described those arrangements in detail, referring to the original structure as the "DTA arrangements". Broadly stated, the arrangements involved individuals supplying services through a contractual structure involving entities connected with the Isle of Man. The intended tax effect of the arrangements was that participants would not be treated as agency workers for the purposes of section 44 ITEPA 2003 and so would not be subject to the income tax and PAYE consequences that would otherwise arise if that provision applied.

9. HMRC's case before the FTT was that, notwithstanding the contractual structures adopted, section 44 ITEPA 2003 applied. One of the principal issues before the FTT was therefore the identity of the relevant "agency" for the purposes of that provision. If HMRC were correct that the contractual arrangements involved a relevant agency within the meaning of section 44, the intended tax treatment of the arrangements would fail.

10. Under the original DTA arrangements, the Applicants typically entered into consultancy agreements with Isle of Man partnerships forming part of the wider contractual chain through which services were supplied to end clients. The FTT found that participants in those arrangements were subsequently migrated into a different structure involving Rathowen. Rathowen was a company introduced into the arrangements administered through Montpelier and was said to have replaced the Isle of Man partnerships as the contractual counterparty to participants in the arrangements.

11. An issue before the FTT was therefore whether, and if so how, the contractual relationships originally involving the Isle of Man partnerships came to involve Rathowen. HMRC's case was that the Applicants were engaged through contractual arrangements involving Rathowen and that Rathowen constituted the relevant agency for the purposes of section 44 ITEPA 2003. The Applicants disputed that conclusion. They challenged both the factual basis upon which the FTT concluded that the consultancy agreements had come to involve Rathowen and the legal basis upon which such a transition could be said to have occurred.

12. During closing submissions before the FTT, the Applicants advanced an additional argument concerning the legal effectiveness of the alleged transition from the Isle of Man partnerships to Rathowen. They contended that the consultancy agreements were contracts for personal service and so incapable of lawful assignment. The FTT addressed that argument at FTT [230]-[240] notwithstanding its observation that the point had not formed part of the pleaded grounds of appeal.

Procedural history

13. Following the Decision, the Applicants sought permission to appeal on nine grounds. In summary:

- (1) Ground 1 contended that the FTT's had misdirected itself and/or misapplied legal principles in its treatment of witness evidence said to contradict contemporaneous documents;

- (2) Ground 2 contended that the FTT asked the wrong question and mischaracterised the Applicants' appeals;
- (3) Ground 3 contended that the FTT failed to give adequate reasons and/or reached conclusions that no reasonable tribunal could properly have reached;
- (4) Ground 4 contended that the FTT erred in law in requiring evidence of Isle of Man law;
- (5) Ground 5 contended that the FTT was not entitled to find that the Applicants had contractual relationships with Rathowen;
- (6) Ground 6 contended that the FTT was wrong in law in deciding that Rathowen was the relevant agency for the purposes of section 44 ITEPA 2003;
- (7) Ground 7(a) contended that the FTT failed to identify the conclusions stated in the closure notices under appeal;
- (8) Ground 7(b) contended that, in certain cases, the FTT impermissibly extended the scope of the appeals;
- (9) Ground 8 contended that the FTT erred in declining jurisdiction to determine whether certain Applicants provided their services as employees or deemed employees; and
- (10) Ground 9 contended that the FTT erred in concluding that certain Applicants were estopped from arguing that they were employed for taxation purposes.

14. In my decision on the papers, I granted permission to appeal in respect of Grounds 1, 2, 3, 5, 6, 7(b), 8 and 9, and in respect of Ground 7(a) (but only insofar as it related to a set of closure notices issued by HMRC in 2021). Permission was refused only in respect of Ground 4.

15. This hearing is therefore confined to the Applicants' oral renewal of their application for permission to appeal in respect of Ground 4.

The Upper Tribunal's jurisdiction

16. An appeal lies to the Upper Tribunal only on a point of law. Permission to appeal should be granted where the proposed ground discloses a realistic, as opposed to fanciful, prospect of establishing a material error of law, or where there is some other compelling reason for the appeal to be heard.

17. Where a party seeks to advance a point that was not properly pursued before the FTT, additional considerations arise. As both parties recognised by reference to *Singh v Dass* [2019] EWCA Civ 360, *Mullarkey v Broad* [2009] EWCA Civ 2, *R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 and *Notting Hill Finance v Sheikh* [2019] EWCA Civ 1337, the question is not simply whether the point is arguable. Consideration must also be given to whether it is appropriate, consistently with the appellate function of this Tribunal, to permit the point to be advanced at the appellate stage.

Discussion

18. Ms Manzano's submissions on Ground 4 proceeded in two stages.

19. First, she continued to pursue Ground 4 in the form in which it had originally been advanced.

20. Second, she sought permission to pursue a reformulated version of Ground 4. She recognised that the reformulated point might properly be characterised as a new ground of appeal and accordingly her submissions addressed the circumstances in which new grounds may be admitted.

21. I address Ground 4 in those two stages.

Ground 4 as originally formulated

22. Ground 4 as originally formulated contended that the FTT erred in law in requiring evidence of Isle of Man law.

23. The issue arose in the context of an argument advanced by the Applicants concerning the alleged assignment of consultancy agreements originally entered into with Isle of Man partnerships. At FTT [233]-[234], the FTT observed that the consultancy agreements contained governing law clauses in favour of Isle of Man law and concluded that, in the absence of evidence as to the content of Isle of Man law, the Applicants had failed to establish the legal premise upon which their argument depended.

24. In Ground 4, the Applicants challenged that conclusion. Relying upon the discussion in Lord Leggatt's judgment in *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2022] AC 995, they contended that the FTT should not have treated the absence of evidence of Isle of Man law as fatal to the argument before it. In broad terms, their case was that, in the absence of evidence establishing any relevant difference between Isle of Man law and English law, the FTT should have proceeded on the basis that the relevant principles of Isle of Man law corresponded with those of English law.

25. The Applicants further contended that the FTT failed properly to engage with the authorities placed before it and incorrectly treated the absence of evidence of Isle of Man law as preventing consideration of the argument they sought to advance.

26. At the oral renewal hearing Ms Manzano argued that the significance of FTT [234] extended beyond its treatment of foreign law. Her argument was that the FTT wrongly treated the Applicants as having failed because they had not adduced evidence of Isle of Man law and that this affected the analysis which followed, in particular at FTT [235]-[239]. She submitted that once the perceived obstacle created by FTT [234] is removed the FTT's subsequent analysis falls to be reconsidered.

27. It is unnecessary for the purpose of this application to determine whether the Applicants are correct in their analysis of the principles discussed in *Brownlie*. The difficulty with Ground 4 lies elsewhere. Even accepting the Applicants' submission as to the applicable principles, the question remains whether any error in the FTT's treatment of the Isle of Man law issue at FTT [234] is capable of affecting the outcome in light of the FTT's subsequent reasoning.

28. The FTT did not stop at FTT [234]. At FTT [235] it proceeded on the assumption that the legal position in the Isle of Man was identical to that in England and Wales and concluded that the Applicants' argument "nonetheless still fails". It explained that conclusion at FTT [236]-[239]. Further, at FTT [240]-[245], it addressed the position on the assumption that the Applicants' assignment argument succeeded. The FTT therefore addressed the substance of the Applicants' case on the basis that Isle of Man law corresponded with English law and on the basis that the assignment argument succeeded.

29. In those circumstances, the obstacle for Ground 4 is materiality. Even if the Applicants are correct that the FTT should not have treated the absence of evidence of Isle of Man law as determinative at FTT [234], the FTT went on to consider the issue on the very basis for which

they contend and nevertheless reached the same conclusion. The Applicants therefore do not identify an arguable basis on which any error at FTT [234] could have affected the outcome of the Decision.

30. Accordingly I remain unpersuaded that that Ground 4 as originally formulated discloses a material arguable error of law. Permission is therefore refused on Ground 4 in its original form.

Ground 4 as reformulated

31. As articulated by Ms Manzano, the proposed ground is that HMRC's case before the FTT depended upon consultancy agreements originally entered into with Isle of Man partnerships being assigned, transferred or otherwise moved to Rathowen, but that contracts for personal service are not assignable as a matter of law. The Applicants therefore contend that the contractual route upon which HMRC's case depended was legally impossible and that the FTT erred in concluding otherwise.

32. Ms Manzano maintained that this point is distinct from Ground 5. In her submission, Ground 5 concerns whether the alleged transition to Rathowen occurred as a matter of fact, whereas the reformulated Ground 4 concerns whether such a transition was legally capable of occurring at all. She characterised the distinction as being between a contention that the transition did not occur and a contention that it could not occur.

33. She further submitted that the reformulated ground did not arise in a factual vacuum. She emphasised that HMRC's own case before the FTT relied upon the proposition that the consultancy agreements had been assigned, adopted or otherwise transferred to Rathowen. In her submission the reformulated ground therefore challenged the legal effectiveness of the contractual mechanism upon which HMRC itself relied rather than introducing an unrelated issue into the proceedings.

34. Ms Manzano went on to argue that the circumstances in which the point emerged were relevant. This was a large and complex appeal involving multiple lead appellants, extensive documentary evidence and contractual relationships whose precise legal analysis remained in dispute. In her submission the reformulated ground represented a refinement of an issue that emerged from the evidence and from the parties' competing analysis of the contractual arrangements.

35. Ms Manzano accepted that this legal impossibility argument had not formed part of the pleaded grounds before the FTT and recognised that it may therefore be characterised as a new ground of appeal. It was for that reason that she relied upon *Singh*, *Mullarkey*, *Humphreys* and *Notting Hill*. Her submission was that the point should nevertheless be admitted because it raises a pure point of law, was argued before the FTT, was answered by HMRC and was ultimately addressed by the FTT at FTT [230]-[240].

36. She further submitted that the reformulated point did not require further evidence or factual investigation. Her submission was that the issue raised could be determined on the basis of the findings made by the FTT and that the question for the Upper Tribunal was whether on those findings the contractual mechanism relied upon by HMRC was legally capable of producing the result for which it contended. She argued that the point therefore raised a pure question of law and fell within the class of case in which a new point may properly be entertained on appeal.

37. Ms Choudhury KC opposed the application. She submitted that the reformulated ground should properly be characterised as a new ground of appeal and not a reformulation or clarification of Ground 4 as originally advanced

38. She submitted that the reformulated ground depends upon the proposition that the consultancy agreements were contracts for personal service and therefore incapable of assignment, but that the legal characterisation of those consultancy agreements was not identified as a distinct issue before the FTT. She further submitted that the point emerged only in closing submissions before the FTT, after the evidence had closed and HMRC therefore had no opportunity to address it through the ordinary forensic processes of disclosure, witness evidence and cross-examination.

39. In particular, she contended that had the point been articulated and pleaded before the FTT, HMRC may have wanted to investigate whether the consultancy agreements were properly characterised as contracts for personal service at all, the significance of any substitution provisions, the extent to which personal performance was required and the possible relevance of Isle of Man law. She further submitted that, once the issue was framed as a challenge to the legal effectiveness of an alleged assignment of contracts governed by Isle of Man law, HMRC may also have wanted to investigate the content of Isle of Man law rather than proceed on the basis that it corresponded with English law.

40. Accordingly, Ms Choudhury KC submitted that there was a realistic possibility that the evidential and forensic conduct of the proceedings would have been different had the reformulated point been raised and pleaded at the appropriate stage.

41. I accept that the reformulated legal impossibility argument is arguable and not without merit. I also accept that the reformulated ground does not arise in a factual vacuum. The assignment issue upon which it is founded was raised before the FTT in closing submissions, HMRC responded to it and the FTT addressed it at FTT [230]-[240].

42. However, these factors do not determine the question which this Tribunal must determine. That question, applying the principles discussed in *Singh*, *Mullarkey*, *Humphreys* and *Notting Hill*, is whether the reformulated ground is a new ground and if so whether it is appropriate to permit it to be advanced on appeal.

43. In my judgment the reformulated point is properly characterised as a new ground of appeal. It was not advanced as a ground before the FTT. Nor was it articulated as a ground in the application for permission to appeal to the Upper Tribunal. The original Ground 4 concerned the FTT's treatment of Isle of Man law and the consequences of the absence of evidence as to its content. By contrast, the reformulated ground advances a different proposition, namely that the consultancy agreements were incapable of lawful assignment and that HMRC's alleged contractual pathway to Rathowen was therefore legally ineffective. In my judgment that is a substantively different legal issue.

44. The principles applicable to the admission of a new point on appeal were not in material dispute. As discussed by the parties by reference to *Singh*, an appellate tribunal should proceed cautiously before permitting a point to be advanced on appeal that was not properly pursued below. *Mullarkey* identifies as a significant consideration whether the proposed point would have required further evidence or whether the proceedings may have been conducted differently had the point been raised in time. *Humphreys* emphasises considerations of fairness to the opposing party. The discussion in *Notting Hill* illustrates that applications of this type occupy a spectrum, ranging from genuinely self-contained points of law to points which may realistically have affected the way in which the case was investigated and presented below.

45. The relevant question is therefore not whether HMRC would definitely have adduced further evidence or conducted the case differently had the point been raised below. Nor is it necessary to determine what HMRC would in fact have done. The question is whether there is

a realistic possibility that the evidential and forensic conduct of the proceedings would have been different had the point been identified and articulated earlier in the proceedings.

46. I have considered Ms Manzano's submission that the reformulated point can be determined without further factual enquiry and therefore raises a pure question of law. I do not accept that characterisation. The reformulated ground depends upon legal and factual propositions that were not identified as issues requiring determination before the FTT. Whether those propositions were correct was not investigated before the FY as they were not advances as part of the Applicants' case. Had the ground been articulated and pleaded in its proposed form, matters such as the legal characterisation of the consultancy agreements, the significance of any substitution provisions and the possible relevance of Isle of Man law may have become the subject of investigation, evidence and submissions. The proceedings below were not conducted on that basis.

47. I therefore conclude that there is a realistic possibility that the evidential and forensic conduct of the proceedings would have been different had the reformulated point been articulated and pleaded before the FTT. The concerns identified in the authorities are therefore engaged.

48. In those circumstances and applying the principles discussed above, I am not satisfied that this is an appropriate case in which to permit the reformulated ground to be advanced as a new ground of appeal.

49. Nothing in this decision should be taken as expressing any concluded view on the substantive merits of the legal impossibility argument itself. The reason permission is refused is not because the argument is unarguable. It is because, applying the principles governing the admission of new grounds on appeal, I am not satisfied that it should now be permitted to proceed as a new ground before the Upper Tribunal.

Decision

50. Permission to appeal is refused in respect of Ground 4 as originally formulated.

51. Permission to pursue the reformulated Ground 4 is also refused.

52. Permission to appeal therefore remains granted only in respect of Grounds 1, 2, 3, 5, 6, 7(b), 8 and 9 and in respect of Ground 7(a) insofar as it relates to the closure notices issued by HMRC in 2021.

Signed:

Date: 13 October 2026

Vimal Tilakapala

Judge of the Upper Tribunal

Issued to the parties on: 13 October 2026

