

TAX EXCEPTIONALISM: A UK PERSPECTIVE

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INTRODUCTION

In her article in this issue of the Journal of Tax Administration, Professor Kristin Hickman explores the relationship between the US Treasury and Internal Revenue Service ('IRS'), and exceptionalism to general administrative law principles, dubbed "tax exceptionalism". It builds upon work that Hickman has produced in response to the 2011 case of *Mayo Foundation for Medical Education and Research v. United States*² in which the Supreme Court is generally considered to have rejected the idea of tax exceptionalism. Indeed, Hickman's article deals a decisive blow to the idea of tax exceptionalism by noting that the functions of the IRS are not dissimilar to those of other administrative agencies. Why then "should the IRS avoid general administrative law requirements when other agencies administering substantially similar programs must follow them?" That does not mean that questions do not remain. Whilst it can be accepted easily that there should be no general exceptionalism, that tells us little about "which administrative practices are susceptible to legal challenge under general administrative law principles" or whether provisions of the tax code might in fact "justify certain tax-specific departures from general administrative law requirements, doctrines, and norms."

A similar dichotomy can be said to arise in the UK between, on the one hand, the idea that there are no special principles of public law which apply to tax law and, on the other hand, the fact that the application of general principles of law in respect of the tax administration, Her Majesty's Revenue and Customs ('HMRC'), will differ from treatment given to other administrative agencies. This article will explore this dichotomy by first exploring briefly the history of the prospect of tax exceptionalism in the UK, and thereafter looking in depth at instances where HMRC may be said, in practice, to benefit from distinct treatment. The article will further assess situations where greater tolerance was given to HMRC actions than ought to have been afforded.

A BRIEF HISTORY OF EXCEPTIONALISM IN UK TAX JURISPRUDENCE

The Oxford English Dictionary defines exceptionalism as being "[o]f the nature of or forming an exception; out of the ordinary course, unusual, special." The term is used, in many contexts, to connote different situations of "exception", such as in "just war theory" where exceptionalism seeks to establish that killing can be justified in war in instances which would not be justified outside of war.³ It may refer to a nation's or supranational body's understanding of itself that it is for some reason distinct from traditional norms.⁴ Exceptionalism might even relate to privacy, such as in the case of genetic exceptionalism, which treats genetic data as unique and thereby requiring of special, more rigid protection.⁵ Exceptionalism at its core

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² *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44, 55 (2011). Hickman K. (2013); Hickman K. (2014).

³ See Allhoff, Evans, & Henschke (2013), p. 206.

⁴ See, for instance, Hodgson (2009), p. 128; Kant (2016).

⁵ Krajewska (2011), p. 55.

requires there to be some kind of distinct understanding of a particular entity, which would, in turn, dictate that different rules or principles would apply.

Does this kind of exceptionalism in terms of public law apply to HMRC? In *R. (Coughlan) v. North & East Devon Health Authority*,⁶ this was decisively rejected by Lord Woolf: “It cannot be suggested that special principles of public law apply to the Inland Revenue or to taxpayers.”⁷

That has not always, however, been the understanding. For instance, it was once the orthodox view that the interpretation of taxing statutes departed from the general rules of statutory construction in that “literal interpretation” should apply. As explained by Loutzenhiser, people were not to be taxed unless they were designated in clear terms by the taxing Act as taxpayers and the amount of their liability was clearly defined.⁸ It was in this context that some of the most memorable statements about interpreting tax statutes arose. In the 1869 case of *Partington v. Attorney General*, Lord Cairns wrote that if the Crown “cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”⁹ In the 1921 case of *Cape Brandy v IRC*, Rowlatt J held that there is “no equity about a tax...Nothing is to be read in, nothing is to be implied.”¹⁰ Lord Tomlin in the 1936 *Duke of Westminster* case wrote that “[e]very man is entitled if he can to arrange his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.”¹¹

This approach by the courts, however, was considerably “softened”¹² by the notorious *Ramsay* case.¹³ Lord Wilberforce held therein that the courts are not confined to literal interpretation: “There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded.”¹⁴ Thus, in *IRC v. McGuckian* Lord Steyn emphasised that there had been a shift away from the literalist approach to a purposive method of construction: “Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it.”¹⁵

Besides the historical flirtation with statutory construction, general principles of public law have applied in the case of HMRC and its predecessor bodies, the Inland Revenue and Customs & Excise, just as they are applied with respect to other entities carrying out public functions. Indeed, judicial review cases of actions by the UK taxing authorities have contributed generously to the development of public law, such as in relation to the doctrine of legitimate expectations,¹⁶ the use of Parliamentary materials in interpreting statutes,¹⁷ and standing.¹⁸

⁶ *R. (Coughlan) v. North & East Devon Health Authority* [1999] EWCA Civ. 1871, [2001] Q.B. 21.

⁷ *Ibid.*, para 61.

⁸ On which, see Loutzenhiser (2016), p.40.

⁹ *Partington v. Attorney General* (1869) L.R. 4 H.L. 100, 122.

¹⁰ *Cape Brandy v. IRC* [1921] 1 K.B. 64, p. 71

¹¹ *Duke of Westminster v. IRC* [1936] A.C. 1, p. 19.

¹² King (2008), p. 114.

¹³ *Ramsay v. IRC* [1982] A.C. 300.

¹⁴ *Ibid.*, p. 323.

¹⁵ *IRC v. McGuckian* [1997] 1 W.L.R. 991, p. 999.

¹⁶ *In Re Preston* [1985] 2 W.L.R. 836; *R v. Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 W.L.R. 1545; *Matrix Securities Ltd v. Inland Revenue Commissioners* [1994] 1 W.L.R. 334; *R v. Inland Revenue Commissioners, ex parte Unilever plc* [1996] S.T.C. 681.

¹⁷ *Pepper v. Hart* [1992] S.T.C. 898.

¹⁸ See *R v. IRC, ex parte National Federation of Self-Employed and Small Businesses* [1982] A.C. 617 (‘Fleet Street Casuals’).

THE DISTINCT TREATMENT OF HMRC

However, whilst there may no longer be “exceptionalism” in terms of the application of general principles of public law to HMRC, it does not follow that principles of public law apply in the same manner to the body as they do with respect to other entities carrying out public functions. For this reason, Lord Carnwath in *The United Policyholders Group v The Attorney General of Trinidad and Tobago* (*The United Policyholders*),¹⁹ added a qualification to Lord Woolf’s earlier assertion in *Coughlan*:

“It is of course true that the Revenue is not governed by special principles of public law. But those principles take effect in a special context... The Revenue’s function is not to make the policy, but to collect the tax. It has a wide managerial discretion... Even in that context, it is only in “exceptional circumstances” that the court will overrule the exercise of discretion by the commission...”²⁰

The wide managerial discretion to which Lord Carnwath referred in this extract is derived from HMRC’s primary statutory function which, by section 5 of the Commissioners for Revenue and Customs Act 2005 (‘CRCA 2005’), is to collect and manage²¹ taxes and credits.²² This statutory provision places an overarching “managerial discretion” in the hands of HMRC as to how it carries out these functions.²³

The breadth of the discretion was explained in *Fleet Street Casuals*, wherein the House of Lords endorsed an agreement by the Revenue effectively not to investigate tax evasion. A federation representing small businesses and self-employed individuals brought an application for judicial review of a Revenue decision to grant an “amnesty” to a group of “casual” newspaper workers. The “amnesty” purported to forego investigation into past tax liabilities of the group of casual workers in return for the completion of the two prior years’ returns and future compliance.²⁴ For the Revenue, the reason underpinning the agreement to extinguish such past liabilities, which was estimated to cost the exchequer £1 million for each year²⁵, derived from the practical inability to obtain the requisite taxing information of the casual workers.²⁶ For instance, the workers used names such as “Mickie Mouse of Sunset Boulevard”

¹⁹ *The United Policyholders Group v. The Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 W.L.R. 3383.

²⁰ *Ibid.*, para 114.

²¹ Prior to 2005, taxes were said to be under the ‘care and management’ of the Inland Revenue and Customs and Excise. CRCA 2005 s. 51(3) ensures that the references to collection and management are to be understood as meaning ‘care and management’. On which see: CRCA 2005, s.5 (2). On which, see: Inland Revenue Regulation Act 1890 (‘IRRA 1890’), s. 1(1), s.13(1) and s. 39; Taxes Management Act 1970 (‘TMA 1970’), s. 1; Customs and Excise Management Act 1979, ss. 1(1), 6(2); Value Added Tax Act 1994 Sch. 11(1).

²² CRCA 2005, s. 5.

²³ See: *Fleet Street Casuals*, supra n. 18, p. 663 (Lord Roskill); p. 637 (Lord Diplock); p. 635 (Lord Wilberforce); p. 654 (Lord Scarman); *R. (Davies) v. HMRC*; *R. (Gaines-Cooper) v. HMRC* [2011] UKSC 47, para 26 (Lord Wilson), [2012] 1 All ER 1048; *R. (Wilkinson) v. IRC* [2005] UKHL 30, [2006] S.T.C. 270, paras 20-21 (Lord Hoffmann). Discretion in the hands of Customs & Excise in this regard was identical to that of the Inland Revenue: *R. v. Customs and Excise Commissioners, ex p. Kay & Co Ltd* [1996] S.T.C. 1500; *Fine Art Developments plc v. Customs & Excise Commissioners* [1994] S.T.C. 668; *Customs & Excise Commissioners v. Croydon Hotel & Leisure Co Ltd* [1995] S.T.C. 855.

²⁴ *Fleet Street Casuals*, supra n. 18, pp. 634-635.

²⁵ *Ibid.*, p. 634.

²⁶ *Ibid.*

and “Sir Gordon Richards of Tattenham Corner”²⁷ in order to hide their true identities from the Revenue. The trade unions did know the details of the casual workers, but there existed the potential of an industrial strike if the unions gave up the details of these workers.²⁸

In the House of Lords' hearing of the case, the starting point for the Lords on the issue of HMRC's discretion lay in the “statutory code”,²⁹ namely the primary statutory responsibility of the Revenue, upon which a few points merited elaboration. The first is that there exist two separate responsibilities: that of collection, and that of care and management.³⁰ Secondly, it is plainly impractical to collect *every* part of tax due. It is this impracticality, which necessarily conflicts with the duty of care and management, that was accepted as giving rise to managerial discretion.³¹ In other words, the effect of the literally read duty to collect *every* part of tax is diluted by the duty to care and manage,³² thereby creating partial autonomy, or *discretion*, for the Revenue.³³ Ultimately, their Lordships were satisfied that the arrangement arrived at between the Revenue and the workers, unions and employers fell within the Revenue's *wide* managerial discretion.³⁴ Lord Diplock went further, however, and explained that:

“[T]he board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.”³⁵

This statement has generally been quoted approvingly in all subsequent cases dealing with HMRC's managerial discretion.³⁶ In the 2005 case of *R. (Wilkinson) v. IRC* (‘*Wilkinson*’),³⁷ the House of Lords added some substance to Lord Diplock's explanation of managerial discretion. The applicant was a widower, whom, had he been a widow, would have been entitled to a widow's bereavement allowance under section 262 of the Income and Corporation Taxes Act 1988. Mr Wilkinson argued, *inter alia*, that HMRC could utilise its managerial discretion to extend the allowance to widowers. The House of Lords rejected the applicant's claim and held that the managerial discretion endowed upon HMRC cannot be so widely construed as to concede such an allowance which Parliament could have granted but did not grant.³⁸ Lord Hoffmann added that:³⁹

²⁷ *R. v. Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1980] Q.B. 407, p. 418 (Court of Appeal).

²⁸ *Fleet Street Casuals*, supra n. 18, p. 635.

²⁹ *Ibid.*, p. 650 (Lord Scarman).

³⁰ For instance, see: *Gaines-Cooper*, supra n. 23, para 26 (Lord Wilson); *R. (Davies) v. HMRC*; *R. (Gaines-Cooper) v. HMRC* [2010] EWCA Civ. 83, (2010) S.T.C. 860, para 111 (Moses LJ).

³¹ *Fleet Street Casuals*, supra n. 18, p. 650 (Lord Scarman); pp. 631-632 (Lord Wilberforce); p. 636 (Lord Diplock); p. 659 (Lord Roskill).

³² cf *New Zealand Stock Exchange v. CIR* [1992] 3 N.Z.L.R. 1, p. 3; Griffiths S. (2012), "No discretion should be unconstrained": considering the "care and management" of taxes and the settlement of tax disputes in New Zealand and the UK. *British Tax Review*, 2, p. 167.

³³ *Fleet Street Casuals*, supra n. 18, p. 651 (Lord Scarman).

³⁴ *Ibid.*, p. 663 (Lord Roskill); p. 637 (Lord Diplock); p. 635 (Lord Wilberforce); p. 654 (Lord Scarman). Lord Fraser declined to comment.

³⁵ *Ibid.*, p. 636. This point was not expressly endorsed by the other judges in the case.

³⁶ See for instance, *Gaines-Cooper*, supra n. 23, para 26 (Lord Wilson); *Wilkinson*, supra n. 23, paras 20-21 (Lord Hoffmann).

³⁷ *Wilkinson*, supra n. 23.

³⁸ *Ibid.*, para 20 (Lord Hoffmann).

³⁹ *Ibid.*, para 21.

“This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time.”

Decisions taken pursuant to HMRC’s managerial discretion will only be disturbed by the courts where “exceptional circumstances” arise, as noted by Lord Carnwath. For instance, where HMRC has acted with “conspicuous unfairness”, by departing without notice from a longstanding practice to accept late applications for tax relief,⁴⁰ or by refusing to give effect to legitimate expectations,⁴¹ or by failing to take account of the comparative unfairness of applying dissimilar treatment to similarly placed taxpayers,⁴² the courts will intervene.

In brief, as HMRC’s wide managerial discretion derives from its primary function to collect and manage taxes and credits as endowed by Parliament, it is for the Revenue to establish the best means of facilitating collection and management of taxes, with the courts overruling the exercise of managerial discretion in exceptional circumstances only. Thus, whilst there is no special principle of public law which applies to HMRC only, HMRC’s actions with respect to collection and management take place in a “special context” thereby requiring restraint on behalf of the courts.

THE DANGER OF DISTINCTIVE TREATMENT

If HMRC can persuade a court that an action falls within its wide managerial discretion, then the affected taxpayer will have little prospect of success. The courts will be highly reluctant to intervene if persuaded of such. That is problematic, however, as it may lead courts to mistakenly fail to apply even general principles of law correctly to HMRC. Several cases in recent years demonstrate this potential: namely *R (Ingenious Media) v HMRC* (*‘Ingenious Media’*)⁴³; *UK Uncut Legal Action Ltd v. HM Revenue and Customs* (*‘UK Uncut’*)⁴⁴; and *R (Bampton) v HMRC* (*‘Bampton’*).⁴⁵ In *Ingenious Media*, the problem lay in conceptualising as a matter of discretion that which was actually a matter of common law confidentiality. In the latter two cases, the issue lay in failing to properly apply public law principles after accepting that the decisions fell within HMRC’s discretion.

Ingenious Media

The author has written about the case in an extended case note for the *British Tax Review*⁴⁶ with the result that there is little purpose in reiterating the views expressed therein in any depth

⁴⁰ *Unilever*, supra n. 16.

⁴¹ *R. (Cameron) v. HMRC* [2012] EWHC 1174, [2012] S.T.C. 1691; *R. (Greenwich Property Ltd) v. Commissioners of Customs and Excise* [2001] EWHC 230, [2001] S.T.C. 618.

⁴² *R. (Hely-Hutchinson) v. HMRC* [2015] EWHC 3261, [2016] S.T.C. 962 (on which, see: Daly, S. (2016), Fairness in tax law and revenue guidance: *R (Hely-Hutchinson) v HMRC*. *British Tax Review*, 1, 18-27. Note that the judgment in the appeal of this case is outstanding at the time of writing.

⁴³ *R. (on the application of Ingenious Media and another) v. HMRC (Ingenious Media (HC))* [2013] EWHC 3258 (Admin), [2014] S.T.C. 673; *R. (on the application of Ingenious Media and another) v. HMRC (Ingenious Media (CA))* [2015] EWCA Civ. 173, [2015] S.T.C. 1357; *R. (on the application of Ingenious Media and another) v. HMRC (Ingenious Media (SC))* [2016] UKSC 54.

⁴⁴ *UK Uncut Legal Action Ltd v. HM Revenue and Customs* [2013] EWHC 1283 (Admin).

⁴⁵ *R. (Bampton) v. HMRC* [2012] EWHC 361 (*‘Bampton’*); *R. (Bampton) v. HMRC* [2012] EWCA Civ. 1744 (*‘Bampton (CA)’*).

⁴⁶ Daly (2017).

in this piece. The case concerned an “off the record” disclosure by David Hartnett, then Permanent Secretary for tax at HMRC, to journalists from *The Times*. The subject of the conversation was tax avoidance schemes that were taking advantage of the “Film Partnership” legislative provisions. Over the course of the meeting, Hartnett referred specifically to the applicants, Ingenious Media and Patrick McKenna, as marketers of such avoidance schemes,⁴⁷ noted that they had contributed to depriving the public purse of circa £5 billion⁴⁸ and that McKenna had personally benefited from the tax relief⁴⁹, and denounced such schemes as “scams for scumbags”.⁵⁰ Some of these comments were later quoted, albeit with anonymity attached, in two articles published by the journalists in *The Times* on 21 June 2012.⁵¹ Perhaps unsurprisingly, Ingenious Media and McKenna (the Claimants) sought judicial review of the decision of Hartnett to disclose such information to *The Times* journalists.

The Claimants, inter alia, submitted that the disclosure of taxpayer information in the case breached section 18 of the Commissioners for Revenue and Customs Act 2005 (CRCA 2005). This prohibits HMRC officials from disclosing information which is held by HMRC “in connection with a function of” HMRC⁵², except where the disclosure is “made for the purposes of a function of” HMRC.⁵³ HMRC’s argument in response, with which both the High Court⁵⁴ and the Court of Appeal⁵⁵ agreed, was that the disclosure of taxpayer information was necessary for the purpose of tax collection. Both courts accepted that there was a rational connection between the function of HMRC to collect tax in an efficient and cost-effective way and the disclosures made by Hartnett in the course of the briefing.⁵⁶ Both accepted that the decision as to whether to disclose taxpayer information to the media was in the nature of an evaluative judgment, in relation to which the courts should not approach whether to condemn such decisions as if they were the primary decision-makers.⁵⁷ The Supreme Court unanimously overturned this assessment. In the oral hearing of the case, Lord Toulson commented that “[t]he courts below proceeded on the basis that it was discretionary... There is a question mark whether in the area of duties of confidence you are in the territory of discretion properly so understood.”⁵⁸ The written judgment of the court went on to reject the view that HMRC’s duty of confidentiality should be approached as a matter of discretion and that the courts should not approach the disclosures as if they were the primary decision-makers.⁵⁹ The court ultimately found that HMRC’s actions had resulted in a breach to the body’s duty of confidentiality. The court regarded the idea of sharing confidential information with the media as “a matter of serious concern”, justified only in extreme circumstances such as “where HMRC officials might be engaged in an anti-smuggling operation which might be in danger of being wrecked by journalistic investigations”.⁶⁰

⁴⁷ *Ingenious Media* (CA), supra n. 43, para 9.

⁴⁸ *Ibid.*, para 10.

⁴⁹ *Ibid.*, para 11.

⁵⁰ *Ibid.*

⁵¹ Mostrous, Schlesinger F. and Watson R. (2012); Schlesinger (2012).

⁵² CRCA 2005 s. 18(1).

⁵³ CRCA 2005 s. 18(2)(a)(i).

⁵⁴ *Ingenious Media* (HC), supra n. 43, paras 38-51.

⁵⁵ *Ingenious Media* (CA), supra n. 43, paras 26-30, 37-47.

⁵⁶ *Ingenious Media* (HC), supra n. 43, para 39; *Ingenious Media* (CA), supra n. 43, paras 42-46.

⁵⁷ *Ingenious Media* (HC), supra n. 43, paras 40-42; *Ingenious Media* (CA), supra n. 43, paras 44-46.

⁵⁸ See the recording of the Supreme Court hearing on the Supreme Court’s website, available at: <https://www.supremecourt.uk/watch/uksc-2015-0082/040716-am.html> [Accessed 13th April 2017] from 4.04mins to 4.37mins.

⁵⁹ *Ingenious Media* (SC), supra n. 43, para 29.

⁶⁰ *Ibid.*, para 35.

The importance of this case for present purposes lies in the potential for courts to be led to error by conceiving of HMRC's actions as falling within its managerial discretion, to which the courts rightly should only intrude in exceptional circumstances, when, in fact, the action could fall to be considered against ordinary legal principles. The assertion of "discretion" may lead the judge to continue driving at ordinary speed past an incident involving an HMRC officer on the side of the road when, in fact, the proper course would be to slow down to have a better look.

UK Uncut and Bampton

Where an official is vested with decision-making power, she must only direct herself to relevant considerations when arriving at a decision. Conversely, the official must not take into account irrelevant considerations. This basic principle is known as the *doctrine of relevancy* and where it has been usurped, the decision is said to be *ultra vires*. The general rule, however, is subject to a minor caveat; namely, where the official would *inevitably* have arrived at the same decision despite having taken into account an irrelevant consideration or having failed to take into account a relevant consideration. A decision will not be set aside accordingly where an irrelevant factor played an 'insignificant or insubstantial' role.⁶¹ In the leading authority *R. (FDA) v. Secretary of State for Work and Pensions ('FDA')*,⁶² Lord Neuberger (then Master of the Rolls) stressed that this would only arise exceptionally. In so doing, the learned judge cited approvingly the judgments of Purchas LJ in *Simplex G.E. v. Secretary of State for the Environment ('Simplex')*⁶³ and May LJ in *R. (Smith) v. North Eastern Derbyshire Primary Care Trust ('Smith')*,⁶⁴ which similarly emphasise the high threshold to be satisfied to disprove the impact that an irrelevant consideration played. In the former, it was held that:

"It is not necessary for [the Claimant] to show that the Minister would, or even probably would, have come to a different conclusion. He has to exclude only the contrary contention, namely that the Minister necessarily would still have made the same decision."⁶⁵

May LJ in *Smith* read the law as likewise importing such a significant hurdle: "Probability is not enough. The defendant would have to show that the decision would inevitably have been the same."⁶⁶ That it would be inconvenient for the decision-maker to retake a decision where it is probable, *but not inevitable*, that she would arrive at the same conclusion cannot be helped. As held by Atkin LJ in *General Medical Council v Spackman*, '[c]onvenience and justice are often not on speaking terms'.⁶⁷

As such, it is incumbent on the court to interrogate the impact that an irrelevant consideration plays in the decision-making process where it is demonstrated one has been taken into account. In the case of *FDA*, which concerned a challenge to the Government's alteration to the basis upon which public service pensions are annually adjusted to take account of inflation, Lord

⁶¹ *R. (FDA) v Secretary of State for Work and Pensions* [2013] 1 W.L.R. 444, para 67 (Lord Neuberger); *Simplex G.E. v Secretary of State for the Environment and the City and District of St. Albans District Council* (1989) 57 P & C.R. 306, p. 326 (Purchas LJ).

⁶² *FDA*, supra n. 61.

⁶³ *Simplex*, supra n. 61.

⁶⁴ *R. (Smith) v. North Eastern Derbyshire Primary Care Trust* [2006] 1 W.L.R. 3315.

⁶⁵ *Simplex*, supra n. 61, p. 328.

⁶⁶ *Smith*, supra n. 64, para 10.

⁶⁷ *General Medical Council v. Spackman* [1943] A.C. 627, p. 638 as cited in *R. v. Secretary of State for the Environment, Ex parte Brent London Borough Council* [1982] Q.B. 593, p. 646 (Ackner LJ).

Neuberger considered the matter *obiter*. Such adjustments are normally made each April by statutory instrument and, for many years, they had been up-rated in accordance with the increase in the Retail Price Index ('RPI') over the year ending the previous September. However, the Government decided that, from and including April 2011, such adjustments should be made in accordance with the increase in the Consumer Price Index ('CPI'). It was this decision that formed the basis of the judicial review. One of the questions was whether the effect on the national economy was a relevant factor for considering a change from RPI to CPI. The court held that it was. If the court had found in the alternative, Lord Neuberger elaborated that the decision would have remained the same in spite of this irrelevant consideration. The evidence supporting this conclusion, in the case, was overwhelming. Indeed, there was *no evidence* cited in the judgment to the contrary. Various experts' statements were cited as evidence in the court that CPI was a more appropriate matrix; namely those made by a senior policy adviser to the Department of Work and Pensions, the Director of Public Spending at the Treasury, the Parliamentary Under-Secretary of State at the Department of Work and Pensions, and the Minister of State for Pensions.

The level of scrutiny afforded by Purchas LJ in *Simplex* to the impact that an irrelevant consideration had on the decision in question more forcefully illustrates the role that the court plays in ensuring that the decision-maker has exercised her powers appropriately. The appellants in this case claimed that the Secretary of State for the Environment had taken into account an irrelevant consideration when rejecting their planning appeals. The irrelevant consideration in question related to a study carried out on the use of green belt spaces in St Albans and recommendations related to that study. The Secretary of State misconceived this study, thinking that it recommended that the space in question be maintained as green belt. In fact, the study did not make a judgment about the appropriateness of allocating the land as green belt, but made recommendations simply on the use of green belt space. It was common ground in the case that the Secretary of State had erred in his understanding of the study. The question for the court was whether or not the Secretary of State would still have rejected the planning appeals had he not taken into account this irrelevant consideration. In seeking to answer this question, the Court of Appeal forensically interrogated the Secretary of State's "admirably succinct, skilfully and carefully drafted" decision letter.⁶⁸ On the whole, Purchas LJ, who gave the lead judgment in the unanimous decision, found it "impossible to consider" that the reference to the (misconceived interpretation of the) study in the decision letter had no impact on the decision.⁶⁹ In support of this assessment, Purchas LJ proceeded to go through the decision letter line by line in order to analyse the impact that the irrelevant consideration made on the decision:

"[The Secretary of State] emphasised in the second sentence [of the letter] that he had had regard to the recommendations of the first inspector and mentioned the subject of a special study. The juxtaposition of that "special study" and the study referred to in the third sentence which the Minister records the council as having themselves "studied" is irrefutable and a logical step in the Minister's reasoning. Having referred to these matters and to further features of the planning context, the Minister starts the sentence in which he records his disagreement with the second inspector with the word "accordingly," thereby embracing the preceding considerations including the error relating to the Napsbury Policy 75C study."⁷⁰

⁶⁸ *Simplex*, supra n. 61, p. 326.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, pp. 326-327 (Purchas LJ); p. 329 (Staughton LJ); p. 329 (Sir Roualeyn Cumming-Bruce).

This reads like the analysis of a poem. There is meticulous attention to detail and that which can be extrapolated from the detail. The Secretary of State's letter begins by referencing a "special study"; given the sentence construction, this "special study" must be the study in question; this "special study" was then *studied* (therefore taken into consideration); and its conclusions *embraced* as implied by the use of the proceeding word "accordingly". The conclusion drawn from this mechanical scrutiny could only be that the irrelevant consideration was "undeniably" a significant factor in the decision-making process.⁷¹

UK Uncut

The zealous investigation of the claim that an irrelevant consideration did not impact the decisions at issue in *FDA* and *Simplex* can be contrasted with that afforded to an HMRC decision in *UK Uncut*. This case concerned a tax settlement between Goldman Sachs and HMRC, which resolved a number of outstanding disputes between the parties. By way of background, Goldman Sachs, in addition to several other banks, had entered into tax schemes, which purported to have the effect of avoiding National Insurance Contributions ('NICs'). In 2005, however, all but Goldman Sachs had settled with HMRC on terms that they would pay 100% of the claimed NICs, but no interest. In 2010, Goldman Sachs agreed with HMRC to pay the disputed NIC amount, but not any of the interest that would be owed. The Goldman Sachs deal accordingly was settled on the basis of the 2005 terms, but without having to pay interest for the enjoyment of the monies in the intervening 5 years. It was leaked to the press that this particular interest amounted to £20 million,⁷² although the true figure was probably closer to £10 million.⁷³ The decision of whether or not to settle disputes is a matter which falls within HMRC's managerial discretion. As noted by Nicol J, issues in relation to settlements are "quintessentially questions to be decided by the Commissioners themselves within the broad managerial discretion given to them by statute".⁷⁴

An action group, UK Uncut, took a judicial review action claiming that the settlement went beyond the powers of HMRC. Of interest for present purposes is the claim that, when arriving at the settlement, HMRC took into account an irrelevant consideration, namely, "embarrassment to the Chancellor". David Hartnett, who led the settlement with Goldman Sachs and was its chief negotiator, conceded that this consideration was taken into account⁷⁵ and that it was irrelevant.⁷⁶ It was countered, however, that the decision would inevitably have been the same even without this irrelevant consideration.⁷⁷ Nicol J accepted HMRC's contention on the basis of three arguments.⁷⁸ First, David Hartnett asserted that there were other independent and substantial reasons for the decision. Second, that the same decision would have been reached is evidenced by the fact that Melanie Dawes, Director General for Business Tax within HMRC at the time, reached the same decision without regard to it. Third, an independent judge, Sir Andrew Park, produced a report for the National Audit Office in which he found the settlement to be reasonable. The court accepted that these arguments cumulatively had the effect of proving the irrelevant consideration had an insubstantial impact

⁷¹ *Ibid.*, p. 327 (Purchas LJ).

⁷² Public Accounts Committee, (2011) *HM revenue & customs 2010-11 Accounts: Tax disputes*. HC 1531 (2010-12), p. 3.

⁷³ This was the figure which was discussed at the Public Accounts Committee hearing. *Ibid.*, 'Minutes of Evidence' Q24 and Q26.

⁷⁴ *UK Uncut*, *supra* n. 44, para 63.

⁷⁵ *Ibid.*, para 22.

⁷⁶ *Ibid.*, para 34.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, para 57.

with an analytical brevity which contrasts the studious and comprehensive analysis undertaken in *FDA* and *Simplex*.

These reasons, however, are each fallible on closer inspection. As for the first, this naked claim by David Hartnett, as with the Secretary of State's assertion in *Simplex*, is unquestionably insufficient to shift the burden which requires that it be proved that the decision would have been inevitably reached. As for the second, the assessment of Dawes is likewise insufficient to shift the burden for two reasons. The first is that she came to the case at the end of November 2010 after the initial meeting with Goldman Sachs and promise of settlement (without interest) had taken place. As the court rightly conceded earlier in the judgment, it needs to be cautious of later reasons and be aware of the risk that they have been composed subsequently to justify the decision and are a retrospective justification of that original decision.⁷⁹ In this regard, the potential for unconscious retroactive justification by Dawes is particularly high given that between the end of November 2010 and the middle of December 2010, when the decision was approved, she had numerous, albeit brief, conversations with David Hartnett.⁸⁰ Whilst this does not render the evidence of Dawes without merit, it does warrant caution and greater scrutiny of this reason. The second, more powerful, reason is that focussing on Dawes' evidence is selective. Contemporaries within HMRC at the time, namely Solicitor and General Counsel to HMRC Anthony Inglese and other lawyers, seemed to suggest that a different deal including the interest element ought to have been secured:

“On 8th December 2010 there was a meeting in the offices of Anthony Inglese, (Solicitor and General Counsel to HMRC). The others present were, it seems, other HMRC lawyers... There was concern among this group about a settlement with Goldman Sachs which omitted interest, in particular whether this was consistent with the *Litigation and Settlement Strategy* and whether it was right to impose no cost on Goldman Sachs for having resisted paying NICs so much longer than other companies who had adopted the same arrangement. Mr Inglese is recorded as saying,

[H]e would always want to assist [David Hartnett], but not if this were 'unconscionable'. He referred to the difficulty all those present at this meeting were having in justifying a settlement without an interest element⁸¹”

As such, the evidence of other similarly placed persons in HMRC counterbalances the evidence of Melanie Dawes. To this end, it cannot be concluded that a decision is inevitable if other senior HMRC officials have assessed that a different deal could have been done. As for the third reason that Park concluded that the deal was reasonable, there are several important problems which undermine the veracity of this justification. The first is a misconception; namely that Park was analysing the settlement from the perspective of a public authority properly carrying out its functions as prescribed by Parliament. There is a subtle but crucial distinction between the latter and the terms of reference for Park's study of the deal. Reasonableness is not a legal standard in Park's report, but rather is defined as follows:

“In evaluating reasonableness, we have considered whether the settlements represent fair value for the Exchequer and were in the public interest. This included considering whether the settlement was as good as or better than the outcome that

⁷⁹ Ibid., para 56.

⁸⁰ Ibid., para 16.

⁸¹ Ibid., para 17.

might be expected from litigation, considering the risks, uncertainties, costs and timescale of litigation”⁸²

This definition of reasonableness does not include other important factors that an HMRC official must take into account, such as, importantly, rationality, compliance with internal processes, and whether the settlement complies with HMRC’s written guidance on settling disputes, the notorious *Litigation and Settlement Strategy* (‘LSS’).⁸³ Accordingly, reasonableness is used in a looser sense than as is used in a legal context and it is incorrect to say that a decision which satisfies the former will likewise satisfy the latter. Moreover, reliance upon the Park report is problematic in the circumstances as it selectively chooses extracts from the report which favour HMRC’s case, but neglect the important qualifications which do not. For instance, the Park report also found that there were “significant errors in the process of reaching the settlement”⁸⁴ - was this agreement then in line with public law requirements? Similarly, Park and HMRC disagree on the flexibility of HMRC’s LSS with which it should comply. Whilst Park’s opinion was that the LSS “does not recognise the reality that when the Department and a taxpayer enter a process to resolve multiple complex, finely-balanced issues at once, interdependency is created between these issues”,⁸⁵ HMRC’s understanding, as recited by the court in *UK Uncut*, was that there could be no “horse-trading” or “package deals”.⁸⁶ This is important as HMRC generally is required to comply with its published guidance,⁸⁷ which in this case it appears it did not. Park’s conclusion that the deal was “reasonable” therefore does not take into account whether the deal was in line with public law requirements. In sum, HMRC and Park arrived at the same conclusion but for entirely different and opposing reasons. It feels closer to coincidence than inevitability that the results were congruous.

The three reasons that underpin the court’s finding that the decision reached was inevitable accordingly are questionable when analysed more closely. Given the general principle that a significant threshold must be surpassed before it will be deduced that an irrelevant consideration played an immaterial role, the court’s analysis is entirely unsatisfactory, particularly when contrasted with the approaches in *FDA* and *Simplex*. After recognising that the settlement was a matter which fell within HMRC’s managerial discretion, the court went on to fail to properly apply legal principles. This error was different from what arose in *Ingenious Media* wherein the erroneous characterisation of the decision as a matter of discretion caused the error. In this case there was the characterisation of the matter as discretionary, followed thereafter by a judicial error. It highlights that even where a decision is discretionary, the courts should be wary not to misapply the relevant legal principles.

Bampton

A similar issue arises in the case of *Bampton*. The taxpayers sought judicial review of an HMRC decision to refuse late claims to group loss relief. HMRC has discretion to accept late claims but, in this case, refused. A question arose as to whether HMRC was entitled to take the

⁸² National Audit Office (2012), p. 5.

⁸³ HMRC (2011).

⁸⁴ National Audit Office (2012), supra n. 82, p. 46.

⁸⁵ Ibid., p. 8.

⁸⁶ *UK Uncut*, supra n. 44, para 10. It is worth clarifying that although the LSS was updated in 2011, the remarks here both refer to the understanding of the LSS prior to 2011. It is also worth noting that Park found that the deal complied with the LSS. However, the reasoning underpinning this finding is conspicuously not provided in the report.

⁸⁷ See for instance, *R. v. Inland Revenue Commissioners, ex parte MFK Underwriting* [1990] 1 W.L.R. 1545, p. 1569 (Bingham LJ).

prospect of “tax avoidance” into account when exercising its discretion.⁸⁸ However, even if it were not a relevant consideration, both the High Court and Court of Appeal accepted that the same decision would have been arrived at in any event. The Court of Appeal only briefly dealt with the issue, as this ground was not argued explicitly on appeal,⁸⁹ so it is more prudent to investigate the High Court’s reasoning.

Alan King of HMRC arrived at the relevant decision for the purposes of the review after having made a “technical submission” on the issue to Paul Jefferies and having received advice in response. Mr Jefferies was a policy and technical specialist with HMRC at the time. Blair J in the High Court accepted that in this “technical submission”, the issue of tax avoidance loomed large, but that the response from Jefferies did not mention tax avoidance.⁹⁰ As this was the contemporaneous document upon which the decision was made, the learned judge concluded that tax avoidance was not a “driving issue” in the decision.⁹¹

This conclusion is problematic for two reasons. First, as stressed above, the test is not whether a consideration was the driving force behind a decision, but whether the role it played was “insignificant” or not. At any rate, even though it was not “driving” in the court’s eyes, it nevertheless accepted that the matter loomed large in the mind of the decision-maker. This suggests that the matter was given some weight: a balancing between considerations in the mind of the decision-maker. That is not a standard of insignificance, as is required, but rather strays more towards one of probability, which was expressly rejected in *Smith*.⁹² As such, the Court failed to apply the relevant test and standard. Secondly, and more importantly, the contemporaneous document, on closer inspection, does not support the court’s assertion. It merely summarises HMRC’s policy on late claims, sets out the facts of the current case, and concludes that: “Considering all the circumstances as presented, it would not appear to be unreasonable for HMRC to refuse the late group relief claim[s]”.⁹³ This response is written in the negative. Moreover, recall that this was written in response to a submission in which the issue of tax avoidance had loomed large. When combined with the relative emptiness (by that I mean that it is a mere summary of facts and HMRC policy) of this contemporaneous document, it is suggested that Mr Jefferies response in fact merely confirms that Mr King’s decision may take account of tax avoidance. In brief, the contemporaneous document does not support the case that the same decision would have been arrived at inevitably.

In the case of *UK Uncut* and *Bampton* then, the level of interrogation given to the importance placed upon irrelevant considerations failed to accord with the standard laid down in cases such as *FDA* and *Simplex*. Both *UK Uncut* and *Bampton* highlight the prospect of errors arising when dealing with discretionary decisions of HMRC.

CONCLUSION

Hickman writes that “[c]ourts and commentators have read the Court’s Mayo Foundation decision broadly as repudiating tax exceptionalism from general administrative law requirements, doctrines, and norms”. At the same time, however, “[l]egal scholars have

⁸⁸ Ultimately both Courts found that tax avoidance was indeed a relevant consideration, see: *Bampton*, supra n. 45, paras 128-129; *Bampton* (CA), supra n. 45, paras 106-109.

⁸⁹ That the same decision would have been arrived at anyway was accepted without question in the Court of Appeal, see: *Bampton* (CA), supra n. 45, paras 41, 63-64.

⁹⁰ *Bampton*, supra n. 45, para 127.

⁹¹ *Ibid*.

⁹² *Smith*, supra n. 64, para 10.

⁹³ *Bampton* (CA), supra n. 45, para 40.

identified numerous ways in which tax administrative practices arguably have deviated from general administrative law requirements, doctrines, and norms”.

This article has looked at this dichotomy from the perspective of the UK, highlighting on the one hand the fact that there are no (longer) “special principles” of law which apply in the case of HMRC, whilst on the other hand acknowledging that decisions taken by HMRC pursuant to its discretion take place in a “special context”. These decisions should, the Privy Council most recently told us in *The United Policyholders*, only be overturned in “exceptional circumstances”.

This idea of deference to discretionary decisions, however, has the potential to lead the courts astray. When dealing with this “special context”, courts should be careful about the application of general legal principles. Characterising as discretionary decisions which should not in fact be afforded such deference can lead the courts to fail to interrogate sufficiently the propriety of HMRC actions. In *Ingenious Media*, the problem of mischaracterisation caused the courts to approach the decision from the wrong perspective. Even where decisions are properly characterised as discretionary, the courts should be wary not to incorrectly apply legal principles. In the cases of *UK Uncut* and *Bampton*, the errors by the courts correlated with the fact that the HMRC decisions under review were discretionary. Whilst incorrect mischaracterisation will lead the judges to fail to slow down to take a good look at the action of the HMRC official on the side of the road, even correct characterisation may lead the judge to drive at the correct speed, but to pay insufficient attention to the HMRC official’s actions.

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