CASE NO SC/CIV/18/16

IN THE SUPREME COURT OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Town Hall
Ross Road
Stanley
Falkland Islands

Date: 13 June 2017

Before:

SIMON BRYAN QC (CHIEF JUSTICE OF THE FALKLAND ISLANDS)

- -

BETWEEN:

THE COMMISSIONER OF TAXATION

Appellant

and

A

Respondent

- -

Stuart Walker (Crown Counsel) for the **Appellant**

Sebastian Clegg (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date: 6 June 2017

- -

Approved Judgment

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THE CHIEF JUSTICE:

A. THE APPEAL

1. This is an appeal by the Commissioner of Taxation (the "Commissioner") pursuant to Clause 4(2) of Schedule 3 to the Taxes Ordinance 1997 (Ordinance No.14 of 1997) (the "Taxes Ordinance") against a decision of the Tax Appeal Tribunal (Clare Faulds, Keith Biles, Andrew Brownlee and Paul Freer) (the "Tribunal") in November 2016 (the "Decision") on an appeal under section 181 of the Taxes Ordinance 1997, by which the Tribunal quashed the assessment of the Commissioner issued on 14 July 2015 (the "Assessment") that A was non-resident in the Falkland Islands in 2014 for tax purposes and substituted its own assessment that the Respondent was resident for the 2014 tax year.

B. THE TAX ORDINANCE AND GUIDANCE GIVEN

2. In order to place in context the Commissioner's Assessment, and the Tribunal's Decision against which the Commissioner appeals, it is first necessary to identify the relevant provisions of the Tax Ordinance and associated guidance that has been issued by the Commissioner. In this regard Section 200 of the Tax Ordinance (entitled "Residence of individuals") provides:-

> "(1) In this Ordinance any reference to a person who is ordinarily resident in any place is a reference to a person who is habitually resident in that place except for such absence therefrom as seems to the Commissioner to be of a temporary nature.
>
> (1A) A person shall be regarded for the purpose of subsection (1) as being temporarily absent from the Falkland Islands for any period during which that person is employed in the service of the government of the Falkland Islands and carries out the duties of that employment in the United Kingdom.
>
> (2) In this Ordinance, a reference to an individual who is resident in the Falkland Islands in a year immediately preceding a year of assessment is a reference to a person who is actually in the Falkland Islands for 183 days or more in that preceding year."

3. It will be noted that a person is defined as ordinarily resident if they are habitually resident *"except for such absence... as seems to the Commissioner to be of a temporary*

nature". The effect of the words *"as seems to the Commissioner"* is to identify that the assessment as to residence is one that is made by the Commissioner in the exercise of the Commissioner's discretion (within the statutory framework). It is accordingly for the Commissioner to assess whether an absence is of a temporary nature, and save in the scenario covered by Section 200(1A) (which is not limited in time) there is no statutory definition as to what is to be regarded by the Commissioner as an absence of a temporary nature for the purpose of Section 200(1).

4. As the words *"absence...of a temporary nature*" in the Ordinance are not the subject of any statutory definition they are to be construed in accordance with general principles of statutory interpretation. So far as the law of the Falkland Islands is concerned the starting point is the Interpretation and General Clauses Ordinance (Ordinance no. 14 of 1977) as amended (the "Interpretation Ordinance"). Section 84 of the Interpretation Ordinance provides that the common law and rules and doctrines of equity for the time being applicable in England shall apply in the Falklands except insofar as they are inconsistent with any relevant legislation. Section 17 of the Interpretation Ordinance provides:

> "17 General principles of interpretation
>
> A written law of the Falkland Islands shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of such written law according to its true intent, meaning and spirit."

5. The object of statutory interpretation is to arrive at the legislative intention - see generally the discussion in *Bennion on Statutory Interpretation* 6th edition Part VIII. In this regard Lord Radcliffe stated in *A-G for Canada v Hallett & Carey Ltd* [1952] AC 427 at 449:

> "There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention."

The interpreter is required to determine the legal meaning, which is the meaning that correctly conveys the legislative intention (*Bennion* Code sections 2 and 150). The starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification (*Bennion* Code section 363).

6. The ordinary meaning of *"absence .... of a temporary nature"* draws a comparison between an absence which is temporary and that which is permanent. Indeed the word "absence" itself emphasises this, being apt to describe a temporary time away (before a return) as opposed to a permanent departure. For present purposes it does not matter how, precisely, that is assessed (it is noted that the Tribunal, for its part, considered the ordinary meaning of *"temporary"* as *"not permanent, transitory, lasting for a short time"* whilst recognising that the time span this may encompass had to be considered in context). What is important, is to note that the focus is upon an absence and whether it is temporary which is not defined by reference to any particular time frame (an absence even after a short period of time may not be temporary, just as a more lengthy absence may not be permanent). It all depends on the circumstances of the absence - and it follows, therefore, that the Commissioner's assessment must have regard to all the circumstances that are relevant in that context, rather than simply measuring matters by any particular passage of time.

7. This accords with the English case law on residence for tax purposes, in particular the judgment of the Supreme Court in *R (Davies) v Revenue and Customs Comrs* [2011 1 WLR 2625, 2635 at [20] per Lord Wilson JSC:-

> "20. It is therefore clear that, whether in order to become non-resident in the UK or whether at any rate to avoid being deemed by the statutory provision still to be resident in the UK, the ordinary law requires the UK resident to effect a distinct break in the pattern of his life in the UK. The requirement of a distinct break mandates a multifactorial inquiry."
>
> (emphasis added)

8. The Commissioner, in its Reply Skeleton on this appeal, submits that this judgment (which is also heavily relied upon by A in her Skeleton Argument), should be treated as a highly persuasive authority submitting (rightly in my view) that of particular relevance is the definition of "resident" set out at paragraph 20 of Lord Wilson's judgment as quoted above. The key point to note is that the requirement of a distinct break mandates a multifactorial approach - just as it is necessary to adopt such an approach in assessing whether there is *"such absence....as seems to the Commissioner to be of a temporary nature."*

9. Whilst there is no statutory definition as to what amounts to such an absence, there is a guidance document issued by the Commissioner titled, *"What you need to do for tax purposes on leaving the Falkland Islands"*. The evidence before the Tribunal (in the form of a witness statement from Leon Wong the Head of Tax Policy and Head of Service for Taxation of the Treasury Department of the Falkland Islands Government) was that the guidance provided that the Commissioner consistently regards an absence as temporary if it is intended to be for a period not exceeding 2 complete tax years. Such guidance does not have the force of law, although if tax guidance is sufficiently clear it may potentially give rise to a legitimate expectation in favour of a taxpayer (see *R (Davies) v Revenue and Customs Comrs* [2011 1 WLR 2625, 2636-2638 at [25]-[29]) regardless of what the position would otherwise be as a matter of law. Equally there is nothing wrong, in principle, with the Revenue giving guidance. However if guidance which has no statutory basis would act as a fetter on the proper exercise of discretion it would be unlawful.

10. It will be noted that the guidance does not delimit or define all circumstances where an absence may be regarded as temporary. However it is clear from the express language of Section 200(1) itself, as has already been identified, that it is not delineated by any particular time period, and a multifactorial inquiry is required when assessing whether an absence is "temporary". In this regard it is conceptually possible for an absence to be temporary even if it extended over a very considerable period of time - to give but one possible hypothetical example, if the taxpayer had to undergo extended specialist treatment for cancer in the UK extending for a great period of time but had every intention to return to a property in the Falkland Islands (where they had lived all their life) as soon as treatment was completed such absence might well be regarded as temporary.

11. I note that Mr Wong stated in his evidence that:

> "The taxpayer asserts she has to be in the UK to provide essential support to her [child to] continue with [its] education. Hypothetically if the official education assessment states the taxpayer has to necessarily accompany her [child] overseas in order for the student to continue with [its] education, then the Commissioner may be prepared to consider the absence as temporary. However, I understand from the Education Department the official assessment did not stipulate it was essential for the taxpayer to be present in the UK in order for her [child] to continue with his education."

The second sentence rightly recognises that it is necessary to have regard to the purpose of the absence (as part of a multifactorial inquiry).

12. If the guidance were to be applied as a rigid two year limit by the Commissioner regardless of all other circumstances this would be an unlawful fetter on the discretion provided by section 200(1) of Tax Ordinance (as Mr Walker, who appeared on behalf of the Commissioner, rightly acknowledged and accepted at the oral hearing before me, albeit he denied that the Commissioner adopted any such rigid two year limit) - see, by analogy, *R (Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin) at [41--[43].

13. In this regard Mr Clegg, who appears on behalf of A on this appeal, draws attention to what was stated by Mr Wong in an email to A and her husband ("B") on 28 March 2016 (the "28 March Email"), in response to an email from B on 22 March 2016 in which B had referred to section 200(1) of the Tax Ordinance and contended that both he and his wife continued to be habitually resident in the Falkland Islands and that their absence was temporary for reasons that he set out. Mr Wong replied in the 28 March Email stating that B's 22 March email arrived after the 30 day deadline and that the Falkland Islands Government Taxation Office ("FTO") was unable to treat it as a valid objection. He continued:-

> "As previously communicated to you, for ordinarily resident the Commissioner has been **consistently only** treating absences not over two complete tax years as temporary. By law, the only temporary absence that is not time bound is for any period during which a taxpayer employed in FIG service carrying out the duties of that employment in the UK."
>
> (emphasis added)

I will need to return to what was said in this email in due course when considering the Decision and the appeal therefrom that is before me for determination.

C. THE BACKGROUND TO THE ASSESSMENT AND THE DECISION

14. Until August 2013, A's husband (B), had lived in the Falkland Islands all his life, aside from absences of no more than two months in any year for holidays and one longer period of absence for medical treatment. He married A in the late 1980s. A had moved to the

Falkland Islands in the mid-1980s. Until the time period relevant to this appeal, she absented herself from the Falkland Islands only for short periods.

15. In the late 1990s their child (who I shall refer to as "C") was born. C has medical difficulties. During the course of C's secondary education, the Falkland Islands Government ("FIG") referred C to a small specialist day school in the UK. Due to C's said difficulties, A and B considered it necessary for them to accompany C to the UK and remain with C whilst undertook education in the UK. Further, the responsibility remained with A and B to arrange and pay for C's accommodation. Accordingly, the three of them left the Falkland Islands some years ago and took accommodation which is relatively close to C's school. C has since moved to study A-levels at college and it is hoped that C may go on to University in the UK (A and B contemplating that they may also need to support C in the UK at least for the first year of C's university degree if not for its duration).

16. In the above circumstances A was absent from the Falkland Islands for the entirety of the 2014 tax year (which runs to 31st December in the Falklands Islands). A and B have kept their house in the Falkland Islands, in Stanley which is being rented out on temporary contracts (with the garage excluded from such contracts). They also keep a car in the garage at that address, and their pensions are paid into an account at Standard Chartered Bank in Stanley out of which their bills and expenses in the Falkland Islands are paid. A and B consider themselves to be in the UK out of necessity and only by way of temporary residence (as they expressed themselves in an email to the FTO on 22 March 2016).

17. On 2 February 2015 the FTO issued notice to A requiring her to fill out a form with information for her tax return for 2014. A filled out the form and signed it on 5 March 2015 and returned it to the FTO. By email dated 20 April 2015, a tax officer of the FTO stated that a review of A's tax returns for 2014 was being undertaken and it was noted that, *"you are residing in the UK whilst [C] attends school, but I couldn't see anything on file to confirm how long you aim to be out of the Islands for".* The e-mail continued, *"For us to be able to assess you both accurately, we need to first confirm what your Falkland Islands Tax status is. Do you have any idea of when you might return to reside in the Islands?"*

18. B responded by email dated 21 April 2015. That is an email of some importance as it contained matters of particular relevance to whether A was resident or non-resident for tax purposes, and was the information available at the time of the subsequent Assessment on 14 July 2015. I will accordingly set it out in full:-

> "Dear [Tax Officer],
> Many thanks for your email
> You are right that we are all residing in UK while [C] attends school here. As a consequence of being on the autistic spectrum [C] was unable to fully access the curriculum at FICS so after much discussion FIG decided to place [C] in a special school ... We moved here temporarily and obtained accommodation… in order to facilitate [C]'s placement. [C] will finish secondary school… and will start A-Levels... [C] therefore needs us to provide… a home in the UK for a further 2 years at least as [C] would not be able to cope with any boarding arrangement outside the family. I am intending to return in November this year for the summer and hope that [C] and [A] will be able to make a short visit back home for the Christmas school holidays. I trust this information will assist in confirming my FI tax status."

19. On 14 July 2015 the FTO issued a notice of assessment for tax for 2014 to A (the Assessment). The FTO assessed A upon the basis that she was non-resident in the Falkland Islands in 2014 and was liable to tax in the sum of £5,254.52. The FTO did not provide any accompanying explanation (for example setting out any particulars as to how the Commissioner reached this conclusion or as to whether or not a multifactorial inquiry had been carried out).

20. If A had been held to be resident in the Falkland Islands then she would have qualified for personal allowances which would have reduced the tax payable by £3,295.26. On 23 July 2015 B emailed the tax officer stating that he was unaware they would not be entitled to the full personal allowances and asked for forms to make elections under section 195(3) of the Taxes Ordinance.

21. On 24 July 2015 B again emailed the tax officer asking that his email of the previous day be accepted as an objection lodged on the ground that no personal allowances had been given. He stated, amongst other matters that he believed that *"both our tax residency positions are 'not resident but ordinarily resident' as we have not been absent yet for 2 complete tax years"*. The email also attached a notice of election under section 195(3) of the Taxes Ordinance signed by A and dated 23 July 2015. The reference to two tax years

was a reference to the definition of "Ordinarily resident" in the FTO's guidance leaflet that I have already referred to.

22. Subsequent correspondence followed in February 2016. On 9 February 2016 the FTO received authorisation from A for B to deal with her tax affairs. On 12 February 2016 Leon Wong of the FTO emailed B in respect of the objection raised on 24 July 2015. Mr Wong stated, *"As you acknowledged, the assessment in question was issued in accordance with taxes legislation and I therefore confirm we will not be able to revise this and the assessment stands"*. There was no explanation as to how the assessment had been undertaken or what factors had been taken into account. Mr Wong told B that he could appeal to the Tax Appeal Tribunal by writing to the Clerk of the Tribunals within 21 days of receipt of the email setting out the grounds of appeal. In the meantime, A was to pay a balance of £1,959.26, which was duly paid.

23. B submitted a notice of tax appeal on behalf of A on 24 February 2016. The primary focus of that notice was section 195(3) of the Taxes Ordinance and the complaint that A had been unable to make an election because she was below the age of 60. In summary, B's position was that the provision was anomalous and should be retrospectively amended to allow A to make the election despite her being below the age of 60. The notice of appeal also challenged the Commissioner's position that A was "not ordinarily resident" in the Falklands for the purposes of the 2014 tax year and section 200 of the Taxes Ordinance. It is only that second point that is relevant to this appeal.

24. By letter dated 3 March 2016 B wrote to the Clerk of Tax Appeal Tribunal providing supplemental information which included an explanation as to why he and A were *"living temporarily in the UK"*. As has already been noted, on 22 March 2016 B emailed Ms Granger and Mr Wong repeating and expanding on the reasons why he said that he and A were residing temporarily in the UK. Mr Wong responded to that email in the 28 March Email that has already been quoted above (i.e. stating that the note had arrived after the 30 day deadline and he was unable to treat it as a valid objection and that *"the Commissioner has been consistently only treating absences not over two complete tax years as temporary"*).

25. On 14 April 2016 B sent further legal materials to the Tribunal. The Commissioner filed a response dated 21 July 2016 to A's appeal. This responded to the appeal based on the failure to accept A's election under section 195(3) of the Taxes Ordinance but did not respond to that part of the appeal which dealt with section 200 of the Taxes Ordinance and the residency point. B filed a reply on 16 August 2016. Paragraphs 18 to 25 of that reply addressed why it was submitted that A was only temporarily absent from the Falkland Islands due to specific family reasons and remained ordinarily resident and entitled to the personal allowance. Although these paragraphs were headed "Fresh ground of appeal" this point was already in issue (and the Tribunal could in any event have allowed the appellant to put forward grounds not specified in the notice of appeal - see Section 181(7) of the Taxes Ordinance).

26. The Commissioner set out its response by way of Leon Wong's witness statement of 31 August 2016, to which reference has already been made above. The Commissioner filed a Skeleton Argument on 8 September 2016. In relation to the residency point the Commissioner argued that the determination under section 200 of the Taxes Ordinance is discretionary and the Commissioner had *"carefully assessed the evidence, applied the appropriate law ... and reached a reasoned and logical conclusion based on evidence"*. It was submitted that the decision was within the range of reasonable decisions and the appeal should, therefore, be dismissed.

D. THE APPEAL TO THE TRIBUNAL AND THE TRIBUNAL'S DECISION

27. The appeal to the Tribunal was pursuant to section 181 of the Tax Ordinance. Section 181 provides:-

"(1) Any person aggrieved-
(a) by an assessment of liability to tax or entitlement to repayment of tax already paid or of entitlement to repayment of any sum already paid on account of tax;
(b) by a decision of the Commissioner with respect to that person's entitlement to the benefit of a deduction, allowance or relief under this Ordinance or the Income Tax Ordinance.
(c) by a decision that a person is or was at any time resident or ordinarily resident or not resident in the Falkland Islands for the purposes of this Ordinance or the Income Tax Ordinance;
(d) by a decision that any income of a person is, for the purposes of this Ordinance or the Income Tax Ordinance , unearned income or, as the case may be, earned income; or

(e) by any other decision of the Commissioner under this Ordinance or the Income Tax Ordinance,
may, subject to section 175, appeal to the Tribunal in accordance with this section."

28. There is no express provision in the Tax Ordinance which articulates the Tribunal's powers or the function of the Tribunal. However it is common ground between the parties, as is clearly right, that it is an appellate jurisdiction. The function of the Tribunal is therefore supervisory, that is to say, the Tribunal could not simply substitute its own views for those of the Commissioner as to the merits as to how the discretion under section 200 of the Taxes Ordinance should be exercised – see *GB Housley Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 1299 and the judgment of Gloster LJ, in particular at paragraph 69 thereof.

29. In such circumstances, as Mr Clegg acknowledged on behalf of A, in accordance with the judgment of Neill LJ in *John Dee Ltd v (Customs and Excise Commissioners* [1995] STC 941 at page 15, the Tribunal, when considering the appeal in relation to the exercise of the Commissioner's discretion under Section 200 of the Taxes Ordinance, had to consider :

"…whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The Tribunal may also have to consider whether the Commissioners have erred on a point of law".

In addition, I accept that the Tribunal could also entertain appeals on questions of fact in circumstances where the right of appeal under section 181 of the Taxes Ordinance is not expressed as being restricted to points of law (in contradistinction to the right of appeal from the Tribunal to the Supreme Court under clause 4(2) of Schedule 3 to the Tax Ordinance). It is also relevant to note that on the appeal clause 3(3)(b) of Schedule 3 provides that the appellant and the Commissioner shall each have the right to call witnesses or to produce written evidence as part of their case. In the present case the Commissioner called two witnesses, who also gave oral evidence, namely Mr Wong and Mr Hill.

30. In the present case, the issue being appealed was essentially that covered by Section 181(1)(c) namely the Commissioner's decision under section 200(1) that B was non

resident in the Falkland Islands (which involved consideration by him of whether A was habitually resident in the Falkland Islands except for such absence therefrom as seemed to him to be of a temporary nature). I address in due course below what the Tribunal was entitled to do in the exercise of that appellate jurisdiction if it found that the Commissioner had erred in a relevant respect.

31. A's appeal came before The Tribunal on 14 September 2016, and the Tribunal issued its Decision on 9 November 2016. At paragraphs 12 to 18 of the Decision the Tribunal summarised the communications between B and the FTO that have already been identified, together with the submissions made by B on behalf of A including in the emails of 3 March 2016, 22 March 2016 and the reply submissions of 16 August 2016. At paragraph 14 the Tribunal expressly quoted the contents of the 28 March Email from Mr Wong on behalf of the Commissioner.

32. At paragraphs 19 to 27 the Tribunal then summarised the Commissioner's case, including by reference to the matters set out in Mr Wong's statement, and what he said about the guidance (i.e. that *"For those who were repeatedly resident and therefore habitually resident for tax purposes before the absence, the Commissioner consistently regards an absence as temporary if it is intended to be for a period not exceeding 2 complete years").* At paragraph 27 the Tribunal summarised the Commissioner's submissions in these terms:-

> "It was submitted that for the purposes of the appeal the key words were "as seems to the Commissioner" in section 200(1) Taxes Ordinance 1997 and the correct issue to be determined by the Tribunal was whether or not the [Commissioner] had made a decision that no reasonable Commissioner could have made. The [Commissioner], it was said, had not followed a rigid policy that would have fettered the [Commissioner]'s discretion but carefully assessed the evidence, applied the appropriate law as set out in section 200(1) Taxes Ordinance 1997 and reached a reasoned and logical conclusion based on the evidence. It was urged that the decision was, therefore, well within the range of reasonable decisions that the [Commissioner] could have reached and that whilst [A] had made a sacrifice for her [child] and the Tribunal might have sympathy with her, it was not a good reason to overturn the [Commissioner]'s decision."

33. After quoting the provisions of Section 200 of the Taxes Ordinance, the Tribunal set out its conclusions and findings in relation to the residency issue at paragraphs 29 to 35, and

at paragraph 36 concluded that the appeal against the Commissioner's decision that [A] was not ordinarily resident for the 2014 tax year succeeded. In this regard:-

(i) At paragraph 29 the Tribunal found:-

> "The Tribunal is satisfied that when [A] left the Falkland Islands… she did not do so with the intention of going to live permanently in the United Kingdom (or elsewhere.). It is clear from the correspondence produced to the Tribunal that she went to the United Kingdom with the specific intention of providing care and support for [C], then a child… while [C] attended a special school... At the time of leaving the Falkland Islands she did not know exactly how long she would be away but she and her husband retained ownership of their home in Stanley and, even if the date of their return was not settled, the Tribunal accepts that the Appellant intended to return to the Falkland Islands when circumstances permitted. The family's plans were, and perhaps still are, evolving with [C]'s needs as [C's] education continued."

It clear from this paragraph of the Decision (and indeed the following paragraphs), that the Tribunal were adopting a multifactorial inquiry when considering the exercise of the Commissioner's discretion and all relevant circumstances that it considered existed and were relevant thereto.

(ii) At paragraph 30 it found that A was absent for the whole of 2014 which brought her habitual residence into question.

(iii) At paragraph 31 it found that the Commissioner was responsible for deciding whether or not A's absence from the Falklands was of a temporary nature and the Taxes Ordinance did not contain any definition of "temporary nature", and in the absence of a statutory definition the Tribunal considered that the word "temporary" must be given its ordinary meaning: not permanent, transitory, lasting for a short time.

(iv) At paragraph 32 it found that the Taxes Ordinance gave no guidance (other than in Section 200(1A)) as to how the Commissioner should assess the temporary nature of a person's absence. The FTO's guidance leaflet was noted and the Tribunal referred to a two year limit being set in it for temporary absence. The Tribunal also noted the evidence given that the Commissioner had also applied a test of necessity in some cases, such as prolonged absence for medical treatment. (paragraph 32).

(v) The Tribunal then concluded:-

"The Tribunal is not satisfied that, at the time the decision was made to treat [A] as no longer ordinarily resident and to refuse her claim for personal allowances, sufficient enquiries had been made into [A's] particular circumstances or that proper account had been taken of the fact that [A] considered it necessary for her to be in the United Kingdom to care for and support her [child] who was then [a child] and receiving special education that was not available in the Falkland Islands."

It is implicit (if not explicit) in the latter part of this conclusion that the Tribunal considered that the Commissioner had not demonstrated that it had taken proper account of factors which the Tribunal considered were material and should have been given proper weight.

(vi) There are then what I consider to be a number of findings of particular importance at paragraph 33 of the Decision:

(a) "The Tribunal rejects the [Commissioner]'s submission that the [Commissioner]'s exercise of discretion was not fettered by policy and that each case was considered on its merits."

In rejecting the Commissioner's submission that the Commissioner's exercise of discretion was not fettered by policy and that each case was considered on its merits, the Tribunal was plainly of the view (and was finding, implicitly if not explicitly) that the Commissioner's exercise of discretion was fettered by policy and that each case was not considered on its individual merits.

(b) "The Tribunal notes that the [Commissioner] was described by Mr Wong as consistently regarding an absence as temporary if it was intended to be for a period not exceeding two years. The Tribunal considers that the [Commissioner] gave too much weight to the practice of applying a two year limit when the two year limit had no basis in law."

This paragraph identifies the policy that the Tribunal has in mind in paragraph 33 of the Decision – namely a policy, which the Tribunal characterised as a practice of applying a two year limit when deciding whether an absence was temporary. The reference to the two year limit having no basis in law is clearly a reference to the fact that any such limit (if limit it be) was not part of any statutory definition, and the guidance did not have statutory force (ie any basis in law).

(c) "The Tribunal finds that the [Commissioner's] decision was based on irrelevant considerations and procedurally inadequate regarding enquiries into [A's] special circumstances and the merits of her case."

Here the Tribunal is spelling out its conclusion, based on its findings in the preceding sentences of paragraph 33, that the Commissioner's decision was based on irrelevant considerations and was procedurally inadequate regarding enquiries into A's case.

(vii) At paragraph 34 the Tribunal noted that the decision to treat A as no longer ordinarily resident in the Falklands was made before A had been living in the UK for two years and, therefore, before the expiry of the two year period referred to in the Commissioner's guidance. The Tribunal stated that it considered that the Commissioner's decision was reached prematurely "particularly in the particular circumstances of [A's] case".

This paragraph again shows that the Tribunal was adopting a multifactorial approach by reference to the particular circumstances of the present case, and shows that the Tribunal considered that the Commissioner's decision was reached prematurely (a view which is criticised on this appeal).

(viii) The Tribunal then concluded (based on its findings in the preceding paragraphs) that the Commissioner's decision-making had been, *"seriously flawed and unreasonable"* (paragraph 35) and that accordingly the appeal against the Commissioner's decision that A was not ordinarily resident for the 2014 tax year succeeded (paragraph 36) - the Tribunal noting that it did not find any merit in the argument under section 195 of the Taxes Ordinance.

E. THE APPEAL TO THE SUPREME COURT

34. The appeal to this Court is pursuant to Schedule 3 paragraph 4 of the Taxes Ordinance which provides, amongst other matters:

"(2) The appellant and the Commissioner may appeal against the determination of the Tribunal to the Supreme Court on a point of law.

(3) An appeal under this paragraph shall be lodged by the appellant or the Commissioner in triplicate with the Registrar of the Supreme Court within twenty-eight days of the receipt by the appellant or the Commissioner (as the case may be) of the notice of the Tribunal's determination; and the notice of appeal shall-

(a) specify the points of law in question;

(b) the reasons for alleging that in relation to that point of law, that the Tribunal was in error.

(4) On determination of an appeal under this paragraph the Supreme Court may-

"(a) correct any immaterial informality or error in the determination of the Tribunal which it is satisfied can be made without injustice to the parties;

(b) quash or vary the determination of the Tribunal in such manner as it considers appropriate; and

(c) make any other order it considers appropriate in the circumstances of the case (including, without prejudice to the generality of the foregoing, an order as to the costs of the appeal to the Supreme Court."

35. As is common ground amongst the parties, a point of law means either a material legal error, a misconstruction of a relevant statutory provision, a finding of fact not rationally supportable on the evidence or a procedural error leading to unfairness (see paragraph 21 of the judgment of Law LJ in *Hague (One of Her Majesty's Inspectors of Health and Safety) v Rotary Yorkshire Limited* [2015] EWCA Civ 696).

F. THE GROUNDS OF APPEAL

36. The Motion on Appeal sets out five grounds of appeal:-

(1) The Tribunal did not find that the Commissioner could not have reached the decision that was reached, it being said that having failed to make this finding of fact, the Tribunal could not in law, have reached the conclusion that it did.

(2) The Tribunal erred in law in placing a positive burden on the Commissioner to ascertain A's particular circumstances beyond requesting A to provide information.

(3) The Tribunal erred in law in concluding that Commissioner had no basis in law for issuing guidance (that is the FTO's leaflet) as to how it would exercise its own discretion when making determinations pursuant to section 200.

(4) The Tribunal erred in law in concluding that the Commissioner should have deferred its tax determination beyond the standard time frame for making a tax determination and issuing a tax assessment.

(5) The Tribunal erred and misapplied the law as set out in section 200 of the Taxes Ordinance as no reasonable Tax Appeal Tribunal directing itself in accordance with the law, could have reached the conclusion that the Tribunal reached.

G. DISCUSSION

37. Whilst the grounds of appeal, as identified above, criticise aspects of the findings of the Tribunal (and I will address separately below each of the matters raised) they do not, in my view, grapple with the gravamen of the Tribunal's findings against the Commissioner which are to be found, in particular, in the final sentence of paragraph 32 of the Decision and paragraph 33 of the Decision.

38. In this regard the Tribunal considered that the Commissioner had failed to take proper account of factors which it considered were material and should have been given proper weight, namely the fact that A considered it necessary for her to be in the United Kingdom to care for and support her child who was receiving special education that was not available in the Falkland Islands (last sentence of paragraph 32) - ie that the Commissioner had failed to take proper account of relevant circumstances a well-established basis for concluding that a body has erred in law (see *John Dee Ltd v (Customs and Excise Commissioners* [1995] STC 941 at page 15)**.**

39. These were relevant circumstances for, as part of a multifactorial approach, they cast light on whether the absence was of a temporary nature. Indeed Mr Wong acknowledged in his evidence that if it was necessary for the taxpayer to accompany her child overseas in order for the student to continue its education, "the Commissioner may be prepared to consider the absence as temporary" (which is a recognition that this was a relevant consideration) albeit that Mr Wong addressed himself at this point in his evidence by reference to any official education assessment rather than the overall factual position as to whether it was (as a matter of fact) necessary for A to accompany C in all the circumstances. I can see no error on a point of law by the Tribunal in this regard of the

type identified by Law LJ in *Hague (One of Her Majesty's Inspectors of Health and Safety) v Rotary Yorkshire Limited* [2015] EWCA Civ 696.

40. Indeed the findings made by the Tribunal in this regard were ones that were open to the Tribunal performing its appellate function - they were entitled to, and did, consider whether the Commissioner had "....disregarded something which should be given weight" (per Neill LJ in *John Dee Ltd v (Customs and Excise Commissioners* [1995] STC 941 at page 15) (emphasis added), and formed the view that the Commissioner had done so (the Tribunal not being satisfied that "proper account had been taken of the fact that [A] considered it necessary for her to be in the United Kingdom to care for and support her [child who was then] receiving special education that was not available in the Falkland Islands") - see also the references to the "particular circumstances of [A's] case" (paragraph 34) and "[A's] special circumstances and merits of her case" (paragraph 33).

41. In this regard the Commissioner rightly recognises the relevance of the decision of the Supreme Court in *R (Davies) v Revenue and Customs Comrs* [2011 1 WLR 2625, 2635 and what Lord Wilson JSC said at paragraph 20 about the requirement of a distinct break (in the context of "residence") mandating a multifactorial inquiry which is equally apt in considering whether there is *"such absence....as seems to the Commissioner to be of a temporary nature."* It is clear that the Tribunal did adopt such a multifactorial approach (as shown by paragraph 29 of the Decision and the reference in paragraph 32 to the particular circumstances surrounding A's considering it necessary for her to be in the UK to care for and support her child).

42. However, and notwithstanding the assertion on behalf of the Commissioner that the Commissioner had "carefully assessed the evidence...and reached a logical conclusion based on the evidence " (see paragraph 27 of the Decision), it is clear that the Tribunal did not agree that the Commissioner had done so having regard to the matters identified in paragraphs 32 and 33 of the Decision. Once again I consider that the Tribunal were entitled to reach such a view on the expressed basis that the Commissioner had (1) failed to take proper account of the matters the Tribunal identified and (2) had fettered its discretion by policy, either of which justified the Tribunal's conclusion that the Commissioner's decision making was seriously flawed and unreasonable.

43. I would add at this point that I do not consider that the evidence before the Tribunal showed that the Commissioner had adopted a multifactorial approach (whether by reference to a "distinct break" or otherwise). In this regard the correspondence from the Commissioner does not support the conclusion that the Commissioner had adopted a multifactorial approach, and the evidence was such that the Tribunal were entitled to conclude that the Commissioner had based its decision as a result of having given too much weight to a practice of applying a two year limit (thereby fettering its discretion) rather than by considering each case, and the case of A in particular, on its merits untrammelled by any policy. In this regard it is notable that in neither the Assessment, nor in the subsequent correspondence, did the Commissioner address the specific circumstances of A detached from (or alongside) any consideration of the guidance. Indeed when he gave his evidence Mr Wong stated, in response to questions from the Tribunal, that the officer who made the assessment considered the intended period of absence but **not** the circumstances. That is not a multifactorial inquiry, nor is it one that has regard to all relevant circumstances. Yet further, it appears that (after the event) the Commissioner looked to (the lack of) a recognition of necessity in the official education assessment to the exclusion of the evidence as a whole advanced on A's behalf in relation to necessity (hence the evidence of Mr Hill).

44. The explanation for the Commissioner's failure to have proper account or proper regard to relevant considerations (specific to A and her child) both at the time of the initial assessment and at all times thereafter (in the 28 March Email, in Mr Wong's statement and in Mr Wong's oral evidence) lies in an examination of how the Commissioner came to reach the decision it did, which was addressed at paragraph 33 of the Decision where the Tribunal rejected the Commissioner's submission that the Commissioner's exercise of discretion was not fettered by policy and that each case was considered on its merits.

45. The Commissioner's approach to the exercise of discretion can most clearly be seen from what was stated by Mr Wong on behalf of the Commissioner in the 28 March Email, namely:-

> "As previously communicated to you, for ordinarily resident the Commissioner has been **consistently only** treating absences not over two complete tax years as temporary. By law, the only temporary absence that is not time bound is for any period during which a taxpayer employed in FIG service carrying out the duties of that employment in the UK."

(emphasis added)

46. The ordinary and natural meaning of these words, as would be understood by any recipient, was that the Commissioner had been "consistently" (ie "uniformly" per the Oxford English Dictionary) "only" (ie "solely" per the Oxford English dictionary) treating absences not over two complete tax years as temporary the corollary of which is that the Commissioner was consistently treating absences over two complete tax years as not temporary for the purpose of section 200 of the Tax Ordinances. This is arguably reinforced by the second sentence which could be regarded as implying that absences other than those provided for in law (ie under section 200(1A) were time bound.

47. The 28 March Email is closest in time to the Assessment (albeit itself a number of months later). Some caution must be exercised in having regard to evidence long after the event in support of a prior exercise of discretion (or indeed any alleged subsequent re-consideration), though in this case that evidence is also consistent with the existence of a policy on the Commissioner's part. It will be recalled that Mr Wong stated in his witness statement of 26 August 2016 (in support of the Commissioner's decision on appeal to the Tribunal) that, "For those who were repeatedly resident and thereby habitually resident for tax purposes before the absence, the Commissioner consistently regards an absence as temporary if it is intended to be for a period not exceeding 2 complete tax years" (as expressly referred to by the Tribunal at paragraph 33 of its Decision). In the same statement Mr Wong referred to the 28 March Email (at paragraph 13 of his statement) stating that the purpose of the 28 March Email was to "reiterate the Commissioner's position regarding temporary absences." Accordingly he did nothing to distance the Commissioner from, or disassociate the Commission from, what was stated in the 28 March Email - on the contrary he thereby represented that it reflected (and was a reiteration of) the Commissioner's position.

48. Mr Wong also gave oral evidence before the Tribunal. In that evidence he confirmed that by reference to the word "temporary" he considered it indicates that it has to end at some point "it is time bound". He said that in order to be consistent with all tax payers, "that's the policy that the commissioner has been consistently applied in all cases" though he said that where a taxpayer submits that they had been away by necessity and it exceeds

two complete tax years, "the commissioner is not completely inflexible" and would look to an official assessment, that is a government assessment (eg on health grounds). This appears to echo the Commissioner's reliance, on the appeal before the Tribunal, upon the fact that the official educational assessment did not stipulate it was essential for A to be present in the UK. This shows that even at the time of the oral hearing itself the Commissioner was maintaining a stance based on the policy with only limited exceptions dependent upon some form of official assessment of necessity, and that it was this policy and the lack of official assessment of necessity (such as an official educational assessment) that was the basis for maintaining the Commissioner's assessment in the present case.

49. An issue arose before me as to whether the assessment under consideration by the Tribunal was the original assessment or any alleged subsequent, or re-visited, assessment by the Commissioner. Prima facie the appeal was from the original assessment (the Assessment), although I accept that the Tribunal could take into account subsequent evidence and any subsequent stance of the Commissioner as expressed in the evidence. The point is academic in the present case because the Commissioner maintained its stance based on its two-year policy with exceptions only in limited circumstances (and then only with official assessment establishing necessity) in the 28 March Email, in Mr Wong's statement and in Mr Wong's oral evidence in which continued to place reliance on the policy and on the lack of an official educational assessment evidencing necessity which he treated as required to support what had been said on A's behalf in the file to suggest that she had to be in the UK. I do not consider that the Commissioner ever adopted a multifactorial inquiry or considered all the circumstances in relation to A's position. To the extent that the Commissioner did consider the matters relied upon by A then (as the Tribunal found) no proper account was taken of them. Furthermore this was not a case where, on a proper exercise of discretion, the Commissioner would inevitably have decided the same thing - on the contrary on a consideration of all the circumstances, the requirement of necessity was made out on the basis of the evidence adduced by A and the factual findings of the Tribunal at paragraph 29 of the Decision.

50. To apply a rigid two year rule would be to unlawfully fetter the discretion provided by sub-section 200(1) of the Taxes Ordinance (as Mr Walker rightly acknowledged and accepted at the oral hearing before me, albeit he denied that the Commissioner adopted

any such rigid two year limit) - see, by analogy, *R (Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin) at [41--[43]. This would be an error of law, and would also be (as a rigid application of a policy) an example of taking into account an irrelevant matter (which a rigidly applied policy without statutory basis would be) or as disregarding something to which the Commissioner should give weight (namely all other circumstances/the particular circumstances of the particular case).

51. In my view the 28 March Email is clear and unequivocal in its terms. Although after the original Assessment, it is representing that the Commissioner has been consistently only treating absences not over two complete years as temporary. That is an unlawful fetter on the Commissioner's discretion as there is no such statutory limitation or provision. A consequence of the application of such a policy is that a multifactorial approach is not adopted and due weight is not given to all the circumstances, here the particular circumstances pertaining to A and why it was necessary for her to absent from the Falkland Islands in the context of the provisions of section 200 of the Taxes Ordinance. The same would be true even if the policy was not applied consistently (as the 28 March Email suggests it was) or rigidly, but was simply applied as the norm - this would be to give too much weight to the policy (as the Tribunal found at paragraph 33) even if the Commissioner might, in certain (undefined) circumstances allow some other factor to trump its policy (for example a governmental health assessment recognising that a health condition requiring an extended stay in the UK).

52. On any view it is clear that the policy is the norm and such a policy fetters the discretion even if there is not complete inflexibility and there is the possibility of exceptions being made - the effect of such a policy is to give too much weight to what is not a statutory time requirement (as the Tribunal found at paragraph 33 of the Decision) which itself acts as a fetter on the discretion. I can also see no justification for any exception of necessity being limited to a case where there is a governmental or official assessment - what is to be adopted is a multifactorial inquiry based on all the evidence. Thus, for example, in the present case, the evidence on behalf of A was that it was necessary for A to accompany her child C for the reasons identified. To demand an official assessment or recognition by a governmental authority of the fact of necessity (which remained the Commissioner's stance throughout in the context of the evidence of Mr Wong and Mr Hill) is a further fetter on the Commissioner's discretion as the Commissioner should look at the evidence

as a whole - and by focussing upon any official assessment the Commissioner is failing to have regard, or any proper regard, to relevant considerations (namely the evidence as a whole including evidence from any other source that is before the Commissioner, and which has the potential to be accepted by the Tribunal).

53. In fact it transpired from Mr Wong's oral evidence that the Commissioner had not originally considered the circumstances at all other than the expressed intention as to how long A would be away (and so had not conducted a multifactorial inquiry):

"Paul Freer - You'd not considered the circumstances other than they intended to be away for at least two years."
"Leon Wong - Yes, that's correct. I didn't consider it personally, but the Officer who made the assessment, based on that exchange, we just wanted to establish the intended period of absence"
"Paul Freer - But not the circumstances?
"Leon Wong - No, that wasn't the case."

That is a clear failure to have regard to all relevant considerations, and Mr Walker, on behalf of the Commissioner, ultimately did not seek to argue to the contrary. However it is equally clear that at no stage thereafter did the Commissioner apply a multifactorial approach or consider all the circumstances. Indeed the Commissioner maintained its stance based on policy in the 28 March Email, in Mr Wong's witness statement, and in Mr Wong's oral evidence, where once again Mr Wong re-iterated the policy consistently applied by the Commissioner, and identified any exception as being based on an official assessment - rather than undertaking the necessary multifactorial inquiry into all the circumstances in which proper weight should have been given to the evidence adduced on behalf of A as to necessity the focus remained on the lack of an official educational assessment evidencing necessity (see in particular the evidence of Mr Wong at pages 21 and 24 to 25 of the transcript).

54. The findings of the Tribunal in respect of the Commissioner's policy fall full square within what the Tribunal had to consider, namely:

"…whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The

Tribunal may also have to consider whether the Commissioners have erred on a point of law"

(see the judgment of Neill LJ in *John Dee Ltd v (Customs and Excise Commissioners* [1995] STC 941 at page 15).

55. To consistently only treat absences not over two complete years as temporary is to act in a way in which no reasonable Commissioner could have acted (as it is to fetter the Commissioner's discretion), is to take into account an irrelevant matter (a rigidly applied policy without statutory basis), is to disregard matters which should be given weight (all other circumstances which were to be taken into account on a multifactorial approach), and is to err in law. The same is true of a policy that was the norm (and which was therefore given undue weight) and which only allowed for exceptions in limited circumstances and which failed to have regard to all sources of evidence as part of a multifactorial inquiry *a fortiori* in the present case where there was no or no proper regard given to all the circumstances, either at the time of the Assessment or at any time thereafter.

56. Accordingly the Tribunal was entitled to reject the Commissioner's submission that the Commissioner's exercise of discretion was not fettered by policy and that each case was considered on its merits, and also to find that the Commissioner's decision was based on irrelevant considerations (see paragraph 33 of the Decision) and that the Commissioner's decision making was seriously flawed and unreasonable (paragraph 35).

57. In reaching such decisions the Tribunal did not make a material legal error, nor misconstrue any relevant statutory provision, not make any finding of fact not rationally supportable on the evidence, nor commit a procedural error leading to unfairness (see paragraph 21 of the judgment of Laws LJ in *Hague (One of Her Majesty's Inspectors of Health and Safety) v Rotary Yorkshire Limited* [2015] EWCA Civ 696). On the contrary, their findings were supported by the evidential material before them, by the 28 March Email, and the written and oral evidence of Mr Wong applied to the applicable legal principles governing the appeal before them. There was no error of law in relation to their findings in this regard, nor the conclusions they reached in consequence, and the current appeal, against the quashing of the Commissioner's Decision, stands to be dismissed.

58. In such circumstances there is no basis for allowing an appeal against the findings of the Tribunal in relation to the Commissioner's Decision. For completeness, however, I will address the five specified grounds of appeal relied upon on behalf of the Commissioner.

59. The first is that it is said that the Tribunal did not find that the Commissioner could not have reached the decision that was reached, it being said that having failed to make this finding of fact, the Tribunal could not in law, have reached the conclusion that it did. I disagree. The Tribunal could and did reach the conclusion it did on the principles identified by Laws LJ in *Hague (One of Her Majesty's Inspectors of Health and Safety) v Rotary Yorkshire Limited*, supra. The Tribunal's findings in that regard were not dependent upon it making the finding of fact propounded.

60. In any event to consistently only treat absences not over two complete years as temporary is to act in a way in which no reasonable Commissioner could have acted, and so no Commissioner could have reached the decision it reached, being based, as it was, on such reasoning. This is the logical consequence of the findings that were made in relation to the Commissioner's application of the guidance which fettered the Commissioner's discretion. The same is true in relation to the findings that the Commissioner failed to take proper account of relevant factors/considerations (see paragraph 32 of the Decision) or was based on irrelevant considerations (see paragraph 33 of the Decision) whether the two year rule was a fetter on the Commissioner's discretion or whether in having regard to it, the Commissioner had given too much weight to it and/or failed to take account of relevant factors/considerations or was based on irrelevant considerations. The same is true in relation to the Commissioner's failure to adopt a multifactorial approach which was persisted in throughout with a continued reliance on the policy and a lack of an educational assessment supporting necessity.

61. The second ground of appeal is that it is said that the Tribunal erred in law in placing a positive burden on the Commissioner to ascertain A's particular circumstances beyond requesting A to provide information. To the extent that the Tribunal did place a positive burden on the Commissioner to ascertain A's particular circumstances I accept that the Tribunal would arguably have gone too far - it is for the taxpayer to set out the circumstances it relied upon. However what was said by the Tribunal at paragraph 32 of

its Decision was only one of the reasons given for setting aside the Decision. The reasons I have identified independently justify the decision reached by the Tribunal.

62. The third ground of appeal is that it is said that the Tribunal erred in law in concluding that Commissioner had no basis in law for issuing guidance (that is the FTO's leaflet) as to how it would exercise its own discretion when making determinations pursuant to section 200. This is to misunderstand the Tribunal's reference to the two year limit having, "no basis in law" (paragraph 33 of the Decision). All the Tribunal was doing in so stating was to highlight that there was no statutory basis for the guidance (there were no statutory provisions specifying a time limit). As recognised in *R v Davies* (supra) the Revenue (here the Commissioner) is perfectly entitled to publish documentation which gives guidance on how discretion will be exercised consistent with the relevant statutory provisions. However the vice of the guidance in the present case was that it was reflective of a policy that "for ordinarily resident the Commissioner has been consistently only treating absences not over two complete tax years as temporary". Such a policy fettered the statutory discretion.

63. The fourth ground of appeal is that it is said that the Tribunal erred in law in concluding that the Commissioner should have deferred its tax determination beyond the standard time frame for making a tax determination and issuing a tax assessment. The factual circumstances in the present case were unusual, and highly dependent on the continuing (and potentially changing) needs of C. I consider that it was in that context that the Tribunal's findings in paragraph 34 of the Decision are to be understood. In any event what was there said by the Tribunal, was only one of the reasons given for setting aside the Commissioner's decision. The reasons I have identified independently justify the decision reached by the Tribunal.

64. The final ground of appeal is that it is asserted that the Tribunal erred and misapplied the law as set out in section 200 of the Taxes Ordinance as no reasonable Tax Appeal Tribunal directing itself in accordance with the law, could have reached the conclusion that the Tribunal reached. This is a point without any substance that is not made out on the facts. A Tribunal directing itself in accordance with the law could indeed have reached the conclusion the Tribunal reached. Just as an extended absence out of the Falklands Islands for medical treatment, where a person was habitually resident in the

Falklands, could be an absence of a temporary nature within the meaning of section 200(1) of the Taxes Ordinance, so too could an extended absence out of the Falklands Islands necessitated by a need to support a child with special educational needs, where a person was habitually resident in the Falkland Islands. In the present case A was habitually resident in the Falkland Islands (and retained a property in Stanley, a car in Stanley and a bank account in Stanley), and the Tribunal found as a matter of fact (which is unchallengeable on this appeal being a question of fact), that when A left the Falkland Islands she did not do so with the intention of going to live permanently in the United Kingdom and intended to return to the Falkland Islands when circumstances permitted (paragraph 29 of the Decision). The Tribunal did not confuse a right to reside with the question of residence. The Tribunal applied the statutory language in section 200 of the Taxes Ordinance and reached a conclusion that a Tax Appeal Tribunal could reach, directing itself in accordance with the law.

65. That leaves one final question namely whether it was open to the Tribunal to substitute its own view for that of the Commissioner once it had decided that the Commissioner's decision should not be upheld and should be quashed. It is common ground that if, for example, the exercise being performed by a tribunal is one of judicial review the Tribunal could not substitute its own view for that of the Commissioner. In the present case the Tribunal was carrying out an appellate function. In this regard reference is made to the decisions in *John Dee Ltd v Customs and Excise Commissioners* (supra) and *GB Housley Limited v The Commissioners for Her Majesty's Revenue and Customs* (supra). However counsel for A submits that such cases are distinguishable on their facts. The *John Dee* case is concerned the exercise of the Customs and Excise Commissioners of its powers under paragraph 5(2) of schedule 7 to the Value Added Tax Act 1983 to take security which it could do "for the protection of the revenue". Neill LJ held that the appeal tribunal was not able to substitute its own view as "the protection of the revenue is not a responsibility of the Tribunal or of a court". In the *GB Housley* case the appeal was against a tax assessment and the particular issue was the effect of regulation 29(2) of the Value Added Tax Regulations 1995 which gave the HMRC a discretion to allow a credit for input tax notwithstanding that the taxable person does not hold a valid tax invoice. Having determined that HMRC wrongly failed even to consider the exercise of the regulation 29(2) discretion, the assessment was set aside, but it was not the court's place

to determine whether another assessment should be issued, that was a decision for the HMRC (see paragraph 80 of Gloster LJ's judgment).

66. In contrast it is said that the case in hand, involving as it does a general right of appeal under section 181 (1)(c) of the Taxes Ordinance, does permit the Tribunal to substitute its own view as to the residency issue for the Commissioner's once it had determined that the Commissioners' decision was flawed, in line the principles stated by Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, 220C:

> "The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference that particular facts existed or did not exist ... There may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision ... is so aberrant that it must be set aside upon the grounds that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

67. For its part the Commissioner does not dispute the principle as set out by Lord Diplock in respect of the circumstances when a court can exercise its own original jurisdiction. However the Commissioner submits that in this case the necessary preconditions for the Tribunal to be able lawfully to do so were not met because the Commissioner had not misunderstood the law, had not relied upon facts that did not exist and did not reach a conclusion so aberrant that no reasonable Commissioner could have reached it.

68. In circumstances where, conceptually, there is the potential for a Commissioner to err in any number of respects (and where an appeal to the Tax Appeal Tribunal can be in relation to questions of fact as well as points of law) I do not consider it would be either helpful or appropriate for me to give general guidance as to the boundary between the situation where a Tax Appeal Tribunal should simply quash a decision and refer the matter back to the Commissioner for reconsideration and that where it is entitled to exercise an original discretion of its own. I would only observe that in circumstances where a Tax Appeal Tribunal can hear evidence on an appeal (as the Tribunal did in the

present case) it is likely that a Tax Appeal Tribunal will itself be considering additional factual material to that before the Commissioner and may be making factual findings of its own which may or may not be determinative of the issues that arise in relation to the appeal and the decision of the Commissioner.

69. It suffices for me to conclude that on the evidence before this Tribunal, and the findings of this Tribunal, I am satisfied that the Commissioner did misunderstand the law, specifically section 200 of the Taxes Ordinance and the proper approach to the exercise of discretion thereunder, as the Commissioner interpreted it as entitling it to consistently only treat absences not over two complete tax years as temporary (save for the possibility of limited exceptions which themselves fettered the discretion), whereas section 200 of the Taxes Ordinance imposed no such test or restriction, and required a multifactorial inquiry (which was not carried out at any time). Also I conclude that to the extent that the Commissioner put his mind to the facts before him (at the time of the initial Assessment and/or at any time thereafter through to the hearing of the oral appeal hearing) he misunderstood the evidence before him which I consider spoke with one voice that, as the Tribunal found, when A left the Falkland Islands she did not do so with the intention of going to live permanently in the United Kingdom, she went there with the specific intention of providing care and support for C (ie that such absence was necessary for that purpose), and that A intended to return to the Falkland Islands when circumstances permitted (as the Tribunal found at paragraph 29 of the Decision). It is not necessary that it also be shown that the Commissioner's conclusion, that A's absence in the circumstances which existed was not of a temporary nature, was so aberrant that no reasonable Commissioner could have reached it though, on any view, it was, at the very least, contrary to the weight of the evidence before the Commissioner (and before the Tribunal).

70. Accordingly, and in addition to quashing the Commissioner's decision, the Tribunal was also entitled to find, based on a consideration of all the circumstances (which it undertook), that A remained ordinarily resident in the Falkland Islands for the 2014 tax year.

71. I accordingly dismiss the Commissioner's appeal. Costs follow the event, and accordingly I order that the Commissioner, as the unsuccessful party, pay A's costs of the

appeal, which I summarily assess in the sum of £7,422, such costs to be paid within 28 days of the date of this Judgment.