



**RUDGE REVENUE REVIEW**

**ISSUE XXXIV**

**MICHAEL PARKER V. HMRC:  
AN EXCEPTIONALLY INTERESTING CASE**

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## **MR PARKER'S SITUATION**

Michael Parker, the taxpayer appealing against HMRC's assessment of his income for the UK fiscal year 2019/20 in *Michael Parker v. HMRC*,<sup>1</sup> is a chartered engineer who was employed to manage civil engineering and construction works in the Kurdistan region of Iraq from July 2017 to June 2025.<sup>2</sup>

During the UK fiscal year 2019/20, Mr Parker was employed on a rotational basis and, as his family home was in the UK, his employer arranged and paid for him to take return flights between Iraq and London.<sup>3</sup>

## **THE MATTERS IN DISPUTE**

### **Was the Overseas Work Test met?**

It seems that the parties accepted that in that fiscal year, the First, Second, Fourth and Fifth Automatic Overseas Tests of the Statutory Residence Test (the 'SRT') were not met.<sup>4</sup> HMRC asserted, in addition, that the Third Automatic Overseas Test (the 'Overseas Work Test') was also not met but Mr Parker rejected that assertion.<sup>5</sup> It was common ground that, if the Overseas Work Test was met, then Mr Parker was not resident in the UK for UK fiscal purposes for the UK fiscal year 2019/20 and that, if it was not, he was so resident.<sup>6</sup>

### **A matter of Day Counting**

It was also common ground that Mr Parker would have met the Overseas Work Test in 2019/20 if the number of days which he spent in the UK in that fiscal year were less than 91 and, if it

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<sup>1</sup> *Michael Parker v. HMRC* [2026] UK FtT 00652 (TC). In this review we refer to this case as *Parker v. HMRC* and to the judgment of the Tribunal as set out in the report of the case as the 'Decision'

<sup>2</sup> See the Decision para. 26

<sup>3</sup> See the Decision paras. 27 & 28

<sup>4</sup> See the Decision para. 9

<sup>5</sup> See the Decision para. 9

<sup>6</sup> See the Decision para. 18 - 21

were 91 or more, he would not have met the test and would have been resident in the UK for the fiscal year.<sup>7</sup>

Further, it was also common ground that he was present in the UK at midnight on 100 days in the year. The Decision records that:

*'MP [the initials by which the Tribunal referred to Mr Parker] claimed that 11 of those days [the 100 days on when he was present in the UK at midnight] did not count pursuant to paragraph 22(2) which would bring his UK day count down to 89. HMRC subsequently accepted that 7 of those days did not count as they were due to covid and came within the third case set out in sub-paragraph (7) of paragraph 22. HMRC therefore assert [sic] that MP was present in the UK at the end of the day on 93 days.'*<sup>8</sup>

### **The General Day Count Rule**

FA 2013 Sch 45<sup>9</sup> para. 22(1) provides the general day count rule that:

*'If P [by which the legislation refers to the taxpayer concerned] is present in the UK at the end of a day, that day counts as a day spent by P in the UK.'*

Para. 22(2) of the SRT Schedule provides an exception to the general rule as follows:

*'But it does not do so in the following three cases.'*

The cases to which the SRT Schedule para. 22(2) refers are:

- (a) para. 22(3) which provides the Transit Exception;
- (b) paras. 22.(4), (5) and (6) which provides the Exceptional Circumstances Exception; and
- (c) paras. 22(7), (8) and (9) which provides the Coronavirus Exception.

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<sup>7</sup> See the Decision para. 18

<sup>8</sup> See the Decision para. 13

<sup>9</sup> We refer to Finance Act 2013 Sch 45 as the SRT Schedule

### **Was the Tribunal in error?**

It will be seen from the above quotation from para. 13 of the Decision that it records that HMRC accepted that seven of the days on which Mr Parker was present at midnight were days to which para. 22(7), that is the Coronavirus Exception, applied. This would seem to be a mistake on the part of the Tribunal because that exception only applies where the taxpayer's presence in the UK is for '*an applicable reason related to coronavirus disease*'. What are applicable reasons is set out in para. 22(8) of the SRT Schedule as follows:

' ...

- (a) *that P is present in the UK as a medical or healthcare professional for purposes connected with the detection, treatment or prevention of coronavirus disease;*
- (b) *that P is present in the UK for purposes connected with the development or production of medicinal products (including vaccines), devices, equipment or facilities related to the detection, treatment or prevention of coronavirus disease..'*

There is nothing in the judgment to suggest that in addition to being a chartered engineer Mr Parker was a medical or healthcare professional and nothing to indicate that he was involved in the development or production of any of the medicinal products etc which are listed in para. 22(8)(b).

Later in the judgment it is recorded that:

*'HMRC accepted that MP was prevented from leaving the UK due to Covid for seven of the days but rejected that the cancellation of his flight from Heathrow Airport to Dublin*

*on 29 February 2020 due to Storm Jorge was an exceptional circumstance and that the 8, 17 and 28 were transit days. This brought MP's UK day count up to 93.'*<sup>10</sup>

This would seem to indicate that HMRC had accepted, not that the Coronavirus Exception applied to these seven days, but rather that the Exceptional Circumstances Exception applied to them and that the exceptional circumstances by reason of which it applied were the disruptions caused by the Covid pandemic.

### **Dispute as to the application of two exceptions to the Basic Day Count Rule**

So the matters in dispute would seem to have been whether the Exceptional Circumstances Exception applied to Mr Parker's presence in the UK at midnight on 29<sup>th</sup> February 2020 preventing that day from counting as a day spent by him in the UK and whether the Transit Exception applied to his presence in the UK on the midnights of the 8<sup>th</sup>, 17<sup>th</sup> and 28<sup>th</sup> February 2020, preventing those days from counting as days spent by him in the UK.

### **THE FACTS RELEVANT TO THE MATTERS IN DISPUTE**

The facts that are of relevance to these disputed days are recorded at paras. 29 – 35 of the Decision:

*'29. On 8 February 2020, the Appellant arrived at Heathrow Airport from Iraq via Istanbul and stayed overnight at a hotel near Heathrow Airport. On 9 February 2020, MP flew from Heathrow Airport to Naples for a holiday. On 17 February 2020, MP returned to Heathrow Airport from Naples and stayed overnight at a hotel near Heathrow Airport. On 18 February 2020, MP flew from Heathrow Airport to Tokyo for a holiday.*

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<sup>10</sup> See the Decision para. 45

30. *On 28 February 2020, MP returned to Heathrow Airport from Tokyo and stayed overnight at a hotel near Heathrow Airport.*

31. *On 29 February 2020, MP boarded a British Airways (BA) flight at Heathrow Airport that was due to depart for to Dublin at 1335hrs. However, after a number of hours sitting on the plane, waiting to take off, cabin crew informed the passengers that Dublin Airport had been closed due to Storm Jorge and consequently the flight was cancelled.*

32. *Due to Storm Jorge, no flights were able to land at Dublin Airport from 1420hrs to 1553hrs on 29 February 2020. During this time 20 flights had been scheduled to land at Dublin Airport. MP's flight was due to land at Dublin airport at 1455hrs. MP's BA flight was one of at least two flights from the UK to Dublin that had been cancelled as a result of the disruption at Dublin Airport. At least two further flights from the UK to Dublin were diverted and at least 23 flights from the UK to Dublin were delayed.*

33. *From the above it is clear that there was severe disruption throughout the afternoon and evening for passengers travelling from the UK to Dublin on 29 February 2020 and a significant number of people who were scheduled to fly from the UK to Dublin on this day were unable to do so.*

34. *MP, together with the other 200 or so passengers on his flight, disembarked. The airline provided MP and the other passengers with a voucher for food and hotel accommodation near the airport. MP was told by BA that he would be booked onto a flight to Dublin the following day and that they would notify him of the details by email, which they did. MP's checked in luggage remained with BA overnight and was put on the rescheduled flight the next day.*

35. On 1 March 2020 MP returned to Heathrow Airport and boarded his rescheduled BA flight to Dublin departing Heathrow Airport at 1045hrs and left the UK.<sup>11</sup>

## **THE EXCEPTIONAL CIRCUMSTANCES EXCEPTION**

### **Lord Justice Nugee's summary of the conditions for the application of the Exception**

In considering whether the Exceptional Circumstances Exception applied in respect of Mr Parker's presence in the UK on 29<sup>th</sup> February 2020 the Tribunal reproduced the summary of the five conditions for the application of the exception which Lord Justice Nugee set out in *A Taxpayer v. HMRC* [2025] EWCA Civ 106:<sup>12</sup>

*"4. On this wording, there are 5 conditions, all of which need to be fulfilled before para 22(4) applies. ... The 5 conditions are as follows:*

- (1) the circumstances are exceptional;*
- (2) the circumstances are beyond P's control;*
- (3) P would not be present at the end of the day but for those circumstances;*
- (4) the circumstances prevent P from leaving the UK; and*
- (5) the person intends to leave the UK as soon as those circumstances permit."<sup>13</sup>*

As the Decision records, HMRC asserted that Conditions (1), (4) and (5) of Lord Justice Nugee's five conditions were not met.

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<sup>11</sup> See the Decision paras. 29 - 35

<sup>12</sup> In this Review we refer to this case as *A Taxpayer v. HMRC*

<sup>13</sup> See the Decision para. 67

## **Lord Justice Nugee's summary of the Tribunal's task**

The Tribunal went on to refer to Lord Justice Nugee's remarks in *A Taxpayer* that with respect to whether a taxpayer is prevented from leaving the UK:

*'[54] ... the position is this. The FTT is ultimately required, having found the primary facts, to make an assessment whether the circumstances prevented P from leaving the UK.*

...

*"What I consider it therefore requires the FTT to do (in a contested case) is (i) find as a fact what the circumstances are; (ii) decide whether those circumstances prevented P from leaving the UK; and (iii) decide whether they were exceptional. That to my mind requires the FTT to look at all the relevant circumstances, and ask whether those circumstances taken as a whole prevented P from leaving, and whether those circumstances taken as a whole were exceptional."*<sup>14</sup>

The Tribunal went on to refer to Lord Justice Nugee's explanation that:

*"(1) The meaning of "exceptional" as an ordinary English word is a question of fact. In R v Kelly (Edward) [2000] QB 198, a case which concerned the meaning of "exceptional circumstances" in s. 2 of the Crime (Sentences) Act 1997, Lord Bingham of Cornhill CJ said at 208C:*

*"We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance that is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."*

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<sup>14</sup> See the Decision paras. 69 & 70

*No issue has been taken with that – nor do I think any could reasonably be – as an explanation of what “exceptional” (or “exceptional circumstances”) means as a matter of ordinary English.”*<sup>15</sup>

### **Were Mr Parker’s circumstances exceptional?**

Having referred to these statements of Lord Justice Nugee in *A Taxpayer* the Tribunal then turned to the question of whether Mr Parker’s circumstances were in fact exceptional. The Decision records that:

*‘HMRC submit that adverse weather conditions and flight cancellations are not exceptional and therefore the fact that MP’s flight to Dublin was cancelled due to adverse weather conditions is not exceptional.’*<sup>16</sup>

Rather unusually, the Decision often refers to Mr Parker’s submissions rather than to the submissions of Mr Parker’s Counsel. This may be because Mr Parker was unusually active in providing the base data underlying his case. In any event, the Decision records that:

*‘MP submits that while adverse weather conditions are not exceptional, flight cancellations as a result of adverse weather conditions are very rare. MP analysed CAA data for all flights from 27 UK airports, including all major hubs, for the period from 2018 to 2024. This analysis established that the overall flight cancellation rate in this period is 1.53% and if one takes out the Covid affected periods this reduces further to 1.39%. The CAA data does not provide the reason for the cancellation so it is not possible to establish from this data how many of the cancellations were due to adverse weather. Other possible reasons for cancellation outside of covid put forward by MP are as follows:*

- *“Industrial action either in the UK or at the flight destination (baggage handlers, ground staff, air crew etc).*

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<sup>15</sup> See the Decision para. 71

<sup>16</sup> See the Decision para. 73

- *Staff shortages (pilots, air crew, ground staff)*
- *Aircraft technical problems*
- *Air traffic control system failures (IT/software)*
- *Non-arrival of the incoming aircraft*
- *Civil unrest or military disruption at the destination*
- *Other outside factors (recent high-profile examples in the UK include fire at a Heathrow substation and drone flying near Gatwick)''<sup>17</sup>*

In respect of this information the Tribunal said:

*'We recognise that the statistical evidence relied upon by the Appellant relating to flight cancellation rates is necessarily general in nature. We therefore do not treat the figures as determinative in isolation.*

*However, the evidence is nonetheless informative. It provides an empirical context showing that flight cancellations, viewed across UK aviation as a whole, are uncommon rather than routine and further that only a subset of these cancellations will be due to adverse weather conditions.*

*When that general context is considered together with the specific facts of this case — namely the closure of a major international airport due to a named storm event, resulting in widespread operational disruption — we are satisfied that the circumstances encountered by MP were out of the ordinary course, unusual, and not regularly or normally encountered by international travellers.'*<sup>18</sup>

On that basis the Tribunal was able to conclude that:

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<sup>17</sup> See the Decision para. 74

<sup>18</sup> See the Decision paras. 75 - 77

*'Accordingly, looking at all the relevant circumstances as required by A Taxpayer, and applying the ordinary meaning of "exceptional" as explained by Lord Bingham and followed by Nugee LJ, we find that the circumstances taken as a whole were exceptional.'*<sup>19</sup>

**Did the exceptional circumstances prevent Mr Parker leaving the UK and did he intend to do so as soon as he could?**

The Tribunal then turned to the question whether these exceptional circumstances prevented Mr Parker from leaving the UK on 29<sup>th</sup> February 2020 and whether, on that day, he intended to leave the UK as soon as the exceptional circumstances permitted although in doing so it rather elided the two questions. On these questions HMRC had submitted that:

*'... MP was not actually prevented from leaving the UK on the 29 February 2020 and he did not intend to leave the UK as soon as circumstances permitted because he did not take any steps to depart the UK as soon as the adverse weather conditions had sufficiently abated for Dublin Airport to reopen. MP did not try to secure an alternative flight to Dublin on 29 February 2020 or to secure a flight or alternative means of transport out of the UK to any other destination that day. Instead MP's intention was to depart the UK only in accordance with arrangements made by BA, which were not until the next day, some time after the adverse weather conditions had prevented flights from landing in Dublin.'*<sup>20</sup>

The Tribunal then summarised the approach that it should take in respect of these questions:

*'In determining whether the exceptional circumstances prevented MP from leaving the UK that day and whether he intended to leave the UK as soon as those circumstances permitted, we approach the question by reference to practical reality rather than abstract possibility. The test is not whether, with the benefit of hindsight, it was*

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<sup>19</sup> See the Decision para. 78

<sup>20</sup> See the Decision para. 79

*theoretically possible for MP to attempt to leave the UK by some alternative means or to a different destination, but whether the circumstances as they presented themselves at the time reasonably permitted departure.’<sup>21</sup>*

It then considered the facts relevant to Mr Parker’s presence in the UK on 29<sup>th</sup> February 2020 and concluded that he was both prevented from leaving the UK on that day by the exceptional circumstances and that he intended to leave the UK as soon as those circumstances permitted:

*‘MP’s destination was Dublin. His scheduled flight was cancelled after boarding due to the closure of Dublin Airport because of Storm Jorge. These circumstances did prevent him from leaving the UK as planned. At that point there was widespread disruption, cancellations, diversions and delays, and no information available to MP to suggest that alternative flights to Dublin later that day were realistically obtainable. MP’s checked in luggage remained with the airline; the airline arranged overnight accommodation and expressly informed him that it would rebook him on a flight to Dublin the following day, which it did.*

*In those circumstances, we find that MP’s acceptance of the airline’s arrangements, and his departure on the rebooked flight the following morning, constituted leaving the UK as soon as circumstances permitted. The fact that weather conditions may have improved later that day does not, of itself, mean that the circumstances then permitted departure in any meaningful or practical sense. Ordinary societal expectations do not require a passenger, in the midst of significant disruption, to disregard airline arrangements, abandon checked in luggage, or attempt speculative alternative travel in order to demonstrate an intention to leave the UK “as soon as those circumstances permit”.*

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<sup>21</sup> See the Decision para. 80

*It follows that as a result of MP's BA flight to Dublin being cancelled and BA being unable to book him onto another flight to Dublin that day, MP was prevented from leaving the UK on 29 February 2020 and therefore met Nugee LJ's condition 4. Further he left the UK the next day on the next flight offered to him by BA and this meets condition 5.'*<sup>22</sup>

Although HMRC had not submitted that elements 2 and 3 of the Exceptional Circumstances Exception were not met in respect of Mr Parker on 29<sup>th</sup> February 2020, the Tribunal expressly found that they had been met. It therefore concluded that all five conditions for the application of the exception were met and that the Exceptional Circumstances Exception applied to Mr Parker's presence in the UK on 29<sup>th</sup> February 2020 and that, therefore, this did not count as a day spent by him in the UK.

## **THE TRANSIT EXCEPTION**

### **The conditions for the application of the Exception**

The conditions which must be satisfied for the Transit Exception to apply are that the taxpayer:

- (a) only arrives in the UK as a passenger on the day concerned;
- (b) leaves the UK the next day; and
- (c) between arrival and departure, does not engage in activities that are to a substantial extent unrelated to his passage through the UK.<sup>23</sup>

### **The first condition (para. 22(3)(a)): 'Arrives as a passenger'**

In respect of the application of the Transit Exception to Mr Parker's presence in the UK on the 8<sup>th</sup>, 17<sup>th</sup> and 28<sup>th</sup> February 2020, HMRC asserted that, on these days, Mr Parker could not satisfy the first condition of the exception that he arrived in the UK as a passenger. HMRC

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<sup>22</sup> See the Decision paras. 81 - 83

<sup>23</sup> The SRT Schedule para. 22(3)

relied on the definition of a passenger in the Court of Appeal decision in *Laroche v. Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12.<sup>24</sup>

Although the Court of Appeal in *Laroche* specifically considered the definition of this word only in respect of its use in the Warsaw Convention (concerning international carriage by air), HMRC's argument proceeded on the basis that this is also the sense in which the word is used in the Transit Exception. The Tribunal's decision proceeds, without saying so expressly, on the assumption that HMRC was correct to do so and it does not appear from the Decision that the Tribunal's assumption was challenged by Mr Parker's Counsel.

### ***HMRC's submissions on whether Mr Parker arrived as a passenger***

HMRC submitted:

*' ... that this definition supports their [sic] contention that if the UK is P's final destination, P is not a passenger when P arrives in the UK because their journey is at an end and they are no longer in the process of being conveyed from place to place.*

*HMRC submit [sic] that each of MP's journeys was a distinct journey so that when he arrived in the UK on each occasion, that was the end of his journey and he was no longer being conveyed and therefore no longer a passenger.*

*HMRC accept that if MP had been on a single ticket from Iraq to Naples, Naples to Tokyo or Tokyo to Dublin that had an overnight stopover at a hotel near Heathrow Airport, he would meet the definition of "passenger" because the UK would not be the end of his journey on each occasion. They submit however that because MP had separate tickets for each part of his journey into and out of the UK, he was not a passenger when he entered the UK.'*<sup>25</sup>

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<sup>24</sup> See the Decision paras. 50 & 51

<sup>25</sup> See the Decision paras. 51 & 52

Neither Mr Parker's Counsel nor the Tribunal noticed that, even under HMRC's construction of this definition, at the point at which Mr Parker arrived in the UK for the purposes of the SRT his journey was not at an end because for those purposes the UK extends to its territorial waters and its airspace.<sup>26</sup> Therefore, even if one applies the *Laroche* definition in its narrowest form, when Mr Parker entered the UK he did so as a 'passenger'.

HMRC's position that whether or not one or two tickets are purchased for a journey of two legs is determinative of whether a person is still a passenger during a stopover is in accordance with the opinion expressed in its manuals in which it says:

*'Transit days do not count towards the total day count for SRT. A transit day is a day when the individual is travelling from 1 country outside the UK **on a through ticket** [emphasis added] to a final destination to another country outside the UK, and whilst on route:*

- *they arrive as a passenger*
- *they leave the UK the next day, as a passenger*

*Provided that, between their arrival and departure, they do not engage in any activities that are to a substantial extent unrelated to their passage through the UK.'*<sup>27</sup>

The words '*on a through ticket*' were added to this text in HMRC's manuals some time after the first edition of our comprehensive book on the Statutory Residence Test, *McKie on Statutory Residence*, was published in 2014. The condition it states is not a condition of the Transit Exception and there was no justification for its insertion into HMRC's summary of the exception. What possible purpose could Parliament have had in giving relief where a taxpayer purchases a single ticket covering two journeys but not where he purchase separate tickets

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<sup>26</sup> The SRT Schedule para. 145 and the United Nations Convention on the Law of the Sea (Montego Bay, 10<sup>th</sup> December 1982; TS 81 (1999) Cmnd 4524) Art 2, para. 2

<sup>27</sup> HMRC's Residence and FIG Regime Manual para. RFIG20730

for the two journeys? It is a good example of HMRC's practice of stating in its Manuals that reliefs given in the SRT are subject to restrictions which are entirely fictitious.

### ***The Tribunal's conclusions on HMRC's submissions on this point***

The Tribunal had little difficulty in dismissing HMRC's argument on this point:

*'We agree with counsel for MP that this distinction is arbitrary and not supported by the wording of the legislation. There is nothing in the legislation that provides that a person must be booked on a single ticket that includes transit through the UK in order to qualify as a "passenger" on entering the UK.*

*MP's evidence was that he had bought return tickets for his holidays from Heathrow Airport because his employer bought and paid for his ticket to and from Heathrow Airport and his reasonable view, supported by evidence, was that it was cheaper and logistically easier to buy return tickets from Heathrow Airport rather than to buy single tickets or multi stop tickets to travel to Naples, Tokyo and Dublin. Beyond this financial and logistical advantage, MP had no preference for travelling via Heathrow Airport or reason to stay at a hotel near Heathrow Airport. MP's choice of ticket type does not prevent MP from being a passenger while in the UK.*

*Further the condition in paragraph 22(3)(a) is only that "**P arrives** [emboldening added] in the UK as a passenger". Even if the UK was MP's final destination and that meant that he was no longer being "conveyed" from one place to another after he arrived in the UK, he would still have been "conveyed" to the UK and therefore arrived in the UK as a passenger.<sup>28</sup>*

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<sup>28</sup> See the Decision paras. 54 - 56

### ***Purpose and being a passenger***

HMRC raised a further argument as to why the Transit Exception would not have applied to these three days:

*'HMRC read "only" in paragraph 22(3)(a) as meaning that being a passenger must have been P's only purpose of being in the UK on the day in question. HMRC submit that MP does not meet this condition because being a passenger was not his only purpose in arriving in the UK, they submit that he also arrived to meet with family members (his wife on 8 February and his stepdaughter on 17 February) or drop off family members who lived in the UK (his wife and stepdaughter on 28 February).'*<sup>29</sup>

This appears to have been an attempt by HMRC to construe the first condition for the application of the Transit Exception, contained in para. 22(3)(a),<sup>30</sup> as containing a purposive restriction equivalent to the third condition for the exception's application, contained in para. 23(3)(c). The third condition in para. 23(3)(c) is not framed by reference to the taxpayer's purpose but, rather it is framed in respect of his activities. It is arguable, however, that it is implicit in the condition that purpose is relevant to it. HMRC appears not to have distinguished the arguments relevant to this asserted purposive requirement, which it claimed arose from the use of the word 'only' in para. 23(3)(a), and the requirements of para. 23(3)(c).

It will be seen<sup>31</sup> that HMRC also cited his meetings with, and his dropping off, his family members in support of its contention that the conditions of para. 23(3)(c) were not met.

### ***The Tribunal's conclusion on the first condition***

On whether the condition in para. 22(3)(a) was satisfied the Tribunal concluded:

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<sup>29</sup> See the Decision para. 57

<sup>30</sup> See above

<sup>31</sup> See below and the Decision para. 61

*'We do not accept that MP did have this dual purpose in entering the UK, which we discuss further below.*

*We find therefore that MP arrived in the UK as a passenger on 8, 17 and 28 February 2020 and therefore meets the condition in sub-paragraph 22(3)(a) on each occasion.'*

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### **The third condition (para. 22(3)(c)): unrelated activities**

Having made this argument in respect of para. 22(3)(a) HMRC also submitted that the condition of para. 22(3)(c), that, between arrival and departure, Mr Parker did not engage in activities that were to a substantial extent unrelated to his passage through the UK, was not satisfied:

*'Turning then to the condition in paragraph 22(3)(c), HMRC submit that MP has not given a comprehensive account of his activities in the UK on each of the 8 February, 17 February and 28 February 2020. They further submit that meeting with family members on 8 and 18 February 2020 so that they could travel to their destination together as part of a shared holiday and dropping off those same family members in the UK on 28 February 2020 constitutes activities that are to a substantial extent unrelated to MP's passage through the UK.'*<sup>33</sup>

In respect of HMRC's argument on this the Tribunal commented:

*We find that MP has provided a comprehensive account of his activities while in the UK, with supporting documentary evidence. As stated in our findings of fact, he did very little while in the UK. Consequently there is little account that he can give of his activities. Further, what he did do was consistent with the activities of a passenger who is in transit. As HMRC acknowledge in their own guidance in RDRM11730:*

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<sup>32</sup> See the Decision paras. 58 & 59

<sup>33</sup> See the Decision para. 61

*“Merely taking dinner or breakfast at their hotel, in the normal course of events, would be related to their passage.”*

*MP did not travel into central London, return to his family home, or undertake any activity that could sensibly be characterised as an end in itself. The hotel accommodation, meals taken there or at the airport, and travel between the hotel and the terminal were all ancillary and functionally connected to onward international travel.*

*Meeting with his wife and stepdaughter because they were travelling with him on the next leg of his journey were not “activities that are to a substantial extent unrelated to his passage through the UK.” Had he met with friends or family for any reason other than onward travel with him that is likely to be an activity that is substantially unrelated to his passage through the UK. However, on the facts of this appeal, MP did not need to travel to the UK to see his wife or stepdaughter as he was spending his holiday with them outside of the UK. MP’s evidence was that he did not need to escort his wife or 33 year old stepdaughter from or back to Heathrow Airport for their respective holidays and we have no reason to doubt this. MP met with his wife and stepdaughter because they were travelling out of the UK together, which is very much related to his passage through the UK.’<sup>34</sup>*

### **The Tribunal’s overall conclusion on the Transit Exception**

The Tribunal concluded therefore that Mr Parker’s circumstances met:

*‘ ... the Transit Exception for 8 and 17 February 2020 and, subject to him meeting the Exceptional Circumstances Exception for 29 February 2020 which we address below, MP will meet the Transit Exception for 28 February 2020.’<sup>35</sup>*

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<sup>34</sup> See the Decision paras. 62 - 64

<sup>35</sup> See the Decision para. 65

## **THE TRIBUNAL'S DECISION IN THE CASE**

Finding that only 89 of the 100 days on which Mr Parker was present in the UK at midnight counted as days spent by him in the UK, therefore, the Tribunal found that he was not resident in the UK for fiscal purposes in the UK fiscal year 2019/20.<sup>36</sup>

### **A STRANGE ERROR BY THE TRIBUNAL**

#### **Para. 60 of the Decision**

One part of the Tribunal's conclusion on the application of the Transit Exception is very odd. Paragraph 60 of the Decision records:

*'It is not in dispute and we have found as a fact that with respect to 8 and 17 February 2020, MP left the UK on the next day so that the condition in paragraph 22(3)(b) is met. It is also agreed between the parties and we agree, that if 29 February 2020 is a day that does not count because it falls within paragraph 22(4), then the fact that MP did not actually leave the UK on 29 February does not prevent MP from meeting para 22(3)(b) for 28 February 2020 because MP left the UK on the next day which would otherwise fall to be counted.'*<sup>37</sup>

#### **The argument adopted by the parties and the Tribunal**

From this it appears that the argument which seems to have been adopted both by the parties and the Tribunal was as follows.

Mr Parker arrived in the UK on 28<sup>th</sup> February and was present in the UK on midnight on that day. On the next day, 29<sup>th</sup> February 2020, he had intended to fly out of the UK but, for the purposes of the argument one is to assume that, he was unable to do so due to exceptional

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<sup>36</sup> See the Decision paras. 86 & 87

<sup>37</sup> See the Decision para. 60

circumstances so that the Exceptional Circumstances Exception applied to that day. He then did fly out of the UK on 1<sup>st</sup> March 2020.

Because of this, the argument proceeds, the Transit Exception applied to 28<sup>th</sup> February. That is because he arrived in the UK as a passenger on 28<sup>th</sup> February. Although he did not actually leave the UK on the following day, 29<sup>th</sup> February 2020, that day does not count because the Exceptional Circumstances Exception applies to it and therefore when he left on 1<sup>st</sup> March he was to be treated as having left on the day following 28<sup>th</sup> February.

### **The Tribunal's error**

If that was the argument adopted by the Tribunal then it is clearly wrong.

The effect of the Exceptional Circumstances Exception is not that the day concerned does not count as a day at all but rather that it does not count as a day spent by the taxpayer concerned in the UK.

One might argue that if Mr Parker is to be treated under the Exceptional Circumstances Exception as not having spent a day in the UK on 29<sup>th</sup> February 2020 that he could not have left the UK on that day even if he actually did so. So that the second condition of the Transit Exception could not have been met.

One might escape from that by arguing that not counting a day as a day spent in the UK does not necessarily mean that the person was not present in the UK at all because the general rule counts a day as one spent by a person in the UK if that person is present in the UK at the end of the day. So the application of the exception, the argument would continue, did not mean that Mr Parker was not to be treated as having been in the UK at all on the 29<sup>th</sup> but only as not having been in the UK at midnight.

That does not help Mr Parker, however, because he did not in fact leave the UK on 29<sup>th</sup> February, he left it on 1<sup>st</sup> March. He cannot, therefore, have satisfied in respect of 28<sup>th</sup> February 2020 the condition of the Transit Exception that he left the *'UK the next day'*.

### **An extraordinary mistake**

It is extraordinary that the Tribunal should have reached the conclusion that it did at para. 60 of the Decision and more extraordinary still that there is no sign in the Decision that Counsel for HMRC raised any contrary argument.

### **Mr Parker still wins**

Fortunately for Mr Parker, the effect of the Tribunal's error was merely that the Tribunal wrongly concluded that there were only 89 days which counted as days spent by Mr Parker in the UK when there were, in fact, 90 such days. So even if HMRC were to appeal against the Tribunal's decision and take this point on appeal the result would still mean that, unless it were also successful on other matters, Mr Parker was not resident in the UK because only 90 days would count as days spent by him in the UK and thus he would still meet the Overseas Work Test.

## **UNDERSTANDING THE FINANCIAL BACKGROUND**

### **The tax at stake?**

HMRC assessed Mr Parker *'to tax of £64,945.65 for the 2019/20 tax year'*.<sup>38</sup> Even if the entire amount assessed would not have been assessable if he were not fiscally resident in the UK in 2019/20 this seems a very small amount of money at stake to justify the costs to Mr Parker of the appeal.

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<sup>38</sup> See the Decision para. 3

## **Costs?**

There is nothing in the case to suggest that the case was allocated to the complex category and, if it was not, costs could only have been awarded if HMRC had acted unreasonably in bringing, defending or conducting the proceedings.<sup>39</sup> So it is likely that when Mr Parker decided to appeal to the Tribunal he would have done so on the basis that he was unlikely to recover any of his costs. Mr Parker was represented at the appeal by two Counsel who were instructed by a firm of chartered accountants. Our experience is that in such circumstances, costs could easily exceed the £65,000 to which Mr Parker had been assessed.

It is true that the hearing only lasted for two days and was heard remotely but most of the costs of an appeal to the FtT are usually not related to the professional time spent at the hearing, but to the time spent in the pre-tribunal procedure, in preparing and submitting witness statements and statements of case, and by Counsel in prepare for the hearing itself.

## **Penalties?**

It may be that Mr Parker was at risk of penalties but the firm of Chartered Accountants which instructed Counsel on his behalf is a respectable and well-regarded firm and if it advised him upon, and, in particular, if it prepared and submitted, his return for the year it seems unlikely that he could have been careless in relying on its advice let alone have made a deliberate error.

## **A temporary period of non-residence?**

It is likely that the fiscal year at issue was part of a longer period of fiscal years in which Mr Parker was not resident in the UK for UK fiscal purposes<sup>40</sup> so it may be that the effect of his being resident in the UK in 2019/20 would have been that a period would be a period of temporary non-residence in respect of him which would not have been so if, as the Tribunal

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<sup>39</sup> Tribunal Procedure (First-tier Tribunal (Tax Chamber) Rules 2009 Rule 10(1)(b) & (c) and Rule 23(5)

<sup>40</sup> See the Decision para. 26

decided, he had not been UK resident in that year. The result of that might have been that income or gains arising during that period were brought into charge in his period of return. If that was the case, however, the Decision does not say so.

### **Tantalising omissions**

It is always rather tantalising that, when one reads case decisions, the wider context of the taxpayer's decision to litigate is usually not set out so that one can only guess at his motivation.

### **WHY DID HMRC TAKE THE CASE?**

HMRC has now lost the only two cases on the application of the SRT that there have been, *A Taxpayer v. HMRC* and *Parker v. HMRC*. *Parker v. HMRC* in particular seems a strange case for HMRC to have taken. The application to Mr Parker of the Exceptional Circumstance Exemption on 29<sup>th</sup> February 2020 fell clearly within the principles stated by the Court of Appeal in *A Taxpayer v. HMRC*. HMRC's contentions in respect of the Transit Exception<sup>41</sup> involved a restricted view of the meaning of the word 'passenger' which, if adopted, would have led to highly artificial distinctions being made between taxpayers whose circumstances are clearly analogous.

By its decision to litigate in respect of Mr Parker, HMRC has ensured that there is a decision of the FtT against it which may be unhelpful to its contentions in more borderline cases. It did so in respect of an assessment for only £65,000 and in respect of a taxpayer whom nobody could reasonably regard as attempting to exploit artificial loopholes in the legislation.

One wonders whether Mr Parker required HMRC to review its decision under Taxes Management Act 1970 s.49A. Such reviews are meant to be undertaken by HMRC staff who

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<sup>41</sup> As we have seen, the application of that exception to 28<sup>th</sup> February 2020 raises difficulties which do not seem to have been part of HMRC's arguments

are independent of the matter in question. It is difficult to see how an independent reviewer could have reached the conclusion that litigation was appropriate.