Chapter 17: Delegated legislation

Judicial review of delegated legislation: *R (Totel Ltd) v First-tier Tribunal (Tax Chamber)* [2012] EWCA Civ 1401

In section 17.4 of the book, we explained that delegated legislation can be judicially reviewed, and quashed if it is found to be outside the powers conferred by the Act of Parliament under which it was purportedly made. We also explain that in determining whether delegated legislation is *intra vires*, general principles of constitutional law which can operate so as to shape the reviewing court's interpretation of the parent Act.

An illustration of this phenomenon is supplied by the instant case. The claimant wished to appeal against a decision of the First-tier Tribunal to the effect that it would not suffer hardship if it were required to pay a certain amount of tax. (A determination that hardship would be caused were the claimant made to pay the tax was a condition precedent to a substantive appeal against the assessment of tax liability.) According to s 11 of the Tribunals, Courts and Enforcement Act 2007, decisions of the relevant type could be the subject of appeals to the Upper Tribunal. However, secondary legislation—in the form of para 221(5) of sch 1 to the Transfer of Functions and Revenue and Customs Appeal Order 2009—purported to remove that right of appeal by inserting a new s 84(3C) into the Value Added Tax Act 1994. The question was whether the primary legislation—viz s 124 of the Finance Act 2008—under which the secondary legislation had purportedly been enacted actually authorised the removal the right of appeal conferred by s 11 of the 2007 Act. The Court of Appeal, reversing the decision of the Administrative Court ([2011] EWHC 652 (Admin), [2012] QB 358), held that it did not.

Section 124 of the Finance Act 2008 provides:

(1) The Treasury may by order made by statutory instrument make provision –

(a) for and in connection with reviews by the commissioners, or by an officer of Revenue and Customs, of HMRC decisions, and

(b) in connection with appeals against HMRC decisions.

(2) An order under subsection (1) may, in particular, contain provision about -

(a) the circumstances in which, or the time within which –

(i) a right to a review may be exercised, or

(ii) an appeal may be made, and

(b) the circumstances in which, or the time at which, an appeal or review is, or may be treated as, concluded. ...

(6) Provision under subsection (1) may be made by amending, repealing or revoking any provision of any Act or subordinate legislation (whenever passed or made, including this Act and any Act amended by it).

...

(8) A statutory instrument containing an order under subsection (1) may not be made unless a draft of it has been laid before and approved by resolution of the House of Commons.
In his leading judgment, Moses LJ said (at [17]):

The principle which should be applied is set out in plain terms in *R (Spath Holme Ltd) v Secretary of State for Transport, the Environment and Regions* [2000] 3 WLR 141 [at [35]]:

"Parliament does not lightly take the exceptional course of delegating to the executive the power to amend primary legislation. When it does so the enabling power should be scrutinised, should not receive anything but a narrow and strict construction and any doubts about its scope should be resolved by a restrictive approach".

Applying that approach, Moses LJ held (at [22]) that

a provision which revokes or removes a right of appeal does not seem to me properly to be described as a provision about the circumstances in which an appeal may be made. The decision of the First-tier Tribunal as to whether a taxpayer would suffer hardship if it was required to pay the tax in issue is a decision in relation to the circumstances in which an appeal may be made but is not itself an appeal. A provision in relation to the circumstances in which an appeal may be made pre-supposes the existence of a right of appeal not its abolition.

He concluded, on that basis, that the secondary legislation displacing the right of appeal was *ultra vires*. However, he rejected a complementary argument based on fundamental rights. He accepted that if delegated legislation is lawfully to interfere with such rights, t such legislation must be clearly authorised by the parent Act. However, he held (at [32]) that

no fundamental right is in play here. It is highfaluting to describe a right of appeal from the decision of the First-tier Tribunal to the Upper tribunal in relation to a hardship application as a fundamental right, analogous to freedom of expression, or access to justice. The right is a right to appeal, only with permission on a point of law. Since judicial review is available, Totel was not deprived of a very great deal: at most, a hearing before a specialist tribunal able to substitute its own view, should an error of law be disclosed, whereas the Administrative Court on judicial review would be far more likely merely to quash the decision and send it back to the First-tier Tribunal.