Grounds of Appeal to the Upper Tribunal

1. It is at least arguable thatJI v HMRC was wrongly decided and should not be followed, for the following reasons not considered in that case.

2. Central to the Judge Rowland’s reasoning was his conclusion that there is no power for the Tribunal Procedure Rules to permit an extension of the time limit in tax credits cases:

“Tribunal Procedure Rules cannot permit an extension or shortening of the time for complying with a provision in primary legislation unless there is a specific enabling provision in primary legislation permitting such a rule (Mucelli v Government of Albania [2009] UKHL 2; [2009] 1 W.L.R 287.” (paragraph 24 of JI v HMRC).

3. It is argued that thereis such a specific enabling provision, namely Schedule 5, paragraph 4 of the Tribunals, Courts and Enforcement Act 2007:

“Rules may make provision fortime limits as respects initiating, or taking any step in, proceedings before the First-tier Tribunal or the Upper Tribunal.”

4. Judge Rowland found that despite this specific enabling provision, the “Rules cannot, and do not need to, make provision for a time limit for tax credit appeals ” (paragraph 36). With respect, we argue that this conclusion was wrong. In enacting the 2007 Act, Parliament clearly envisaged that the procedure for initiating appeals to the First-tier Tribunal, including the time limits for doing so, would be set out within the structure of the Tribunal Procedure Rules, amending S39(1) of the Tax Credits Act 2002 by implication. This was also the intention of the HMRC and the reason why the Parliamentary drafters correctly assumed that there was no longer a need for an express power to extend the time limit elsewhere in legislation.

5. Mucelli v Albania, can be distinguished. In that case, there was no provision in primary legislation that would permit the Civil Procedure Rules to extend the statutory time limit for appeals against extradition, analogous paragraph 4 of Schedule 5 of the 2007 Act. Further, the Court was swayed by the strong policy reasons in favour of not permitting an extension of the time limit in extradition cases. By contrast, there are strong policy reasons for allowing an extension of time in tax credits appeals, not least because that has always been the legislative intention.

6. Furthermore,Mucelli was recently criticised by the Supreme Court inPomiechowski v Powland [2012] UKSC 20. The Court read down the absolute statutory time limit so as to make it compatible with Article 6 of the ECHR. See Lord Mance at para 39:

“In these circumstances, I consider that, in the case of a citizen of the United Kingdom like Mr Halligen, the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6(1) inTolstoy Miloslavsky.”

6. As the rule inMucelli does not apply, then it is at least arguable that there isvires for the Tribunal procedure rules to extend the time limit in tax credits cases. This is achieved, as in social security cases, through Rule 5(3)(a), provided it is not longer than 12 months under Rule 23(5).

7. Judge Rowland appears to have assumed that because Rule 5(3)(a) only permits the Tribunal to extend the time “for complying with any rule, practice direction or direction”, this could not apply to a time limit set out in legislation. This was misconceived, because the time limit for tax credits appeals is laid down in the Rules themselves – namely Rule 23(2) and Schedule 1. The fact that Schedule 1 cross-refers to the time limit in S39(1) of the Tax Credits Act 2002, does not alter the fact that the one month time limit is itself a “rule” compliance with which can be extended under Rule 5(3)(a). This is the method by which the rules “make provision for time limits as respects initiating… appeals ”, in accordance with the 2007 Act.

8. If there is any ambiguity, Rule 5(3)(a) should be interpreted in a way that is compatible with Article 6 of the European Convention under Section 3 of the Human Rights Act 1998. The removal of the power to extend the time limit in tax credits cases cannot be a proportionate or legitimate restriction on the right of access to an independent Tribunal, because (assuming it has happened) it was entirely accidental. The Article 6 issue was not argued before or considered by Judge Rowland, who merely commented that “I am not persuaded that any unfairness is such that I can read into the legislation provisions that are not there” (paragraph 25).

9. We submit that, notwithstandingJI v HMRC, permission should be granted in this case to re-consider the question of whether the Tribunal has a power to extend the time limit in tax credits cases. We note that:

1. The Upper Tribunal is not strictly bound by a decision of another judge of the Upper Tribunal sitting alone, where there is good reason to depart from it.

2. The claimant inJI v HMRC was unrepresented, therefore the Tribunal did not in that case have the benefit of full argument from both sides.

3. The ruling on whether there is a power to extend time in that case was arguablyobiter dicta.

4. The issues set out above, particularly Section 3 of the Human Rights Act 1998 and Article 6 of the European Convention, was not considered by the Tribunal in JI v HMRC.

5. This issue is affecting a significant number of claimants and causing disruption to the HMRC and the Tribunal system.

6. Judge Poynter has already been granted permission to appeal in another case - SC242/14/02438 –so there is no reason why permission should not also be granted in this one.