DECISION ON THE APPEAL OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the Newton Abbot First-tier Tribunal dated 19 April 2016 under file reference SC243/15/00054 does not involve any material error on a point of law. The Tribunal's decision therefore stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Summary of Upper Tribunal's decision

1. This is an appeal about entitlement to home responsibilities protection for a two-year period in the early 1980s. I dismiss the Appellant's appeal to the Upper Tribunal. The First-tier Tribunal ("the Tribunal")'s decision dated 19 April 2016 involves no material error on a point of law. The Tribunal's decision accordingly stands.

The timeline

2. The Appellant was born on 12 October 1942. Her two children were born in 1976 and 1980. She re-located with her family to the Netherlands for the period from May 1982 to May 1984, as her husband was seconded to work there by his employer. During this period she was not entitled to, and did not receive, child benefit from the UK authorities, but she received the equivalent Dutch family benefit.

3, The Appellant claimed and started to receive her own UK retirement pension in 2002, when she reached 60. She also received a small Dutch pension from 2007, when she reached 65, in line with the retirement age under the state pension scheme operating in the Netherlands.

4. In 2015 the Appellant made a claim for home responsibilities protection (HRP) for the tax years 1982/83 and 1983/84, explaining on the claim form that her husband had been posted abroad by his employer for the two years in question.

The background to the appeal to the First-tier Tribunal

5. On 8 September 2015 an HMRC decision-maker wrote to the Appellant refusing her claim for HRP for the tax years 1982/83 and 1983/84. The explanation given in the letter was that "you are not entitled to HRP because you were not in receipt of UK child benefit for a child aged under 16".

6. On 15 September 2015 the CAB, who were then acting for the Appellant, lodged an appeal on her behalf, arguing that the Appellant was still 'ordinarily resident' in the UK throughout the material period while she was living in the Netherlands.

7. On 21 October 2015 a different HMRC decision-maker looked at the decision again but refused to change it. The decision-maker noted that entitlement to HRP was based on receipt of a UK 'passport' benefit (such as child benefit) for the full tax year. She also observed that the Appellant had been living abroad and had been in receipt of Dutch child benefit.

8. The Appellant sent in further evidence, including copies of the original correspondence with what was then the Department for Health and Social Security (DHSS) about her child benefit entitlement in the UK and in the Netherlands. She also included a cutting of the Times law report of the European Court of Justice (CJEU) decision in Case C-135/99 *Elsen v Bundesversicherungsanstalt für Angestellte* (14 February 2001) ("Pension credit must be given for child-rearing in another [member] state").

The proceedings before the First-tier Tribunal

9. The Tribunal held an oral hearing of the Appellant's appeal on 19 April 2016. The Tribunal's decision was to confirm the HMRC decision of 8 September 2015 (i.e. that the Appellant was not entitled to HRP for the two tax years in question) and so to dismiss the appeal.

10. The Tribunal Judge later issued a statement of reasons for the decision. He explained that in his view the decision of the CJEU in *Elsen* did not assist as the material facts were different. The Tribunal also found no assistance for the Appellant in EC Council Regulation 1408/71 on social security rights for migrant workers. He noted that the Appellant had (in my view rightly) abandoned the 'ordinary residence' argument originally advanced by the CAB.

11. By reference to regulation 2 of the (then) Social Security Pensions (Home Responsibilities and Miscellaneous Amendments) Regulations 1978 (SI 1978/508), and what were subsequently the Social Security Pensions (Home Responsibilities) Regulations 1994 (SI 1994/704), the Tribunal summarised its conclusion thus:

> "15. There are no provisions in European law that either enable or require the regulations to be read any differently so in circumstances where [the Appellant] was not in receipt of Child Benefit for the then under 16 year old children throughout each tax year (and she agrees she was not) she does not qualify."

12. The Appellant then applied for permission to appeal to the Upper Tribunal, which was granted by the First-tier Tribunal District Tribunal Judge on 19 July 2016. This was on the basis that the appeal raised a question as to the application of European Union (EU) law to entitlement to HRP.

The proceedings before the Upper Tribunal

13. On 5 September 2016 I issued initial Observations and Directions on the appeal. In doing so I queried whether the Tribunal should have been referred by HMRC (in its original response to the appeal) to my two previous Upper Tribunal decisions relating to HRP in an EU context, namely *SF v SSWP and HMRC* [2013] UKUT 175 (AAC) and *FH v HMRC and SSWP* [2015] UKUT 672 (AAC).

14. I also invited the Secretary of State for Work and Pensions to be a party to the appeal before the Upper Tribunal, an invitation to which the Secretary of State's representative has acceded. The Respondents have subsequently made two joint submissions as the proceedings have unfolded, to which the Appellant has responded in turn in writing. There has been no application by any party for an oral hearing and I am satisfied the appeal can be fairly decided without one.

15. The Respondents' first submission on the appeal pointed out that the Tribunal had proceeded under a misapprehension, or at least its attention had not been drawn by HMRC to a material consideration. The Appellant, however, had referred in her covering letter (with the extra evidence as sent to the Tribunal) to the fact that she

was in receipt of a Dutch retirement pension "from the age of 65 … for the period 3rd May 1982 to 22 May 1984 based on my husband's domicile" (letter dated 9 April 2016). The Appellant had also provided a copy of a letter from the Dutch social security authority, the Sociale Verzekeringsbank (SVB), confirming the award of a pension of (about) €39 a month. Accordingly, the Respondents argued, the Appellant had not been subject to less favourable treatment as a result of her husband exercising his right to free movement. So, it was said, there was no inequality of treatment. Indeed, if the Appellant was to be awarded HRP for the two tax years in issue for the purposes of entitlement to her UK state retirement pension, then she would benefit from double recovery, which would be inconsistent with the fundamental principles underpinning EC Council Regulation 1408/71.

16. In her own response, the Appellant referred to the advice she had originally been given by the UK social security authorities. She further pointed out that she had become entitled to her UK pension at the age of 60 but only qualified for a Dutch pension when she was 65. As such, she argued, "there is a gap there of 5 years and no adjustment to the UK pension for the years I was in the Netherlands. Should there be an adjustment upwards to my UK State Pension for the missing years in the Netherlands. Should the years 2002-2007 be included?"

17. I then issued the following further Observations:

> "2. As previously noted, the argument of the Secretary of State and HMRC (in summary) is that the Appellant in any event has a right to a pension from the Dutch authorities in relation to the child-raising period spent in the Netherlands. Accordingly, it is said, there is no less favourable treatment and so no inequality. I do not understand the Appellant to dissent from the proposition that she should not enjoy 'double recovery'. That would be the case if today (and indeed from 2007 onwards) she were to have her child-rearing years between 1982 and 1984 recognised by *both* the GB and Dutch pensions.
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> 3. However, this argument does not directly address the point the Appellant makes in her e-mail of April 26, 2017. As I understand it, that argument is that she had a GB pension from 2002 (when reaching 60) and a Dutch pension from 2007 (at age 65). The GB pension did not take account of the years 1982/83 and 1983/84, although these were subsequently recognised by the Dutch pension from 2007. So what then, she asks, of the 'missing 5 years'?
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> 4. On one view the Appellant has suffered no detriment when compared with a Dutch national. Her notional Dutch comparator would presumably likewise not have qualified for a pension until age 65 and the Dutch scheme would then recognise those child-rearing years, as did the Appellant's Dutch pension. However, on another view, is it not arguable that the failure of the GB scheme to recognise her years in the Netherlands, whilst not discriminatory on grounds of nationality, did act as a fetter on the right of free movement within the EU (see *SF v SSWP and HMRC (HRP)* [2013] UKUT 175 (AAC))? Her UK comparator would have qualified for a pension at age 60 which recognised the years in respect of which the Appellant now seeks HRP."

The Upper Tribunal's analysis

Introduction

18. At the time when the Appellant and her family moved to live in the Netherlands, the social security rights of migrant workers were governed by EC Council Regulation 1408/71. That instrument has been replaced with effect from 1 May 2010 by Regulation 883/04. There are a number of important themes which are common to

Regulation 1408/71 and Regulation 883/04 (and the corresponding implementing instruments, Regulations 574/72 and 987/2009).

The overarching themes of Regulation 1408/71 and Regulation 883/04

19. First, both Regulations are based on, and must be read in the light of, Articles 45 and 48 of the Treaty. As Upper Tribunal Judge Jacobs explained in *IG v Secretary of State for Work and Pensions (AA)* [2016] UKUT 176 (AAC); [2016] AACR 41, "The former [Article 45] makes general provision for freedom of movement for workers. The latter [Article 48] makes specific provision for the impact of social security on freedom of movement of workers by requiring the European Parliament and the Council to adopt such measures are necessary to provide for freedom of movement."

20. Second, both Regulations are premised on the notion that a migrant worker should be subject to the social security regime of only one member state at any one time. Both Regulations accordingly make provision for the 'competent member state' to be identified for any given individual. This principle is designed to avoid the problems that would arise with overlapping periods of entitlement and/or liability under different national social security systems.

21. Third, all migrant workers covered by the Regulations are subject to the same rights and obligations under the relevant social security scheme as are nationals of the competent member state. This is usually referred to as the principle of equal treatment or the principle of non-discrimination.

22. A fourth important common theme of both Regulation 1408/71 and Regulation 883/04 is that they establish a social security regime based on *co-ordination*, but not *harmonisation*, of such national schemes. Put another way, EU law is not concerned with creating a unified social security system across all member states with common, standardized rules. Rather, its focus is on ensuring the different national schemes mesh together (or are co-ordinated) in such a way that migrant workers do not experience those disadvantages in social security provision which might otherwise arise by exercising their right to free movement. As Upper Tribunal Judge Jacobs also explained in *IG v Secretary of State for Work and Pensions (AA)*:

> "31. It is, however, not the purpose of the Regulation to harmonise social security legislation across the EU; the title of, and recital (4) to, Regulation (EC) 883/2004 emphasise that it is concerned only with coordination. This means that there is no obligation on States to make any particular level of provision for a given class of benefit."

23. Fifthly and finally for present purposes, neither Regulation provides a cast-iron guarantee that exercising the right of freedom of movement will be neutral in its effect in any given case. The point was made as follows by the CJEU in Case C-88/09 *da Silva Martins v Bank Betriebskrankenkasse-Pflegekasse* [2011] ECR I-5761:

> "71. Since Article 48 TFEU provides for the coordination, not the harmonisation, of the legislations of the Member States (see, inter alia, Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 23), substantive and procedural differences between the social security schemes of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision, as each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions for granting benefits under a social security scheme (see, to that effect, *von Chamier-*

> *Glisczinski*, paragraph 84, and Case C-345/09 *van Delft and Others* [2010] ECR I-0000, paragraph 99).
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> 72. In that context, the primary law of the European Union cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits are concerned. Thus, the application, possibly under the provisions of Regulation No 1408/71, following a change of Member State of residence, of national legislation that is less favourable as regards social security benefits may in principle be compatible with the requirements of primary European Union law on freedom of movement for persons (see, inter alia, by analogy, *von Chamier-Glisczinski*, paragraphs 85 and 87)."

24. In that final passage the CJEU referred to its earlier decision in C-208/07 *von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse*. There, the Court had reiterated that, as the Treaty "provides for the coordination, not the harmonisation, of the legislation of the Member States, substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision" (at paragraph 84). It therefore followed that moving to another member state will not necessarily be neutral as regards social security. Rather, "as the Commission states, in view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, depending on the case, be more or less advantageous or disadvantageous for the person concerned, according to the combination of national rules applicable pursuant to Regulation No 1408/71" (at paragraph 85).

25. The question then is how these principles play out in the particular circumstances of the Appellant's case.

The application of those themes in the circumstances of this case

26. The starting point is that – although apparently this was not appreciated by HMRC at the time of its original decision or by the Tribunal on appeal – the Appellant is in receipt of an admittedly modest pension from the Dutch social security authorities based on her period of child-raising in the Netherlands between 1982 and 1984. Her UK state retirement pension takes no account of those two years. However, were the Appellant to receive recognition for her child-raising responsibilities both under the Dutch scheme (through her Dutch pension) and under the UK regime (through HRP for the same years) she would in effect be receiving double recovery. Such an outcome would be inconsistent with the principle that an individual covered by the Regulation is subject to the social security legislation of the single competent member state at any one time. It would also be incompatible with the general rule barring overlapping benefits. Thus the Appellant cannot have her UK state retirement pension enhanced in relation to two years for which the scheme in the Netherlands has already taken responsibility.

27. It follows that the facts of the present case are a long way removed from the two earlier Upper Tribunal precedents referred to above, namely *SF v SSWP and HMRC* and *FH v HMRC and SSWP*. There was no evidence in either of those two cases that the claimant was entitled to let alone actually in receipt of a pension based on residence and related child-raising periods in Belgium and France respectively.

28. As the submissions on this appeal have unfolded, the real issue now is over the so-called "five missing years". The Appellant qualified at age 60 for a UK pension in 2002 (which disregarded the 1982-1984 period in the Netherlands), but her

entitlement to a pension from the Dutch authorities did not commence until 2007, when she attained 65. This differential, however, is simply a reflection of the fact that there is no harmonisation of retirement ages across the European Union. Member states are at liberty to set the retirement age as they see fit for the purposes of receiving a pension under the national social security scheme. Female Dutch nationals raising their children were placed in exactly the same position as the Appellant in that regard, so there was no question of unequal treatment based on citizenship or nationality.

29. It is true, of course, that had the Appellant remained in the UK between 1982 and 1984 those years of child benefit receipt would have counted for HRP purposes and so would have been recognised in the award of the UK state retirement pension in 2002, five years earlier than was provided for by the Dutch scheme. However, this again is a consequence of "the disparities existing between the schemes and legislation of the Member States in this field" and reflects the fact that such a move to another member state "may, depending on the case, be more or less advantageous or disadvantageous for the person concerned, according to the combination of national rules applicable pursuant to Regulation No 1408/71" (see C-208/07 *von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse* at paragraph 24 above).

30. In that respect a general invocation of the principle of free movement cannot assist the Appellant, given both the underpinning principles and the clear terms of the relevant EU Regulations. As Upper Tribunal Judge Jacobs noted in *IG v Secretary of State for Work and Pensions (AA)*:

> "37. Unlimited resort to general principles of freedom of movement, non-discrimination and equal treatment would allow the Court of Justice of the European Union and any national court applying EU law to rewrite any EU subordinate legislation to the extent that it might hamper freedom of movement … Resort to this basic principle could rewrite vast tracts of Directive 2004/38 and undermine the principle of coordination that is the stated purpose of Regulation 883/2004. The ultimate logic of the argument is to lead to increasing harmonisation of social security benefits across the EU. That is not the purpose of the Regulation, as the Court has regularly stated. It would also allow, or even encourage, forum shopping when claimants or their families have connections with a number of States. That would be inconsistent with the coordination principle on which the Regulation is based."

31. It follows that the principles of EU law do not assist the Appellant in any way. The fact that she did not receive any 'credit' in terms of her pension entitlement in respect of the child-raising years from 1982 to 1984 until 2007 (as opposed to 2002) is no more and no less than a function of the different state retirement ages operating in the social security regimes in the Netherlands and the UK respectively.

Some further technicalities

32. There are, in addition, two further and rather more technical reasons why the Appellant cannot rely on HRP for the period from 1982 to 1984 to be included when assessing her entitlement to her UK state retirement pension. One of these reasons relates to the provisions of EU law while the other is purely domestic in nature.

33. First, as regards EU law, Regulation 1408/71 and its companion implementation instrument made no provision at all for the recognition of child-raising periods for the purposes of accruing entitlement to a state retirement pension. This is why reliance was placed on general principles of EU law in cases such as C-522/10 *Reichel-Albert* and *SF v SSWP and HMRC*. However, although Regulation 987/2009, implementing

Regulation 883/2004, does now make such express provision, it does not do so in a way which assists the Appellant in the present case.

34. The relevant rule in Regulation 987/2009 is contained in Article 44, which provides as follows:

"Article 44

Taking into account of child raising-periods

1. For the purposes of this Article, 'child-raising period' refers to any period which is credited under the pension legislation of a Member State or which provides a supplement to a pension explicitly for the reason that a person has raised a child, irrespective of the method used to calculate those periods and whether they accrue during the time of child-raising or are acknowledged retroactively.

2. Where, under the legislation of the Member State which is competent under Title II of the basic Regulation, no child-raising period is taken into account, the institution of the Member State whose legislation, according to Title II of the basic Regulation, was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned, shall remain responsible for taking into account that period as a child-raising period under its own legislation, as if such child-raising took place in its own territory.

3. Paragraph 2 shall not apply if the person concerned is, or becomes, subject to the legislation of another Member State due to the pursuit of an employed or self-employed activity."

35. Thus Article 44(1) simply defines "child-raising period" for the purposes of this provision. Article 44(3) provides for an exclusion which happens not to arise on the facts of the present appeal. The core of the provision is Article 44(2), which states the general rule. It is fair to say it is not a model of clarity in terms of legislative drafting. However, as the Respondents' second written submission argues, the overall purpose of Article 44(2) is, in certain carefully defined circumstances, to deal with any gap in pension protection that may arise when a person spends periods of time in different member states by making provision for the recognition of such time spent child-raising.

36. The Respondents' argument as to the application of Article 44(2) in summary runs as follows. The trigger for Article 44(2) to apply is if one member state (here the Netherlands) is one "where, under the legislation of the Member State … no child-raising period is taken into account". If that is the case, then the other member state (here the UK) is obliged to take the relevant child-raising period into account. However, as we know that the Dutch scheme has taken account of the period of child-raising between 1982 and 1984, then the essential pre-condition of Article 44(2) has not been met. The Article simply makes no provision for the scenario where actual entitlement to a pension attributable to that period comes into effect at a later date (because of different pensionable ages).

37. I am not sure if all the steps in that analysis of Article 44(2) are correct, but I agree with the outcome identified by the Respondents. Article 44(2) predicates two member states. The first (MS1) is the one "which is competent under Title II of the

basic Regulation" and under whose legislation "no child-raising period is taken into account". The second (MS2) is the one "whose legislation, according to Title II of the basic Regulation, was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned". The Respondents' analysis assumes that MS1 is the Netherlands and MS2 is the UK.

38. But is that correct? The Respondents' reading therefore presupposes that the Netherlands is the competent state "under Title II of the basic Regulation". That precondition is a cross-reference to Article 11 of Regulation 883/2004 and its subsidiary rules. There must be a strong argument in this case that the Appellant remained resident in the UK throughout, in the sense of being habitually resident (see Article 1(j) of Regulation 883/2004). If so, then the UK would have remained the competent state under Article 11(3)(e). If that is right, then the UK was MS1 for the purpose of Article 44(2). This assumes, of course, that the requirement that "no child-raising period is taken into account" refers to a specific and defined period of child-raising that is not accounted for. Nor is it clear that the Netherlands ever became MS2, as there is no evidence that the Appellant herself was pursuing an activity as an employed or self-employed person in the Netherlands. Even if the Netherlands was MS2, the deeming requirement – that MS2 "shall remain responsible for taking into account that period as a child-raising period under its own legislation, as if such child-raising took place on its own territory" – does not work as the child-raising in question did take place under the Dutch scheme which in any event recognises such a period.

39. Whichever reading is correct, the fact remains that neither Regulation 883/04 nor Regulation 987/09 (nor their predecessors) make any provision for the scenario where entitlement to a pension based on a period spent child-raising is recognised at a later date in one member state as compared with another simply by virtue of the fact that there are different state retirement ages operating in those member states.

40. The other and second technicality barring the Appellant's way relates to a matter of purely domestic UK social security law. As already noted, the Appellant qualified for her UK state retirement pension in 2002, when entitlement was governed by section 44 of the Social Security Contributions and Benefits Act 1992. This provided that once a claimant had reached pensionable age and met the relevant statutory requirements, including the contribution conditions, then the Category A retirement pension "entitlement will continue throughout [her] life" (section 44(1)(a)). The individual's contributions record is in effect frozen and assessed as at that date. The award of a pension is thus in practical terms fixed on the basis of the then contributions record as at the date of the original award, subject only to annual uprating and the possibility of a change under the provisions in the Social Security Act 1998. In particular, however, the statutory scheme provides no facility for HRP to be awarded for a time limited period, even if that were consistent with the principles of EU law set out above.

41. I recognise that the legal arguments are complex and the Appellant is at a disadvantage when seeking to counter the submissions by the Respondents. However, I can see no realistic way in which the appeal can succeed. The Appellant complains that much of the law cited by the Respondents post-dates the period when she and her family were living in the Netherlands. However, the key issue here is the relevant law relating to HRP at the time when HMRC made its decision to refuse her 2015 application for HRP for the period from 1982 to 1984. The Appellant also says

that she has been refused HRP for the period from 1978 until 1980. However, that is not the decision which was before either the Tribunal below or the Upper Tribunal. Any such further decision would need to be challenged by way of a separate appeal. She also complains that the then DHSS managed to lose a copy of her husband's contract and other documentation in the 1980s. If so, that is a matter for an internal complaint and ultimately a maladministration claim. None of these matters can impact on the current dispute.

42. In the final analysis the First-tier Tribunal came to the correct decision, namely that the Appellant had no entitlement to HRP for the years 1982/83 and 1983/84. The Tribunal may not have appreciated that the Appellant was in receipt of a Dutch pension based on her child-raising responsibilities for the same period, but any such error did not amount to a material error of law. I accordingly dismiss the appeal.

Conclusion

43. The Appellant's appeal to the Upper Tribunal is therefore dismissed. I conclude that the decision of the First-tier Tribunal involves no material error of law (Tribunals, Courts and Enforcement Act 2007, section 11). The FTT's decision accordingly stands. The Appellant is not entitled to home responsibilities protection for the tax years 1982/83 and 1983/84.

Signed on the original
on 5 January 2018

Nicholas Wikeley
Judge of the Upper Tribunal