



**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. CP/839/2020**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

**Between:**

**Mr B.A.B.**

Appellant

- v -

**The Secretary of State for Work and Pensions (SSWP)**

Respondent

**Before: Upper Tribunal Judge Wikeley**

Decision date: 9 June 2021  
Decided on consideration of the papers

**Representation:**

Appellant: In person  
Respondent: Ms I. Franckevic, DMA, Department for Work and Pensions

**DECISION**

**I dismiss the Appellant's appeal.**

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

## REASONS FOR DECISION

### Introduction

1. This is a factually and legally complex case. It concerns the Appellant's right, now that he lives in Turkey, to be paid a modest weekly enhancement to his UK state retirement pension on the basis of his residence in New Zealand over 60 years ago.

### A summary of the factual background

2. The factual context to this appeal is complicated but for present purposes a summary will suffice. The Appellant is a gentleman in his 80s, who now lives in Turkey with his wife and young daughter. He was born in the UK in 1936. In his early 20s he spent two years working in various trades in New Zealand (1958-1960). He then returned to the UK where he spent most of his adult life, claiming his retirement pension in 2001. In or around 2003 the Appellant moved to Spain for a period, followed by a move to Malta in 2006. In February 2007 the Appellant relocated to Turkey, where he has remained living since. He states that the climate in Turkey suits his health conditions better and, in any event, he lacks the funds to return to the UK.

### The chronology of the Appellant's retirement pension claim

3. The Appellant did not have a complete contributions record when he made his claim for retirement pension in the UK in 2001. As a result, he was awarded a Category A retirement pension at 82% of the full weekly rate, which then amounted to £59.45 a week. This was topped up by very small amounts of graduated retirement benefit (GRB) and additional pension (some £1.12 p.w. in all), so amounting to a grand total of £60.57 a week. This award took no account of the Appellant's time spent living and working in New Zealand.
4. In November 2017 (by which time he had been living in Turkey for some 10 years) the Appellant telephoned the Department and in the course of that conversation advised that he had spent a period as a young man in New Zealand (it should be said he had also mentioned this fact on his original claim form in 2001, but that document is no longer available). Following the 2017 telephone call the Department sent the Appellant a form requiring further details about his Antipodean stay, which he duly completed and returned.
5. On 1 August 2018 the Department's decision-maker made a further decision about the Appellant's retirement pension claim. This decision comprised two elements. First, the Appellant's entitlement to his Category A retirement pension was increased from 82% to 89% with effect from the date of his original claim in 2001. The 7% enhancement reflected the period of his residence in New Zealand (hence 'the New Zealand enhancement'). Second, however, this increase was withdrawn with effect from 16 February 2007, the date on which the Appellant moved to Turkey (and so ceased to reside in either the UK or the EU).
6. The net result (ignoring the very small amounts of extra payments such as GRB) was the Appellant was awarded a Category A retirement pension at the 89% rate from June 2001 to February 2007 followed by an award at the 82% rate from February 2007 to the present day. The Department sent the Appellant

a lump sum payment of arrears, reflecting the New Zealand enhancement for the period from June 2001 to February 2007.

7. The Appellant queried the second element of the Department's decision, pointing out that his pension had all along been paid into a UK bank account and arguing that the New Zealand enhancement was part of his UK basic pension and so, he argued, should be paid wherever he lived. He requested a mandatory reconsideration. This did not change the Department's decision. The Mandatory Reconsideration Notice concluded as follows:

“As you have been permanently residing in Turkey since 16 February 2007 your basic State Retirement Pension was reduced from £74.98 to £69.09 per week as you were not entitled to the increase in your State Retirement Pension based on your New Zealand employment/residency as you are not ordinarily resident [in] the United Kingdom or an EEA country.”

### **The Appellant's appeal to the First-tier Tribunal**

8. The Appellant lodged an appeal with the First-tier Tribunal. The gist of his appeal was that he had been completely unaware of the UK/New Zealand pension arrangement and that the Department had failed to inform him of his rights in a timely manner. He put it this way in his appeal letter: “the problem arose because I needed to have completed my claim whilst resident in UK to have qualified for the payments to continue in Turkey. How was I to do this when I was completely ignorant of this NZ arrangement, it was over 50 years (1958-1960) when I worked in NZ?”
9. On 3 June 2019 the First-tier Tribunal dealt with the Appellant's appeal on the papers, neither party (unsurprisingly) having requested an oral hearing. The First-tier Tribunal's decision notice confirmed the Secretary of State's decision dated 1 August 2018, holding that:

“The Appellant is neither ordinarily resident in the UK nor an EU country. As such, he is not entitled to an enhancement of his state pension for the reasons set out in the [Department's] submission.”

10. The First-tier Tribunal's statement of reasons elaborated briefly on that explanation. The District Tribunal Judge emphasised that the reason why the New Zealand enhancement was no longer payable was because the Appellant was no longer resident in either the UK or the EU. Displaying his mastery of the geography of the Aegean Sea, the Judge added that “If the appellant lived on the island of Rhodes, across the bay from Fethiye, he would be entitled to an enhancement. As he resides in a non-EU state he is not.”

### **The Appellant's application for permission to appeal to the Upper Tribunal**

11. The Appellant then applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. He argued (and the Department has conceded) that back in 2001, when he had first claimed his retirement pension, he had provided the Department with information about his residency in New Zealand. He repeated his argument that he had not been properly advised: “my future circumstances may have been different had I known the penalties involved by living in Turkey.” The District Tribunal Judge refused permission to appeal, commenting that “the

core issue relates not to the history concerning New Zealand but instead relates to current residence outside the EU.”

12. The Appellant then renewed his application before the Upper Tribunal. He reiterated his point that he had correctly advised the Department in 2001 of his past residency in New Zealand. He argued that the Department had then taken 16 years to act on that information, by which time his personal circumstances were such it was too late for him to move back to the UK or to another EU country.
13. Upper Tribunal Judge Poynter gave permission to appeal, although not for the reasons advanced by the Appellant. Having considered the relevant statutory provisions, Judge Poynter considered it arguable that “the scheme established by the legislation is that whether a claimant satisfies the contribution conditions for a Category A retirement pension is a once-for-all decision made by reference to the law and facts that existed as at the date the claimant reached pensionable age”. As he noted, section 44(1) of the Social Security Contributions and Benefits Act 1992 “specifically says that once that assessment has led to a claimant becoming entitled to a Category A retirement pension ‘his entitlement shall continue throughout his life’.”
14. Judge Poynter proceeded also to consider Article 9(3) of the UK-New Zealand bilateral social security convention (discussed further below), which provides for residency in New Zealand to be treated as equivalent to payment of Class 3 contributions in the UK “for the purpose of a claim for basic retirement pension under the legislation of the United Kingdom” (in the terms of the relevant Order). Following such analysis, Judge Poynter concluded it arguable that Article 9(3) “only applies to the initial decision to award a basic retirement pension (and to any revision of that decision) but does not apply for the purposes of changing that decision on the basis of a subsequent change of circumstances”.

### **The further proceedings in the Upper Tribunal**

15. The appeal has since been transferred to me for decision. Ms Irina Franckevic, who acts for the Secretary of State in these proceedings, has provided a detailed written submission that resists the Appellant’s appeal against the First-tier Tribunal’s decision. The Appellant has provided further representations by e-mail in turn. His principal argument is that the Department owed him a duty of care to act on the information he had provided in good faith in 2001. However, the Department failed to do so; moreover, “when the default came to light I was domiciled in Turkey with a wife & infant child. It was impossible for me to move anywhere.”

### **The Upper Tribunal’s analysis**

#### *Introduction*

16. For the reasons that follow, I accept Ms Franckevic’s analysis and so dismiss the Appellant’s appeal. The legislative scheme is such that the Department’s decision-maker took the correct decision on 1 August 2008, given the undisputed facts. The First-tier Tribunal was right to uphold that decision, even if the Tribunal’s decision could have been more expansively reasoned. Be that as it may, I conclude there was no material error of law in the First-tier Tribunal’s decision. That said, however, I understand the Appellant’s sense of

grievance and return below to outline other steps that he may wish to consider taking outside of the formal appeals system (see paragraphs 37-39).

17. The analysis that follows addresses these three central questions in understanding this appeal:
  - (a) First, why was the Appellant's Category A retirement pension originally fixed at only 82% of the full rate pension?
  - (b) Second, why was the Appellant's Category A retirement pension increased to 89% of the full rate pension on the basis of his New Zealand residency?
  - (c) Third, why was the New Zealand enhancement withdrawn with effect from 2007?

*The Appellant's 82% Category A retirement pension*

18. The calculation of the 'UK element' of the Appellant's Category A retirement pension is not in dispute and can be dealt with shortly. A person (such as the Appellant) who reached the minimum pension age before 6 April 2016 had to satisfy two contribution conditions (see paragraph 5 of Part I to Schedule 3 to the Social Security Contributions and Benefits Act 1992). The second of those conditions stipulated that, in order to qualify for a full retirement pension, a person must have either paid or been credited with contributions of the relevant class in respect of each of the requisite number of years of that individual's working life (so as to give an earnings factor of not less than the qualifying earnings factor for that year). In the present case the Appellant's 'working life' for this purpose spanned the period from April 1952 to April 2001 (49 years in total). His 'requisite number of years' (so as to qualify for a full pension), for which contributions would have had to be paid or credited, was accordingly 44 years (see the Table in paragraph 5(5) of Schedule 3).
19. Those persons who did not satisfy the second contribution condition were nevertheless entitled to a reduced Category A retirement pension if they had either paid or been credited with sufficient contributions in at least 25% of the requisite number of years of their working lives (see regulation 6 of the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979 (SI 1979/642)). The Appellant fell into this category. His national insurance record showed that he had 36 qualifying years of insurance paid into the UK scheme (as against 44 years for the requisite number of years for the full rate pension). The Appellant was therefore entitled to a reduced Category A retirement pension representing 82% of the full rate pension ( $\frac{36}{44}$ , when rounded up, equates to 82%).
20. Pausing there, it is also relevant to consider the issue of the payment of the Appellant's pension when he left the UK and moved abroad (first to Spain). The general rule is that benefits under the Social Security Contributions and Benefits Act 1992 are not payable when the claimant "is absent from Great Britain" (section 113(1)(a)). This rule prevents *payment* but not *entitlement*: see the decision of the Tribunal of Social Security Commissioners in *CIB/3645/2002* at paragraph 31, a distinction upheld on appeal in that same case in *Campbell v Secretary of State for Work and Pensions* [2005] EWCA Civ 989. However, for specified benefits (essentially contributory benefits such as retirement pension, and which are not related to capacity for work) absence abroad is not a

disqualifying condition (see regulation 4 of the Social Security Benefit (Persons Abroad) Regulations 1975 (SI 1975/563)). Accordingly, leaving aside any rights derived from EU law, the Appellant's Category A retirement pension continued in payment when he moved to Spain in about 2003.

21. As previously noted, however, the calculation described above took no account of the two years or so the Appellant had spent living and working in New Zealand between 1958 and 1960, which I now turn to consider.

*The Appellant's 89% Category A retirement pension with the NZ enhancement*

22. There are circumstances in which a claimant who qualifies for less than the full rate of the Category A retirement pension may have their reduced rate pension increased or enhanced, e.g. by operation of a reciprocal agreement with another state. Section 179(1) of the Social Security Administration Act 1992 (formerly section 143(1) of the Social Security Act 1975) makes provision for giving effect to reciprocal agreements about social security legislation with countries outside the United Kingdom. In particular, it provides that "Her Majesty may by Order in Council make provision for modifying or adapting such legislation in its application to cases affected by the agreement or proposed alterations." This section applies to Category A retirement pension (and indeed other benefits under the Social Security Contributions and Benefits Act 1992) by virtue of subsection (4)(a).
23. The Social Security (New Zealand) Order 1983 (SI 1983/1894; 'the Social Security (NZ) Order') was originally made under section 143 of the Social Security Act 1975 and continues to have effect by virtue of section 179 of the Social Security Administration Act 1992. The Schedule to the Social Security (NZ) Order is the Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of New Zealand ("the New Zealand Convention"), to which effect is given (for present purposes) by Article 2 of the Social Security (NZ) Order. The relevant provision is Article 9 of the New Zealand Convention, which reads as follows (the passages of text omitted from the extract below relate exclusively to married women and as such are not relevant for present purposes):

ARTICLE 9

UNITED KINGDOM RETIREMENT PENSION BY VIRTUE OF  
RESIDENCE IN NEW ZEALAND

- (1) The provisions of this Article shall apply to persons in the United Kingdom who have been resident in New Zealand.
- (2) Where a person is in, or resident in, the United Kingdom and at the time when he was last in New Zealand he was receiving national superannuation under the legislation of New Zealand, otherwise than by virtue of this Convention or the former Agreements, provided that he is over pensionable age as defined under the legislation of the United Kingdom he shall be entitled, subject to the provisions of paragraph (6) of this Article, to receive a basic retirement pension at the full standard rate under the legislation of the United Kingdom as if he satisfied the contribution conditions for such a pension.

...

(3) Subject to the provisions of paragraphs (4) and (6) of this Article, for the purpose of a claim for basic retirement pension under the legislation of the United Kingdom by a person to whom the provisions of paragraph (2) of this Article do not apply, a person in, or resident in, the United Kingdom shall be treated as if he ... had paid a Class 3 contribution under the legislation of the United Kingdom for each week during which he was resident in New Zealand.

(4) ...

(5) ...

(6) Any basic retirement pension which has become payable under the legislation of the United Kingdom by virtue of the provisions of this Convention or the former Agreements shall cease to be payable if and when the person to whom, or in respect of whom, the pension is payable leaves the United Kingdom, unless that person is usually resident in the United Kingdom and his absence from the United Kingdom is only temporary.

24. The Appellant was, in principle, within the personal scope of Article 9 as he had been at one time resident in New Zealand (see Article 9(1)). On that basis, as the heading implies, he could use his New Zealand residency to improve his UK retirement pension. He was plainly not affected by Article 9(2), as he had not been in receipt of NZ national superannuation when resident there. However, for the purpose of his UK retirement pension claim, made when he was in the UK in 2001, Article 9(3) had the effect of treating him as having paid class 3 voluntary national insurance contributions in the UK for every week that he was resident in New Zealand. As he was resident in New Zealand from June 1958 until October 1960, he was entitled to an additional three qualifying years in his pension calculation. This accordingly had the effect of increasing the number of his qualifying years from 36 to 39 (out of the requisite number of 44 years for a full pension), thereby increasing his reduced rate Category A retirement pension from 82% to 89% ( $\frac{39}{44} = 89\%$ , when rounded up).
25. As previously noted, this enhancement was not in fact put in place at the time of the Appellant's original claim for retirement pension in 2001, but following a telephone conversation between one of the Department's officers and the Appellant some 16 years later in 2017. The Appellant does not take issue with the arithmetic which results in the uplift being calculated at 7%.

*The withdrawal of the New Zealand enhancement with effect from 2007*

26. The second element of the Department's decision dated 1 August 2018 was the removal of the 7% New Zealand enhancement with effect from February 2007, when the Appellant moved from Malta (in the EU) to Turkey (out of the EU). As a consequence of this supersession decision, the Appellant's Category A retirement pension reverted to the 82% rate, based solely and exclusively on his UK national insurance contributions record. This is the Appellant's real bone of contention.
27. When giving permission to appeal, Judge Poynter considered it arguable that "the scheme established by the legislation is that whether a claimant satisfies

the contribution conditions for a Category A retirement pension is a once-for-all decision made by reference to the law and facts that existed as at the date the claimant reached pensionable age". He drew attention to section 44(1) of the Social Security Contributions and Benefits Act 1992. At the material time (when the Appellant attained pensionable age) section 44(1) provided as follows (emphasis added):

**44.— Category A retirement pension.**

(1) A person shall be entitled to a Category A retirement pension if—

(a) he is over pensionable age; and

(b) he satisfies the contribution conditions for a Category A retirement pension specified in Schedule 3, Part I, paragraph 5;

and, subject to the provisions of this Act, **he shall become so entitled on the day on which he attains pensionable age and his entitlement shall continue throughout his life.**

28. However, contrary to the provisional view expressed by Judge Poynter, this apparently resounding legislative declaration does not assist the Appellant, as the statutory scheme draws a distinction between *entitlement* and *payment or payability* (see also paragraph 20 above). Ms Franckevic's submission is that the Appellant became entitled to his Category A retirement pension on his 65<sup>th</sup> birthday and that "entitlement shall continue throughout his life", but it does not necessarily follow that it is payable at the same rate throughout his life. The distinction between entitlement and payability was confirmed by the Court of Appeal in *Campbell v Secretary of State for Work and Pensions* (again, see paragraph 20 above); see also on the same distinction *JL v Secretary of State for Work and Pensions* [2011] UKUT 293 (AAC); [2012] AACR 14. The Appellant's entitlement to the New Zealand enhancement thus continues throughout his life and will not cease, but it is only payable in accordance with the provisions of the Social Security (NZ) Order.
29. The basis for the decision to withdraw the New Zealand enhancement was Article 9(6) of the New Zealand Convention, cited above, which was seemingly not drawn to Judge Poynter's attention. This bears repetition and provides as follows:
- (6) Any basic retirement pension which has become payable under the legislation of the United Kingdom by virtue of the provisions of this Convention or the former Agreements shall cease to be payable if and when the person to whom, or in respect of whom, the pension is payable leaves the United Kingdom, unless that person is usually resident in the United Kingdom and his absence from the United Kingdom is only temporary.
30. In fact, of course, the Appellant had left the UK in 2003 (at first to live in Spain), and so one might be forgiven for asking why the New Zealand enhancement continued to be in payment until as late as 2007. The answer, of course, lies in the UK's (then) obligations under EU law to recognise free movement (see further Article 21 of the Treaty on the Functioning of the European Union). More particularly, as Ms Franckevic helpfully points out, the Social Security (NZ) Order was modified by the Social Security (Application of Reciprocal



Agreements with Australia, Canada and New Zealand) (EEA States and Switzerland) Regulations 2015 (SI 2015/349; 'the EEA States and Switzerland Regulations 2015') so as to reflect Article 21. Regrettably the Secretary of State's response to the Appellant's appeal before the First-tier Tribunal did not draw attention to this relevant amendment. Regulation 3(3)(e) modified Article 9(6) to read as follows (amendments by way of deletions and additions are shown by striking through and underlining respectively):

(6) Any basic retirement pension which has become payable under the legislation of the United Kingdom by virtue of the provisions of this Convention or the former Agreements shall cease to be payable if and when the person to whom, or in respect of whom, the pension is payable ~~leaves the United Kingdom, unless that person is usually resident in the United Kingdom and his absence from the United Kingdom is only temporary~~ leaves the area comprised of the EEA states and Switzerland, unless that person is usually resident in that area and his or her absence is only temporary.

31. Ms Franckevic helpfully acknowledges that the modifications made to the Social Security (NZ) Order by the EEA States and Switzerland Regulations 2015 did not strictly come into force until 1 April 2015, which of course was well after both the Appellant's original retirement pension claim and his relocation to Turkey. However, she explains that the Department's policy is to give claimants in the Appellant's position the benefit of those provisions, given that the UK was a signatory to the Maastricht Treaty on 1 September 1993. As such, and at that time at least, residency within the area covered by the EEA States and Switzerland was treated as if the person concerned was resident in the UK. The Appellant was accordingly given the benefit of this easement in the decision of 1 August 2018.
32. It followed that the Appellant remained entitled to be paid his New Zealand enhancement, originally awarded by virtue of Article 9(3) of the New Zealand Convention, so long as he was resident in Spain or Malta, as both countries are EEA states.
33. However, once the Appellant left "the area comprised of the EEA states and Switzerland", his right to payment of the New Zealand enhancement ceased under the modified Article 9(6), there being no serious suggestion that after February 2007 he was usually resident within that area and that his absence was only temporary. If the Appellant was to return to the UK, or to relocate to a country in the EEA bloc, then the NZ enhancement would become payable once again.

### **The Appellant's arguments**

34. I have not overlooked the Appellant's own various arguments in support of his appeal but they are not persuasive for the reasons that follow.
35. The gist of the Appellant's appeal to the First-tier Tribunal was that he had been completely unaware of the New Zealand Convention and that the Department had failed to inform him of his rights in a timely manner. He added that "the problem arose because I needed to have completed my claim whilst resident in UK to have qualified for the payments to continue in Turkey" (see paragraph 8

above). This is misconceived in two respects. In the first place, there is no suggestion that the Appellant actively sought information or advice about his own specific circumstances and was thereafter misadvised. Secondly, it mattered not whether his claim was made while resident in the UK, Spain or Malta – once he moved outside the area of the EEA States (and Switzerland), he was bound to lose the New Zealand enhancement because of the operation of Article 9(6).

36. The gist of the Appellant's appeal to the Upper Tribunal was that he had provided the Department with information about his residency in New Zealand when he had first claimed his retirement pension in 2001. This much is not in dispute. He also repeated his argument that he had not been properly advised: "my future circumstances may have been different had I known the penalties involved by living in Turkey" (see paragraph 11 above). However, again there is no suggestion that he actively sought information or advice from the Department about his own specific circumstances, and in particular about the consequences of relocating from a country within the EU to one outside the EU. As the District Tribunal Judge observed, there is no direct linkage between the Department's failure to act on information provided to it by the Appellant in 2001 and the subsequent withdrawal of the NZ enhancement with effect from 2007. Even if the Department had acted correctly at the time on the information provided in 2001 about his New Zealand residency, that uplift would still have been removed with effect from his relocation to Turkey in 2007.

#### **An alternative remedy?**

37. I should mention that there are alternative channels that the Appellant could pursue outside the tribunal system in respect of his grievance. He could, for example, make a complaint to the Department for Work and Pensions – e.g. about the Department's failure to act on the information he provided in 2001 about his residency in New Zealand – and, if dissatisfied with the Department's response, he could lodge a complaint with the Independent Case Examiner. He could also make a claim for compensation under the arrangements set out in DWP's *Financial Redress for Maladministration: Staff Guide* (updated 30 November 2020, being staff guidance that may be consulted on-line at <https://www.gov.uk/government/publications/compensation-for-poor-service-a-guide-for-dwp-staff/financial-redress-for-maladministration-staff-guide>).
38. However, the Appellant may face difficulties in a number of respects with either course of action. For example, and as already noted, it is not clear that the Appellant has ever been given inaccurate advice by any member of DWP staff. His complaint may well be that he was not given any advice at all, but as noted above he appears to have taken no steps to seek information about his specific circumstances (e.g. especially as to the implications for his retirement pension of moving from Malta to Turkey). In addition, it is not immediately obvious that the Appellant has suffered any quantifiable financial loss. It is true that he did not receive payment of the New Zealand enhancement between 2001 and 2007, but this was remedied in 2018 (although it is unclear whether any interest was paid by the DWP on the arrears). The analysis above demonstrates that he was no longer entitled to the New Zealand enhancement on moving from Malta to Turkey in 2007, so no loss can be established thereafter. Furthermore, it does not appear that the Department's actions or inactions contributed in any way to the decision to move to Turkey.

39. The most that can be said is that if the Department had put in place the New Zealand enhancement at the very outset of the Appellant's retirement pension claim in 2001, then it is possible that the Appellant may have sought advice from the Department in 2007 about its continued payability if he were to move outside the EU. Of course, if the Appellant can show that he did indeed seek advice from the Department in 2007 about the implications of moving from Malta to Turkey, then his complaint may well appear stronger. However, there may well be a difference between specifically seeking advice from the Department and simply notifying the Department of a change of address.
40. Be all that as it may, none of this can affect the proper operation of Article 9(6) of the New Zealand Convention as given effect in domestic law by the Social Security (NZ) Order.

**Conclusion**

41. I therefore dismiss the Appellant's appeal (under section 11 of the Tribunals, Courts and Enforcement Act 2007).

**Nicholas Wikeley**  
**Judge of the Upper Tribunal**

Authorised for issue on 9 June 2021