DB v Secretary of State for Work and Pensions
[2023] UKUT 144 (AAC)

IN THE UPPER TRIBUNAL **Appeal No.** UA-2021-000233-RP
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

DB

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church

Decided on consideration of the papers

Representation:
Appellant: Not represented
Respondent: Ms Beverley Massie

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.
The decision of the First-tier Tribunal made on 26 June 2021 under number SC0/268/18/03290 was not made in error of law, and is confirmed.

REASONS FOR DECISION

What this appeal is about

1. This appeal is against the decision of the First-tier Tribunal made on 26 June 2021 in respect of a previous decision made by a decision maker for the Respondent as to the Appellant's entitlement to a state pension. The First-tier Tribunal allowed the Appellant's appeal in part, holding that the Appellant's state pension entitlement from 21 October 2016 was £120.23, and not £115.63 as the Secretary of State had previously decided (the **"FtT Decision"**).

2. At the heart of this appeal is the Appellant's insistence that his periods of residence in Australia and New Zealand should have been taken into account in the assessment of his entitlement to his state pension, which would have resulted in his

entitlement being greater. The Appellant says that the First-tier Tribunal erred in law because it misunderstood and misapplied the law.

3. The Appellant was very unhappy with the FtT Decision and he applied to the First-tier Tribunal for a statement of reasons in respect of the FtT Decision, and for permission to appeal to the Upper Tribunal. When this was refused, he exercised his right to apply to the Upper Tribunal for permission.

The permission stage

4. The matter came before me. I decided that the grounds argued by the Appellant cleared the relatively low bar for a grant of permission, which was that they were "arguable" with a "realistic" as opposed to "fanciful" prospect of success. I gave permission and made case management directions.

Why there was no oral hearing of this appeal

5. Neither party requested an oral hearing of this appeal. I took the views of the parties into account and I considered the overriding objective. In the circumstances, I decided that an oral hearing was unnecessary and the interests of justice favoured this appeal being determined on the papers to avoid further delay.

The positions of the parties

6. The Appellant made detailed written submissions, the main thrust of which was that:

a. all his years of residence in Australia should have been taken into account in the calculation of his Retirement Pension under "Step 2" (as defined in Part II of Schedule 1 to the Pensions Act 2014 (the **"2014 Act"**), thereby increasing his entitlement, either:

   i. because (while the 2014 Act is not listed as relevant legislation in section 299(6)(c) of the Pensions Act 2004 (the **"2004 Act"**)), section 299(6)(c) on its proper interpretation nonetheless applies to it; or

   ii. if section 299(6)(c) does not apply to the 2014 Act, this amounts to unlawful discrimination and the Secretary of State failed to consider the impact on those who, like him, have resided in Australia but are unable to benefit from Steps 1 and 2 of the 2004 Act by using the years of residence in Australia, unlike residents of Canada and New Zealand before March 2001, who can benefit from Step 2 by using their period of residence in those countries; and

b. Class 3 national insurance contributions (**"NICs"**) credited to him during his period of residence in New Zealand in one year should have been credited to him in another year's earnings factor.

7. Ms Massie made a written submission on behalf of The Secretary of State arguing that the FtT Decision involved no error of law and inviting me to confirm the FtT Decision and to dismiss the appeal.

My reasons for dismissing the appeal

Proper interpretation of section 299 of the 2004 Act

8. In *FE v SSWP (RP)* [2019] UKUT 61 (AAC) (***"FE"***) Judge Wikeley considered most of the arguments that the Appellant makes on this appeal. He explained the background to the relevant provisions and provided a clear and compelling analysis of the proper construction of the legislative provisions relevant to the Appellant's claim in respect of his entitlement to a new state pension. The decision is highly relevant to this appeal, and it bears close reading. I therefore reproduce the bulk of that decision here. References to "NSP" are to the new state pension introduced by the 2014 Act (and which is the category of pension to which the Appellant in this case is entitled), and references to the "ORP" are to the old style pension that preceded it. Judge Wikeley said:

> "*Introduction*
>
> 16. …. Legislation must be read on its own terms and in its context. Oftentimes, what the legislation does not say can be just as important as what it does say. The present appeal illustrates that point well.
>
> *The starting point*
>
> 17. The starting point must be that entitlement to UK social security benefits is governed by UK domestic legislation. Such entitlement can be affected by international agreements, of which there are two broad categories. First, our (current) membership of the European Union provides for the co-ordination (but not the harmonisation) of social security rules across the EU. Second, the UK Government has over the years, both before and after our accession to (what is now) the EU, entered into a series of individual reciprocal agreements with other states making provision for e.g. mutual recognition of residency in each country to count for the purposes of qualifying for social security benefits in the other country.
>
> *The UK-Australia Reciprocal Agreement*
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> 18. The governments of the UK and Australia first signed a reciprocal agreement on social security matters in 1958. Such agreements are, by definition, mutually beneficial. Many UK citizens live, work and retire in Australia – some, like the Appellant and his wife, later return to retire in the UK. Likewise, many Australians build up a national insurance record in the UK before returning home. As Professor Terry Carney has observed, "the prime objectives of these agreements are to provide for the transfer, from one country to the other, of social security rights accumulated in the first country and to accommodate the increasing mobility of Australia's population" (Social Security Law and Policy, The Federation Press, Sydney, 2006, p.181). The most recent Agreement on Social Security Between the Government of the United Kingdom and Northern Ireland and the Government of Australia is dated October 1, 1990 ('the Reciprocal Agreement'). The scope of that agreement was defined by Article 2, which establishes the following points.
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> 19. First, the Reciprocal Agreement was applicable, within the territory of the UK, to what were then the main social security statutes, namely the Social Security Acts 1975 to 1989 (Article 2(1(a)(i)). The ORP (Category A) was at that

time governed by section 28 of the Social Security Act 1975 and so was within the scope of the Agreement.

20. Second, the Reciprocal Agreement also applied to "any laws, orders and regulations which superseded, replace, amend, supplement or consolidate" such legislation (Article 2(2)). So, the Reciprocal Agreement also applied to section 44 of the Social Security Contributions and Benefits Act 1992, which effectively re-enacted section 28 of the 1975 Act.

21. Third, the Reciprocal Agreement "shall not affect any benefits payable under the legislation of either Party except in the manner set out in this Agreement" (Article 2(3)). The NSP, of course, was not mentioned in the Reciprocal Agreement for the simple reason it did not exist at that time.

22. Fourth, and reinforcing the same point, the Reciprocal Agreement "shall apply … only to benefits described in the legislation specified in paragraph (1) at the date of coming into force of this Agreement *and for which specific provision is made in this Agreement"* (Article 2(5), emphasis added).

23. I should interpose here that I have considered whether the NSP could fall within the scope of the Reciprocal Agreement on the basis that the Pensions Act 2014 was in one sense a law which, on a possible reading of the terms of Article 2(2), 'superseded' or 'replaced' the legislation governing the ORP. There are at least two problems with that interpretation. The first is that it is otherwise inconsistent with the narrow way in which the scope of the Reciprocal Agreement is very precisely defined (see Article 2(3) and 2(5)). The second, to anticipate the reasoning below, is that the Agreement is now no more in any event.

24. Article 3 of the Reciprocal Agreement then made specific provision for "retirement pensions" (defined by Article 1(1) as meaning the "retirement pension or old age pension payable under the legislation of the United Kingdom"). In particular, Article 3(1) provided that "for the purpose of determining entitlement to retirement pension" under UK law, a person who was permanently resident in the UK "shall be treated as if he … had paid contributions" under UK legislation "for any period during which that person … (a) was resident in Australia and had attained the age of sixteen years." So, in short, the Reciprocal Agreement enabled residency in Australia to be treated as equivalent to the payment of national insurance contributions under the UK social security scheme when claiming an ORP (conversely see Article 4(2) relating to Australian age pensions).

25. The Reciprocal Agreement was an international treaty between two sovereign states. As such, and in accordance with well-established legal principle, while it defined the UK's international obligations it had no direct effect under UK law until incorporated into domestic legislation. This incorporation was achieved by the 1992 Order (see paragraph 9 above), which came into force on June 29, 1992. Article 3 of the 1992 Order revoked earlier instruments giving effect to previous reciprocal agreements, while Article 2 provided that the Social Security Act 1975 "and any regulations made under it shall be modified to such extent as may be required to give effect to the provisions contained in the Agreement so far as the same relate to England, Wales and Scotland."

26. Accordingly, Article 2 of the 1992 Order was of critical significance. It was the key that unlocked the Reciprocal Agreement at a domestic level and gave effect to its various provisions, including Article 3 of the Agreement governing retirement pensions. But, obviously if tautologically, the 1992 Order only had legal effect so long as it itself was in force.

The termination of the UK-Australia Reciprocal Agreement

27. The ending of the UK-Australia Reciprocal Agreement needs to be understood in its context. One of the recitals to the Reciprocal Agreement stated that it was entered into by the two governments "wishing to strengthen the existing friendly relations between the two countries". However, those "friendly relations" have been strained by a long-running dispute between the UK and Australia over the indexation (or rather non-indexation) of the ORP when paid to Australian residents. This dispute eventually resulted in the termination of the Reciprocal Agreement.

28. A short digression is in order. The ORP is payable overseas, but the rate payable to an overseas resident is uprated annually only if (broadly speaking) the claimant lives either in an EEA country or in a state which has a reciprocal agreement with the UK that specifically requires such indexation. The UK-Australia Reciprocal Agreement did not require such uprating. In the absence of such provision, claimants' ORP cash entitlement is frozen at the rate it was when they first became entitled (or the date when they left the UK, if they were already pensioners). Most of the half a million or so pensioners who are affected by non-indexation live in Australia or Canada. Successive UK governments have resisted attempts to apply uprating across the board overseas, citing the costs involved and the policy imperative of targeting limited resources on pensioners living in the UK. A legal challenge to the current arrangements failed both in the domestic courts (R (on the application of Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173) and at Strasbourg (Carson v United Kingdom (42184/05) (2010) 51 EHRR 13 (Grand Chamber)). The Pensions Act 2014 likewise includes provision for the NSP not to be uprated annually when paid overseas (see section 20(1) and Part 7 of the State Pension Regulations 2015 (SI 2015/173), inserted by regulation 4 of the State Pension and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2016 (SI 2016/199)).

29. Thus, the Australian Government terminated the Reciprocal Agreement because of the UK Government's continued refusal to uprate the ORP when paid to Australian residents, although other reciprocal agreements do make provision for indexation. On March 1, 2000 the Australian Government gave the UK Government a year's notice to terminate the Reciprocal Agreement (see the diplomatic exchange of Notes in the Schedule to the Social Security (Australia) Order 2000 (SI 2000/3255; 'the 2000 Order'). The 1992 Order was accordingly revoked by Article 3(1) of the 2000 Order, which came into force on March 1, 2001. Article 2(1) of the 2000 Order provided that, as a general rule, "modifications to the legislation by the Australia Order [i.e. the 1992 Order] shall cease to have effect" (emphasis added). The exception to this general principle was that such modifications would continue to apply where, as at February 28, 2001, a person was already in receipt of benefit by virtue of those modifications (or had a made a claim for benefit before that date where entitlement to benefit would first arise before that date; see Article 2(2)).

30. Be all that as it may, the result was that – subject to the preserved rights specified in Article 2(2) of the 2000 Order – the Reciprocal Agreement was finished and no longer had any practical effect. It was, in short, an ex-Agreement. However, the Article 2(2) exception was narrowly drawn – it only helped those individuals who were existing beneficiaries (or who had an existing benefit claim in train to commence before March 1, 2001). As such, Article 2(2) did nothing to protect the position of those people who had lived in Australia but who had not made a claim for benefits by March 1, 2001 (or who had made a claim for benefits before that date but where their entitlement started on or after that date).

31. As a matter of principle, it was obviously difficult to justify distinguishing between two ORP claimants who had lived for the same period of time in Australia before March 2001 where one claimed while the Reciprocal Agreement was still in force and one claimed after it had ended. Consequently, the DWP decided as a short-term 'fix' to treat those in the latter category on an extra-statutory basis as if they were also covered by Article 2(2). A longer-term strategy would require further legislation.

Section 299 of the Pensions Act 2004: UK-Australia Reciprocal Agreement limps on

32. In the event, the preserved rights specified in Article 2(2) of the 2000 Order were extended to a limited extent by section 299 of the Pensions Act 2004. According to Mr. Chris Pond, the then Parliamentary Under-Secretary of State for Work and Pensions (Standing Committee B, cols 213-214, March 16, 2004), section 299 was needed:

> "to regularise the extra statutory payments we are making to people now living permanently in the UK who have had previous periods of residence in Australia. When Australia ended the social security agreement in March 2001, we had to take steps to protect the national insurance contribution records of the people affected. We did so initially by making extra-statutory payments, and this protection applies to those who are entitled to the payments of state pension, widow's benefits and bereavement benefits, and puts payments on a proper legislative footing. If we declined to legislate, extra-statutory payments would have to come to an end, thereby reducing the benefits of about 3,000 people."

33. Section 299 therefore provided that, for the purposes of claims for the retirement pension, bereavement benefit or widow's benefit and made on or after March 1, 2001 (subs.(1)), certain provisions of the Reciprocal Agreement were treated as still continuing in force with modifications. Accordingly, any week of residence in Australia before April 6, 2001 (and forming part of a period of residence beginning before March 1, 2001) continued to be treated as a week of residence in the UK on the same basis as under the now defunct Reciprocal Agreement (subs. (3)(a)) and "the relevant UK legislation" continued to have effect as so modified (subs. (3)(b)). However, "the relevant UK legislation" was defined to cover only the 1992 consolidation statutes (subs.(6)(c)) and, of course, the section only applied to claims for the three specified types of benefits (subs. (1)). In addition, "retirement pension" was defined in the same terms as under the Reciprocal Agreement (subs. (7)).

34. Section 299 in full reads as follows:

‘Claims for certain benefits following termination of reciprocal agreement with Australia

299. —

(1) This section applies to claims for–

(a) retirement pension,

(b) bereavement benefit, or

(c) widow's benefit,

made on or after 1st March 2001 (the date from which the termination of the reciprocal agreement with Australia had effect).

(2) This section also applies to claims for retirement pension or widow's benefit made before 1st March 2001 if the claimant only became entitled to the pension or benefit on or after that date.

(3) For the purposes of such claims-

(a) the relevant provisions of the reciprocal agreement with Australia shall be treated as continuing in force as provided by this section; and

(b) the relevant UK legislation shall have effect as if modified to the extent required to give effect to those provisions (as they continue in force by virtue of this section).

(4) The relevant provisions of that agreement are treated as continuing in force as follows–

(a) references to periods during which a person was resident in Australia are only to periods spent in Australia before 6th April 2001 and forming part of a period of residence in Australia which began before 1st March 2001;

(b) Articles 3(3) and 5(2) (entitlement by virtue of previous receipt of pension in Australia) apply only to persons who were last in Australia during a period falling within paragraph (a) above;

(c) references to the territory of the United Kingdom do not include the islands of Jersey, Guernsey, Alderney, Herm or Jethou;

(d) references to widow's benefit, widow's payment, widow's pension and widowed mother's allowance include, respectively, bereavement benefit, bereavement payment, bereavement allowance and widowed parent's allowance;

(e) for the purposes of claims by a widower–

(i) for retirement pension by virtue of his wife's insurance, or

(ii) for bereavement benefit,

references to widows and husbands include, respectively, widowers and wives.

(5) An order made under–

(a) section 179 of the Social Security Administration Act 1992 (c. 5), or

(b) section 155 of the Social Security Administration (Northern Ireland) Act 1992 (c. 8),

may, in consequence of a change in the law of Great Britain or, as the case may be, Northern Ireland, modify the relevant provisions of the reciprocal agreement with Australia as they are treated as continuing in force for the purposes of claims to which this section applies.

(6) For the purposes of this section–

(a) "the reciprocal agreement with Australia" means the agreement set out in Schedule 1 to the Social Security (Australia) Order 1992 (S.I. 1992/1312) and the Social Security (Australia) Order (Northern Ireland) 1992 (S.R. 1992 No. 269) (as amended by the exchange of notes set out in Schedule 3 to those Orders);

(b) "the relevant provisions" of that agreement are the provisions of Articles 1, 3, 5, 8, 18, 20 and 24, so far as they relate to the United Kingdom;

(c) "the relevant UK legislation" is–

(i) the Social Security Contributions and Benefits Act 1992 (c. 4);

(ii) the Social Security Administration Act 1992;

(iii) the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (c. 7); and

(iv) the Social Security Administration (Northern Ireland) Act 1992; and, for the purposes of subsection (5), a change in the law of Great Britain or Northern Ireland includes any change made after the date of the reciprocal agreement with Australia.

(7) In this section–

"retirement pension" has the meaning given by the reciprocal agreement with Australia;

"bereavement benefit" means bereavement payment, widowed parent's allowance or bereavement allowance payable under the Social Security Contributions and Benefits Act 1992 or the Social Security Contributions and Benefits (Northern Ireland) Act 1992;

"widow's benefit" means widow's payment, widowed mother's allowance or widow's pension payable under either of those Acts.

(8) This section shall be deemed to have had effect at all times on and after 1st March 2001.

(9) Nothing in this section affects Article 2(2) of the Social Security (Australia) Order 2000 (S.I. 2000/3255) or Article 2(2) of the Social Security (Australia) Order (Northern Ireland) 2000 (S.R. 2000 No. 407) (which provide for cases where a person was in receipt of benefit on 28th February 2001 or had claimed a benefit to which he was entitled on or before that date)."

35. There is one other notable feature of section 299 of the Pensions Act 2004, which came into force on Royal Assent on November 18, 2004 (section

322(2)(c)(iv)). It has not been amended in any respect since enactment. More particularly, there is no reference to either the Pensions Act 2014 or the NSP in section 299. Indeed, if one examines the Pensions Act 2014 itself, it makes various amendments to other provisions of the Pensions Act 2004, but no change to section 299. Parliament could have chosen to do so but did not. For example, the 2014 Act does not amend section 299(1) of the 2004 Act so as to provide that "This section applies to claims for – … (d) state pension", with further consequential amendments to e.g. subsections (6) and (7). The only possible inference from those omissions is that section 299 applies to the benefits it mentions and to the extent that it provides, but no further. It was designed to ensure that e.g. ORP claimants would continue to be able to claim the advantages provided by the Reciprocal Agreement (and in particular recognition of periods of Australian residency before March 2001) but only for the social security benefits within the scope of that instrument. Reciprocal agreements in social security today

36. Reciprocal agreements for social security benefits in general are governed by section 179 of the Social Security Administration Act 1992. Section 179(1) provides that an Order in Council may be made for the purpose of giving effect to any particular reciprocal agreement and so modifying or adapting domestic legislation. Section 179(4) provides that the section applies to a range of primary legislation about social security, including Part 1 of the Pensions Act 2014 (section 179(4)(ai)).

37. The Social Security (Reciprocal Agreements) Order 2016 (SI 2016/158; 'the 2016 Order'), made under the powers conferred by section 179, effects changes to various reciprocal agreements to accommodate the reforms in Part 1 of the Pensions Act 2014. In effect, it provides for a process of statutory updating, modifying certain existing reciprocal agreements to include the NSP. In particular, paragraph 1 of Schedule 1 to the Order applies a "search and replace" function to the listed reciprocal agreements. In effect, it provides that where a reciprocal agreement refers to an ORP that should now be taken as referring also to the NSP. However, this modification only applies (see Article 2 of the 2016 Order) to those reciprocal agreements listed in Schedule 3 to the 2016 Order – so, for example, the Social Security (United States of America) Order 1984 (1984/1817) is included but not the Social Security (Canada) Order 1995 (SI 1995/2699). It may be no coincidence that the retirement pension is uprated for claimants living in the USA but not for those resident in Canada. The 2000 Order implementing the Reciprocal Agreement with Australia is also not included on the list in Schedule 3, for the simple reason that it no longer exists.

38. The Appellant's wife questioned why the 2016 Order did not also include a list of countries which were <u>not</u> covered by the provisions making modifications on account of the Pensions Act 2014. There are two reasons for that, one being principled and one being practical. The principled reason is that the omission of the Reciprocal Agreement with Australia is sufficient in itself to show it is not included (and, in any event, it has been terminated). The practical reason is that the list of countries is not static (think of the nation building changes in the former Yugoslavia since 1991), and keeping the 2016 Order up to date with a list of states that are not covered would be both time-consuming and prone to confusion. Drawing those threads together

> 39. It follows I agree with Ms Smyth's careful and compelling analysis of the legislative jigsaw. In short, the Reciprocal Agreement, which allows claimants to rely on periods of Australian residency when claiming certain UK social security benefits, (a) no longer exists; (b) was given effect in domestic law by the 1992 Order, but that has been revoked by the 2000 Order; (c) now limps on but only to the extent permitted by section 299 of the 2004 Act; and in any event (d) never applied to the new state pension under the Pensions Act 2014. The recognition of Australian residency before March 2001 that used to apply under the Reciprocal Agreement for the benefit of retirement pension claimants has been preserved and continued by section 299 of the Pensions Act 2004. However, those advantages apply only to the benefits specifically mentioned in section 299 and to no other social security benefits. As such, the DWP was correct to have regard to the Appellant's pre-March 2001 Australian residency when calculating Step 1 of his transitional rate new state pension (which looks at how the ORP would be calculated) but to ignore it under Step 2 (which is premised on the NSP rules applying to the calculation).
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> 40. What all this means, in plain English, is as follows:
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> • Claimants of UK social security benefits <u>cannot</u> rely on any period of residency in Australia on or after March 1, 2001;
>
> • Claimants of UK social security benefits <u>can</u> rely on any period of residency in Australia before March 1, 2001 <u>but only</u> for those benefits and in the circumstances set out in section 299 of the Pensions Act 2004;
>
> • Consequently, a claimant of the UK's new state pension (NSP) under the Pensions Act 2014 can rely on their pre-March 1, 2001 residency in Australia when calculating their Step 1 entitlement to the transitional rate NSP but not when calculating their Step 2 entitlement to that transitional rate."

9. The Appellant acknowledges the decision in FE but says that he disagrees with it. The First-tier Tribunal considered itself bound to follow *FE*. It was right to do so because the Upper Tribunal is a superior court of record and its decisions create precedent which is binding on the First-tier Tribunal.

10. While *FE* is not binding on me, in the interests of comity and to avoid confusion on questions of legal principle, a single judge of the Upper Tribunal will normally follow the decisions of other single judges of the Upper Tribunal (see *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at [37]).

11. In any event I agree wholeheartedly with Judge Wikeley's analysis and nothing that the Appellant has said in his submissions persuades me that there is any good reason to depart from it. I adopt Judge Wikeley's reasons as my own. For these reasons the Appellant's arguments on interpretation fail.

Alleged breach of Convention rights

12. Aside from his arguments on construction, which are comprehensively dealt with in Judge Wikeley's decision in *FE*, the Appellant makes a further argument that the Secretary of State's failure to take into account his residence in Australia in his "Step 2" calculation amounts to unlawful discrimination contrary to his rights under Article 14 read with Article 8 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms (the **"Convention"**) as those rights are protected by the Human Rights Act 1998 (**"HRA 1998"**).

13. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

14. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

15. The Appellant says that, given that people who lived in Canada and New Zealand before March 2001 are able to use their residence in those countries in their "Step 2" calculations, his inability to use his residence in Australia is discriminatory. He says that, as a result of this discrimination, his pension is insufficient for his needs and prevents him from spending a reasonable time with his family. He says that parliament could have amended section 299 of the 2004 Act to include the 2014 Act, but it chose instead to discriminate against him and those sharing his status in favour of those living in New Zealand and Canada before March 1, 2001.

16. In *R (Stott) v Secretary of State for Justice* [2020] AC 51 (***"Stott"***) at [8] Lady Black set out the four elements which needed to be shown to establish a discrimination claim under Article 14:

> "In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking."

17. *M v SSWP* [2006] 2 AC 91 was a case that concerned a divorced mother with a same sex partner who claimed that the child maintenance rules discriminated against her contrary to both A1 P1 and Article 14 read with Article 8, because the calculation of her liability to pay child maintenance would have been more advantageous had she been in a relationship with a partner of the opposite sex. In that case Lord Bingham said at paragraph [5] that the fact that a person has less money to spend does not by itself bring a claim within the ambit of Article 8:

> "No doubt, Ms M has less money to spend that if she were required to contribute less … But this does not impair the love, trust, confidence, mutual dependence and unconstrained social intercourse which are the essence of family life, nor does it invade the sphere of personal and sexual autonomy which are the core of private life …."

18. The Appellant's argument as to why his situation comes within the ambit of Article 8 is that he is unable to spend reasonable time with his family "due to the financial limits imposed by my circumstances and the present value of my pension". This is a purely financial consideration. Like Ms M's, this financial impact has too tenuous a link with his private and family life to bring his situation within the ambit of Article 8. I agree with the Respondent's submission that to extend Article 8 to apply in such circumstances would mean that all negative financial impacts would be brought within the ambit of Article 8, because "having less money will always limit what you can do with your family". That cannot have been intended.

19. Even if I am wrong on ambit, the Appellant still has to satisfy the second, third and fourth requirements identified by Lady Black in *Stott*.

20. In terms of the second requirement outlined in *Stott* (i.e. establishing that the difference in treatment he has experienced was on the ground of one of the characteristics listed in article 14 or "other status"), the Appellant maintains that he, as a former resident of Australia, is treated less favourably than former residents of New Zealand and Canada. While this may at first glance appear to satisfy the second requirement, because residence in a particular country amounts to an "other status" for the purposes of Article 14, I am not persuaded that the different treatment that the Appellant identifies is on the basis of his country of residence, but rather the fact that his country of residence has no applicable reciprocal agreement with the United Kingdom in respect of social security matters, while New Zealand and Canada do.

21. In terms of the third requirement in *Stott*, (showing that the claimant and the person who has been treated differently are in analogous situations) there is very clear authority on this issue: in *Carson and Others v The United Kingdom* [2010] ECHR 338 (***"Carson"***) the Grand Chamber rejected a claim that the United Kingdom's policy of not uprating state pensions for residents in countries which didn't have a reciprocal agreement with the United Kingdom which required uprating was discriminatory. It rejected the proposition that the applicants, who were resident in South Africa, which didn't have such a reciprocal agreement with the United Kingdom, were in a relevantly similar position to residents of countries which did have such an agreement in place. The Grand Chamber said at [88]-[89]:

> "States clearly have a right under international law to conclude bilateral social security treaties and indeed this is the preferred method used by the Member States of the Council of Europe to secure reciprocity of welfare benefits …. Such treaties are entered into on the basis of judgments by both parties as to their respective interests and may depend on various factors, among them the numbers of people moving from one country to the other, the benefits available under the other country's welfare scheme, how far reciprocity is possible and the extent to which the advantages to be gained by an agreement outweigh the additional expenditure likely to be incurred by each State in negotiating and implementing it … The Court agrees with Lord Hoffman that it would be extraordinary if the fact of entering into bilateral arrangements in the social security sphere had the consequence of creating an obligation to confer the same advantages on all others living in all other countries. Such a conclusion would effectively undermine the right of States to enter into reciprocal agreements and their interest in so doing."

22. It is abundantly clear from *Carson* that the Appellant cannot be said to be in a relevantly similar position to his chosen comparators (former residents of New Zealand

and Canada), and therefore the denial of a right to use his residence in Australia in his "Step 2" pension calculations cannot be said to breach Article 14.

23. Even if all of that is wrong and discrimination is established, there is still the fourth element identified by Lady Black in *Stott* to consider: the issue of justification. It is well established that contracting states enjoy a wide margin of appreciation in relation to policy on social security matters. See *Richardson v United Kingdom* [2012] ECHR 766 at [21], which states:

> "The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"

24. As was emphasized by the Grand Chamber in *Carson*, "states clearly have a right under international law to conclude bilateral social security treaties". They must surely also have the right to terminate them. Once the reciprocity provided for in a bilateral treaty comes to an end it is perfectly reasonable for the parties to treat residents of the country in question in the same way as residents of other countries with whom it has no treaty on social security matters. The United Kingdom government's choice not to legislate to extend the same protection to residents of Australia as it extended to residents of Canada and New Zealand cannot be said to be "manifestly without reasonable foundation".

25. For the sake of completeness, I shall deal with another argument that the Appellant made in relation to the HRA 1998. The Appellant rightly acknowledges that the Upper Tribunal does not have jurisdiction to make a declaration of incompatibility with the HRA 1998 in respect of primary legislation (such as the 2004 Act), and cannot disapply primary legislation, even if that primary legislation breaches rights protected by the HRA 1998. However, the Appellant makes a submission that it was Judge Wikeley's interpretation in *FE* of the proper construction of the 2004 Act (and in particular section 299) that was the cause of the unlawful discrimination he claims to have suffered.

26. I find this submission a bit confusing, but I think that what the Appellant is getting at is the fact that section 3 of the HRA 1998 provides that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

27. Judge Wikeley does not reference that duty in *FE,* and nowhere in that decision does Judge Wikeley attempt the kind of mental gymnastics that section 3 HRA 1998 might require, but that is for the very simple reason that the appeal before him did not raise arguments of breach of Convention rights.

28. For the reasons I have given I am by no means persuaded that the interpretation which Judge Wikeley has put on section 299 of the 2004 Act results in any

incompatibility with Convention rights. As such there is no requirement to seek to identify an alternative interpretation.

29. For these reasons the Appellant's arguments on breach of his Convention rights fail.

Issues relating to the Appellant's residence in New Zealand

30. The Appellant argues that the First-tier Tribunal erred in its treatment of his residence in New Zealand, and had it approached this correctly it would have resulted in his receiving an additional pension increment for one year, and that this would increase his entitlement if his Australian residence were included.

31. Section 13(3) of the Social Security Contributions and Benefits Act 1992 provides that the Secretary of State may provide for Class 3 NICs, although paid in one tax year, to be appropriated in prescribed circumstances to the earnings factor of another tax year.

32. That provision was made by Regulation 2 of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 (the **"2001 Regulations"**), which states that Class 3 NICs paid in one year may be appropriated to the earnings factor of another year if such contributions may be paid for that other year according to the usual entitlement conditions.

33. The First-tier Tribunal found that the Appellant was resident in New Zealand between 27 April 1979 and 12 July 1980. He was not resident for a full 52 week period within either the 1979-1980 tax year or the 1980-1981 tax year (paragraph [14] of its statement of reasons).

34. It found that neither year created an earnings factor that was equal to, or higher than, the qualifying earnings factor for that year. It decided that these tax years contained insufficient credited contributions to amount to a pre-commencement qualifying year under either "Step 1" or "Step 2".

35. It went on to consider whether, under the 2001 Regulations, he could appropriate credited contributions from one incomplete tax year to complete the other tax year for either the 1979-1980 tax year or the 1980-1981 tax year.

36. The Appellant accepts that he did not pay Class 3 NICs while he lived in New Zealand. However, he says that Article 9 of the Social Security (New Zealand) Order 1983 (the **"New Zealand Order"**) requires him to be treated as if he had paid a Class 3 NIC for each week during which he was resident in New Zealand.

37. Article 9 of the New Zealand Order provides, so far as relevant, as follows:

> "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."

38. While the Appellant maintains that because he must, by virtue of the New Zealand Order, be "treated as if he … had paid" a Class 3 NIC for each week of his residence in New Zealand, his situation fell within Regulation 2 of the 2001 Regulations. However, the First-tier Tribunal found that it didn't because he had not <u>actually</u> paid contributions

during either tax year. It interpreted the 2001 Regulations (which contain no definition or interpretation provision which suggests that "paying" includes circumstances where contributions are "being treated as having paid") as requiring actual payment for the right of appropriation to apply. I agree with the First-tier Tribunal's interpretation.

39. The First-tier Tribunal nonetheless went on to consider whether, if the Appellant were to have the benefit of an additional pre-commencement qualifying year in respect of his residence in New Zealand, that could make any difference to his Step 1, 2 and 3 calculations.

40. It found that under Step 1 the Appellant had already been assessed as meeting the maximum 30 qualifying pre-commencement years that could be taken into account, so an additional pre-commencement qualifying year would make no difference.

41. It found that even with an additional pre-commencement qualifying year in respect of the residence in New Zealand, his Step 2 calculation figure would still be lower than the Step 1 calculation figure, and therefore it couldn't make any substantive difference to the Step 3 comparison.

42. The First-tier Tribunal does appear to have made a mistake in that it says in paragraph B2 of its statement of reasons that the Appellant was born in 1961, when in fact he was born in 1951. However, that appears to have been simply a typographical error (given that the Appellant is said to have reached state retirement pension age in 2016 (which accords with his correct date of birth), and is not material because had it not been made the outcome of his appeal wouldn't have been any different.

43. The Appellant responds that if his Australian residence were included then it would make a difference. For the reasons explained above, I am not persuaded by his arguments on the period of residence in Australia.

44. The First-tier Tribunal considered the evidence and made clear findings of fact based on the evidence as it assessed it. It considered the relevant law and interpreted it correctly. It applied the law to the facts it found. Its statement of reasons is an impressive piece of work which explains its decision with admirable thoroughness and clarity. While there is a mistaken reference to the Appellant's date of birth I am satisfied that this mistake was not material to the decision it reached.

45. For these reasons I dismiss this appeal.

Thomas Church
Judge of the Upper Tribunal
Authorised for issue on 22 June 2023