NATIONAL INSURANCE CONTRIBUTIONS — appellant making UK contributions for 78 weeks — thereafter resident overseas — whether entitled to make additional voluntary contributions — application of EU coordination legislation — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **Appeal No: UT/2015/0173**

BETWEEN:

JOHN AUGUSTINE GARLAND **Appellant**

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Tribunal: Judge Colin Bishopp
Judge Greg Sinfield

Sitting in public in London on 12 July 2016

The appellant appeared in person

Ms Julia Smyth, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

1. This decision represents the latest stage in a long and dedicated campaign by the appellant, Mr John Garland, by which he has been attempting to persuade or compel the respondents, Her Majesty's Revenue and Customs, or HMRC, to permit him to pay what are now called Class 3 national insurance contributions ("NICs"), that is the voluntary contributions ("voluntary NICs", the term we shall use) which may be made by persons not obliged to pay NICs but who wish to enhance their entitlement to benefits, particularly of state pension, by doing so. The opportunity of paying voluntary NICs is not open to everyone: certain conditions must be satisfied. The issue in the appeal is whether Mr Garland satisfies them.

2. The relevant facts are uncontroversial and can be stated quite briefly. Mr Garland was born in Dublin in May 1928. After leaving school he secured employment, in the course of which he made 53 weekly contributions to the Irish national insurance scheme. He was credited with a further 46 weeks' contributions for periods of illness or unemployment. On 20 December 1948 he moved from the Irish Republic, where he had hitherto spent his entire life, to Great Britain. We refer to Great Britain because Northern Ireland has its own, separate, national insurance scheme, but nothing turns on this for present purposes. In January 1949 Mr Garland obtained employment in Great Britain in which he remained continuously until 31 July 1950. During that time he made 78 weekly contributions to the British national insurance scheme; he received no additional credits.

3. On 1 August 1950 Mr Garland moved to Kenya in order to join the Kenyan police service, in which he remained until 7 October 1963. He later lived in a number of countries, none within what is now the European Union and with none of which Great Britain has or had reciprocal national insurance arrangements, before returning to Ireland on or about 1 January 1984. He remained there until 31 July 1994, when he moved to the Isle of Man (which is not part of the United Kingdom or of Great Britain). In mid-2003 Mr Garland moved again, to Gibraltar, where he still lives. Although he has made a number of relatively brief visits to the United Kingdom since 1963 he has at no time since his move to Kenya in 1950 been resident in any part of the United Kingdom, nor has he undertaken any employment giving rise to an obligation to pay British NICs.

4. Mr Garland's case is that he satisfied the relevant conditions, and was entitled to pay voluntary NICs, for the entire period from his move to Kenya until 30 May 1993, his 65th birthday, on which date he attained pension age; he acknowledges that he is not permitted, for that reason, to pay any kind of NICs for periods falling after 30 May 1993. HMRC have accepted that Mr Garland did meet the applicable conditions while he was living in Ireland from 1 January 1984 until he attained pension age, and he has paid voluntary NICs for that period. HMRC now say that they were mistaken, and that Mr Garland was not, as a matter of law, entitled to pay voluntary NICs in respect of his second period of residence in Ireland, though they do not seek to go back on their concession. We do not need to, and will not, say any more about that period. HMRC have consistently maintained that Mr Garland did not meet the relevant conditions at any time between 1 August 1950 and 31 December 1983, and they have refused to allow him to pay voluntary NICs for any part of that period.

5. Until he was permitted to pay voluntary NICs for the second period of his Irish residence Mr Garland was in receipt of no British state pension. The relevant entitlement rules at the time he attained pension age were to be found in the Social Security Contributions and Benefits Act 1992, s 44 and Sch 3 Part I para 5. They too are not controversial and can be briefly described. The first rule of application in this case, the threshold condition, was that the person concerned had "actually paid contributions" into the British scheme in at least one year of his working life, which Mr Garland plainly did. The second related to the calculation of the pension entitlement. In short summary, and omitting some details of no present importance, the rule as it stood when Mr Garland reached pension age, and as it still applies to him and others of the same age, was that a full pension became payable to a person who had a sufficient contribution record (including both actual payments and credits) in each year of the "requisite period" which, in Mr Garland's case, was 44 years. If the person had paid or been credited with sufficient contributions for fewer years than the requisite period the amount of the pension he received was reduced proportionately, save that if his contributions and credits covered less than 25% of the requisite period—in Mr Garland's case 11 years—no pension was payable.

6. The contributions Mr Garland made into the British scheme in the 18-month period in 1949 and 1950 when he was living and working in Great Britain fell far short of the 11-year requirement, but the voluntary NICs he paid in respect of his second period of Irish residence enabled him to overcome the 25% hurdle and to become entitled to a British state pension, though of only 28% of the amount he would have received if he had a full contributions record. Mr Garland's aim is to secure a full, or at least a greater, pension by paying further voluntary NICs, and he has been corresponding with HMRC and their predecessors on the topic for well over 40 years. His success so far has been limited to his second period of residence in Ireland. He will be disappointed to learn that he has not improved on that limited success in this appeal.

7. In 2010 Mr Garland appealed to the First-tier Tribunal against a decision of HMRC, dated 9 October 2009, by which they refused to permit him to pay voluntary NICs for the period of his residence in Kenya between 1950 and 1963. That appeal was unsuccessful (see [2011] UKFTT 273 (TC)) ("F-tT 1") and Mr Garland's onward appeal to this tribunal also failed: see [2012] UKUT 471 (TCC) ("UT 1"). Mr Garland sought permission to appeal to the Court of Appeal, but his application was refused, ultimately by the Court of Appeal itself. UT 1's decision is therefore final, but Mr Garland continues to argue that it was wrong; we shall return to this point. In 2014 Mr Garland appealed against a further decision of HMRC, dated 27 November 2013, refusing him permission to pay voluntary NICs for the period from 29 November 1963 to 31 December 1983. That appeal came before Judge Richards in the First-tier Tribunal in 2015, and was dismissed: see [2015] UKFTT 0417 (TC) ("F-tT 2").

8. Mr Garland now appeals to this tribunal against F-tT 2. Permission was refused in the First-tier Tribunal by Judge Richards, but the application was renewed to this tribunal. It came before Judge Berner, who granted it but on limited grounds. Mr Garland has elected to renew his application, so far as it was refused by Judge Berner, at an oral hearing and, because he lives in Gibraltar, it was decided that there should be a single hearing at which the renewed application should immediately precede the hearing of the appeal, on those grounds for which Mr Garland already has permission as well as any further grounds in respect of which he is able to persuade us to grant it.

9. Mr Garland represented himself at the hearing before us, as he has done throughout. HMRC were represented by Ms Julia Smyth of counsel, who did not appear below.

10. It will become clear from what follows that the question whether a person may pay voluntary NICs breaks down into two issues:

(1) did he meet the applicable conditions at the time for which he wishes to pay voluntary NICs?

(2) if not, has later legislation retrospectively made it possible for him to meet the conditions, or to qualify in some other way?

11. The rules relating to those issues are to be found in a combination of domestic and European legislation. The evolution of the legislation and the manner in which Mr Garland advances his case make it necessary to consider three periods: the period from August 1950 to November 1963 when Mr Garland was in Kenya, the subject of F-tT 1 and UT 1; the period from November 1963 to 31 December 1972; and the period from 1 January 1973 (the day of the United Kingdom's accession to what was then the European Economic Community) until 31 December 1983, the day before Mr Garland moved back to Ireland. We shall refer to them respectively as Period 1, Period 2 and Period 3. Nevertheless, as will become clear, the segregation into periods does not matter since the outcome in respect of all is the same and, save for one minor point, for the same reasons.

12. Mr Garland accepts that, if the domestic legislation is taken alone, he does not satisfy the relevant conditions in any of Periods 1, 2 and 3. His case is therefore wholly dependent on the validity of his argument that the domestic legislation is incompatible with provisions of European Union legislation and is to be disregarded, or alternatively (though it comes to the same thing) is overridden by that same European legislation. F-tT 1 and UT 1 rejected that argument in respect of Period 1, and Judge Richards rejected it in respect of Period 2 upon the ground that, as there was no material change in the law between 1950 and 1972, UT 1 was binding on him in respect of any time before 1973, though he added that he was in any event satisfied that UT 1 was correct. He accepted Mr Garland's argument that UT 1 was not binding on him with regard to Period 3, but nevertheless dismissed his appeal for reasons to which we shall come.

13. Mr Garland's application for permission to appeal to this tribunal related primarily to Periods 2 and 3, but he made it clear that he also wished to re-open the question whether he is eligible to pay voluntary NICs for Period 1; as we have said, he refuses to accept that F-tT 1 and UT 1 were correctly decided. Judge Berner did not permit him to extend his application to Period 1, but nevertheless embarked in his decision notice on a short examination of the reasoning in UT 1, and in the course of doing so addressed Mr Garland's submissions about it. He concluded that it was not reasonably arguable that UT 1 was wrong, and refused permission to appeal in respect of Period 2 on the intended ground that (reformulating Mr Garland's application rather more briefly) Judge Richards should have distinguished UT 1 or, even if he was bound to follow it, we, also sitting in the Upper Tribunal, could legitimately revisit the reasoning and differ from it if we were persuaded UT 1 was wrongly decided. Judge Berner did, however, give permission to appeal in respect of Period 2 on a different ground, and Mr Garland was granted permission to appeal, on some of his proposed grounds, in respect of Period 3. Before we explain the detail of those grounds on which

he has permission, and those on which he does not, it is necessary to say something more of the relevant law.

14. The starting point is the National Insurance (Residence and Persons Abroad) Regulations 1948 ("the 1948 Regulations"), which were in force from 24 June 1948 to 5 April 1975. The only provision of present relevance is regulation 5 which, so far as material, was as follows:

> "(1) Where an insured person is throughout any contribution week outside Great Britain and is not in that week an employed person, he shall not be liable to pay any contributions as an insured person for that week.
>
> (2)(a) Subject to the conditions specified in sub-paragraph (b) of this paragraph an insured person shall, for any week during the whole of which he is outside Great Britain, and for which by virtue of paragraph (1) of this regulation he is not liable to pay a contribution as an insured person, be entitled to pay a contribution as a non-employed person or, if he desires and is gainfully occupied in that week, as a self-employed person.
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> (b) The conditions referred to in the preceding sub-paragraph are:—
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> (i) either that … not less than 156 contributions of any class under the Act had been paid by him as an insured person, or alternatively, that he had been resident in Great Britain for a continuous period of not less than 3 years at any time before the week in question; and
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> (ii) that in either case he exercises the option to pay contributions in respect of any period during which he is outside Great Britain before the expiration of 26 weeks from the date on which the period commenced…."

15. It is common ground that Mr Garland came within para (1) of the regulation: he was an "insured person" within the definition provided by s 1(1) of the National Insurance Act 1946 (the enabling legislation), and he was not an "employed person", defined by s 1(2) of that Act as a person "gainfully occupied in employment in Great Britain, being employment under a contract of service". For the same reasons, and because he was at all times outside Great Britain (ignoring his brief visits) he also came within para (2)(a). The only remaining question is therefore whether for the whole or any part of Periods 1, 2 and 3 he satisfied either of the conditions set out in para (2)(b)(i). At an earlier stage HMRC took the view that the time limit imposed by para (2)(b)(ii) might be offended, but they no longer pursue that possible argument and we leave it out of account.

16. Regulation 5 was replaced from 6 April 1975 by reg 115 of the Social Security (Contributions) Regulations 1975 ("the 1975 Regulations"). So far as material the successor regulation provided that:

> "(1) … a person … may … if he so wishes and if he satisfies the conditions specified in the next succeeding paragraph, pay contributions in respect of periods during which he is outside Great Britain as follows—
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> …
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> (b) in respect of any year which includes a period during which he is outside Great Britain he may pay Class 3 contributions.
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> (2) The conditions referred to in the last preceding paragraph shall be either—

(a) that the person has been resident in Great Britain for a continuous period of not less than 3 years at any time before the period for which the contributions are to be made; or

(b) that there have been paid by or on behalf of that person contributions of the appropriate amount—

(i) for each of 3 years ending at any time before the relevant period; or

(ii) for each of 2 years so ending and, in addition, 52 contributions under the former principal Act; or

(iii) for any one year ending before the relevant period and, in addition, 104 contributions under the former principal Act; or

(c) that there have been paid by or on behalf of that person 156 contributions under the former principal Act."

17. Thus the residence condition was materially the same as under the 1948 Regulation. The contributions condition was more complicated but, in practical terms, to the same effect as its predecessor. "Contributions of the appropriate amount" were those paid at an employed person's rate or its equivalent for at least 50 weeks in the contribution year. The "former principal Act" to which para (2) referred was the National Insurance Act 1965 and, as Judge Richards pointed out, Mr Garland had made no contributions under that Act, which was not in force in 1949 and 1950. That does not matter as Mr Garland's contributions in those years did not meet the changed condition. In 1979 the 1975 Regulations were replaced by the Social Security (Contributions) Regulations 1979; reg 121 of those Regulations is materially identical to reg 115 of the 1975 Regulations, save that "contributions of the appropriate amount" now meant payments at an employed person's rate or its equivalent for all 52 weeks in the contribution year.

18. Mr Garland accepts that he did not and does not meet either of the requirements of para (2)(b)(i) of reg 5 of the 1948 Regulations: as we have said, he made only 78 contributions while he was in the UK in 1949 and 1950, and his period of residence amounted to about 19 months. Similarly, he accepts that, in respect of that part of Period 3 which fell after 5 April 1975, he cannot satisfy either of the conditions imposed by reg 115 of the 1975 Regulations or reg 121 of the 1979 Regulations. The voluntary NICs he has paid in respect of his period of resumed Irish residence do not help him since it is plain from all the regulations that the requisite contributions must have been paid, or that the three years of residence must have been completed, before the start of the period for which the person concerned wishes to pay voluntary NICs.

19. Mr Garland's case, however, is that regs 5, 115 and 121 cannot be taken alone; they must be read with Council Regulation 1408/71/EEC (on the application of social security schemes to employed persons and their families moving within the Community) ("the 1971 Regulation") and Regulation 883/2004/EC (on the coordination of social security systems) ("the 2004 Regulation"). The 1971 Regulation came into effect, in the UK, immediately on accession to the Community. The 2004 Regulation, which repealed and replaced the 1971 Regulation, came into force on 1 May 2010 by virtue of art 97 of Regulation EC/987/2009. The kernel of Mr Garland's argument is that both the 1971 and the 2004 Regulations have retrospective effect to his advantage.

20. The first provision of the 1971 Regulation which is relevant is art 9, entitled "Admission to voluntary or optional continued insurance". In the form in which it was in force on 1 January 1973 it read:

> "1. The provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to persons resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employed or self-employed persons.
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> 2. Where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of insurance periods, any such periods completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State."

21. Article 9.2 was amended, with effect in the United Kingdom from 1 April 1973, by Council Regulation (EEC) 2864/72. As Judge Richards explained in F-tT 2, at [55], that amendment was connected with the accession of Denmark, and it appears to reflect a feature of Danish national insurance law. As amended it read as follows:

> "Where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of periods of insurance, the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State."

22. The equivalent provision of the 2004 Regulation is art 6, entitled "Aggregation of periods":

> "Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:
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> – the acquisition, retention, duration or recovery of the right to benefits,
>
> – the coverage by legislation, or
>
> – the access to or the exemption from compulsory, optional continued or voluntary insurance,
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> conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies."

23. Mr Garland argues that art 9 of the 1971 Regulation compels HMRC, regardless of domestic legislation, to add the 53 contributions he made and the 46 contributions with which he was credited in Ireland before he left for Great Britain in 1948 to his 78 British contributions, making a total of 177, comfortably in excess of the 156 needed to satisfy the contributions condition of the 1948 Regulation and similarly sufficient to satisfy the equivalent condition of reg 115 of the 1975 Regulation. The article also compels HMRC, he says, and again regardless of domestic legislation, to aggregate his period of residence in Ireland between 1928 and 1948 with his period of residence in Great Britain between 1948 and 1950, with the consequence that he meets the three-year

residence conditions of regs 5(2)(b)(i) and 115(2)(a). He advances similar arguments by reference to art 6 of the 2004 Regulation.

24. Those arguments are the foundation of the grounds on which Mr Garland was granted permission to appeal. They were set out by Judge Berner as follows:

> (1) whether on application of the 1971 Regulation the period of residence of Mr Garland in Ireland between 1928 and 1948 is to be taken into account and so to enable Mr Garland to satisfy the residence test with respect to his claim to pay voluntary NICs for the period 1 January 1973 to 1 January 1984;
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> (2) whether on application of the 1971 Regulation the 53 actual weekly contributions made by Mr Garland under the equivalent Irish legislation in the period 1928 to 1948 are to be taken into account in determining whether Mr Garland satisfies the contributions test with respect to his claim to pay voluntary NICs for the period 1 January 1973 to 1 January 1984;
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> (3) whether on application of the 1971 Regulation the 46 Irish credits available to Mr Garland under Irish law by reference to his contribution record in Ireland in the period 1928 to 1948 were required to be treated in the same way as actual NICs made under UK law, and accordingly are to be taken into account in determining whether Mr Garland satisfies the contributions test with respect to his claim to pay voluntary NICs for the period 1 January 1973 to 1 January 1984; and
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> (4) whether the 1971 Regulation applies to a payment which may be made after the date of entry into force of that Regulation in the UK in respect of a period falling prior to that date, so as to enable either or both of the residence test and the contributions test to be satisfied in relation to any part of such period, in the case of Mr Garland by reference to either or both of his residence and contribution records in Ireland between 1928 and 1948.

25. Grounds (1), (2) and (3) therefore relate only to Period 3, while ground (4) may relate to both Periods 2 and 3.

26. Judge Berner also recorded the three further grounds on which Mr Garland sought permission, which was refused:

> (5) The conclusion of [F-tT 2] that the issue of Mr Garland's move to Kenya in 1950, which was the subject of [UT 1], could not be re-opened in this appeal.
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> (6) The conclusion of [F-tT 2] as regards the irrelevance of [the 2004 Regulation] to this appeal.
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> (7) An assertion that [F-tT 2] had confused the concepts of residence and insurance.

27. As we have said, Mr Garland renewed his application at the beginning of the hearing before us. In the event, the arguments relating to that application and those relating to the grounds on which permission had already been granted became somewhat mingled, but it is nevertheless convenient to deal with the permission application first.

28. We agree with Judges Richards and Berner that the question whether Mr Garland is entitled to pay voluntary NICs in Period 1 has been conclusively decided against him by UT 1, and it is not possible for us to re-open that question. There is a public interest in the finality of litigation and a defined appellate process which, as we have explained, Mr Garland has exhausted. Accordingly, even if we should think there was merit in Mr Garland's arguments in respect of Period 1 we are obliged to refuse permission on ground (5). The matter does not quite rest there because the decision in respect of Period 1 is a decision of a differently-constituted panel of this tribunal (albeit Judge Sinfield has been a member of both panels) and as we have indicated it is open to us, if we are satisfied that the decision in UT 1 is wrong, to reach our own conclusion on the point, though only in respect of Period 2; even if we were to take a different view from UT 1 we could not reverse or change the decision so far as it relates to Period 1, for the reasons we have given. However, as we explain below, we are satisfied that the decision in UT 1 was correct and, had we not refused permission to appeal on ground (5) for jurisdictional reasons, we would refuse it on the basis that the ground is unarguable.

29. We also refuse permission to appeal on grounds (6) and (7). The reasons appear at the end of this decision as it is more convenient to explain them after we have dealt with the remainder of the parties' arguments.

30. Before going further we should mention, in case it should be thought we have overlooked them, some matters which were explored in F-tT 1, UT 1 or F-tT 2 but which are no longer in issue, or at least are no longer pursued. We have already mentioned the time limit imposed by para 5(2)(b)(ii) of the 1948 Regulation. The 1975 and 1979 Regulations imposed similar time limits, and HMRC also take no point about any possible infringement of them. In F-tT 1 there is a discussion of a ruling made by the Isle of Man Authority relating to Mr Garland's time in Kenya, and his argument that his employment there represented a continuation of his earlier British employment—an argument which, if correct, would have engaged the provisions of art 3 of the 1948 Regulation and would correspondingly have opened a different possible gateway to Mr Garland's paying British NICs. Mr Garland does not now rely on that argument and in our view he is wise not to do so since, for the reasons given by F-tT 1, it has no prospect of success. Before Judge Richards HMRC raised the argument that Mr Garland might have secured an Irish pension by reference to the contributions he made before leaving in 1948 and that, if so, art 12 of the 1971 Regulation (which precludes, with some limitations, the recovery of more than one benefit from the same contributions) was engaged but Judge Richards dismissed the argument for lack of evidence and HMRC expressly do not pursue it now.

31. We should also make the point that it has been assumed without comment in the decisions which precede this that it is immaterial that what is now the European Union did not exist while Mr Garland was in Ireland between 1928 and 1948 and that, like the UK, the Irish Republic did not become a Member State until 1973. Thus it has also been assumed that, if the legislation otherwise allows and he meets the relevant conditions, Mr Garland can take advantage of his earlier period of residence in Ireland, and of his contributions while he was there, regardless of the fact that neither the UK nor the Republic was a Member State at that time. The point was not argued before us, and we were not taken to any case in which it has been formally decided by the Court of Justice of the European Union or its predecessor body (collectively "the CJEU"), but it is touched upon in some of the authorities to which we were referred, in particular Case C-

368/87 *Hartmann Troiani v Landesversicherungsanstalt Rheinprovinz* ECLI:EU:C:1989:206 and Case C-28/00 *Kauer v Pensionsversicherunganstalt der Angestellten* [2002] ECR I-1367, in terms suggesting that the assumption is correct. We have accordingly made the same assumption, but without reaching any conclusion on the matter.

32. While we agree with F-tT 1, UT 1 and F-tT 2 that Mr Garland's appeals must fail, we arrive at that conclusion by a slightly different route and, rather than examine and elaborate on those decisions in detail, we think it more helpful simply to explain our own reasoning. Without repeatedly acknowledging them we have drawn from Ms Smyth's submissions, with which we broadly agree; we are grateful to her for their clarity and thoroughness.

33. We need to make the preliminary observation that the European legislation does not set out to harmonise, but to coordinate, the national insurance regimes of the Member States. As the CJEU said in Case C-503/09 *Stewart v Secretary of State for Work and Pensions* [2011] ECR I-6497,

> "[75] It must be pointed out … that Regulation No 1408/71 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes …. Thus, according to settled case-law, Member States retain the power to organise their social security schemes ….
>
> [76] Therefore, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits ….
>
> [77] In exercising those powers, Member States must none the less comply with the law of the European Union and, in particular, with the provisions of the FEU Treaty giving every citizen of the Union the right to move and reside within the territory of the Member States …."

34. In other words, the European legislation is designed to ensure that national rules do not operate in a manner which would impede freedom of movement within the European Union. The overarching principle is that a citizen of one Member State who moves to live or work in a different Member State should not suffer a national insurance disadvantage by doing so; the legislation does not confer on him greater rights than he would have obtained had he remained in his original Member State. The underlying principles are discussed in some detail in the judgment of the Master of the Rolls in *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, and we do not think it necessary for us to rehearse them in this decision. It is also worth remembering, bearing in mind that Mr Garland did not live or work within the European Union during any part of Periods 1, 2 and 3, that the European legislation counters impediments to free movement within the Union; it has nothing to say about movements further afield.

35. We have already made the point that the manner in which reg 5(2)(b)(i) of the 1948 Regulations and the successor provisions are worded makes it clear that the requisite contributions must have been made, or three years of residence within Great Britain must have been completed, before the start of the period in respect of which the person concerned wishes to pay voluntary NICs, and that Mr Garland cannot meet either condition. We turn therefore to consider whether he is right in his argument that

art 9 of the 1971 Regulation assists him. We take the residence condition first, as that is the order in which the article deals with them.

36. Article 9.1 was engaged when the legislation of a Member State made "admission to voluntary or optional continued insurance conditional upon residence in the territory of that State." In other words, a provision of a Member State's legislation which limited the right to pay voluntary contributions to those resident within its territory was disapplied. The first point to be made is that the relevant British legislation did not impose any such condition; reg 5(2)(a) of the 1948 Regulations, as well as its successors, permitted those who were *outside* Great Britain to pay voluntary NICs, and did not impose any other territorial limitation. Different regulations, which could not apply to Mr Garland, permitted persons resident in Great Britain to pay voluntary NICs. Thus on a plain reading art 9.1 was not engaged at all; but even if it had been it would not help Mr Garland because it disapplied a residence condition in favour only of those resident in a Member State (or a country which later became a Member State: see *Kauer*) but Mr Garland was not resident in a Member State or a country which later became a Member State at any time within Periods 1, 2 and 3.

37. Mr Garland does not, however, read the article in that way. His case is that any period of residence in another Member State (or a country which later became a Member State) must be taken into account, not by reference to the time in respect of which the person concerned wishes to make a payment, but in determining whether the initial qualifying condition is met. The phrase "admission to voluntary or optional continued insurance" might suggest that the draftsman had in mind the initial qualifying conditions, but the remainder of the article makes it clear that the focus was on residence conditions affecting persons wishing to pay voluntary contributions, by reference to their situation at the time in respect of which payment was to be made. That is apparent not merely from the words used, but also from the contrast between the reference to "persons resident in the territory of another Member State", implying a present state of affairs, and the proviso "that at some time in their past working life they were subject to the legislation of the first State", again indicating that the target was a condition affecting the person concerned at the time for which he was seeking to make a payment. Had the draftsman intended that residence in another Member State at some time in the past was enough, he could easily have said so. The fact that he did not is in our view a clear indication that it was not his intention.

38. Advocate General Jacobs was of the same view in his Opinion given in *Hartmann Troiani*, at [17]:

> "In the first place, it is necessary to have regard also to the provisions of Article 9(1). Article 9(1) requires *present* residence in another Member State to be treated as equivalent in a case where national legislation requires residence as a condition of admission to a voluntary pension insurance scheme." [emphasis added]

39. It is true that the Court did not reach the same overall conclusion in that case as the Advocate General. However, it supplied a more restrictive answer than he had given to the question whether a condition imposed by one Member State of affiliation to its own compulsory insurance scheme was satisfied, by the application of art 9, if the person concerned was affiliated to an equivalent scheme in another Member State. The Court decided that it was not. It did not, however, doubt what the Advocate General had said at [17], and it is implicit in its own reasoning that on this point he was correct.

40. It follows, therefore, that the 1971 Regulation does not permit Mr Garland to add his period of residence in Ireland between 1928 and 1948 to his 19 months in Great Britain in order to meet the residence requirement of reg 5(2)(b)(i) of the 1948 Regulations or the equivalent replacement provisions. He cannot satisfy the residence condition at any time within Periods 1, 2 and 3.

41. At first sight art 9.2 seems a little more promising from Mr Garland's perspective. There is no evident temporal limitation to its application, and thus no immediately obvious impediment to the aggregation of his Irish contributions with his British contributions. There are, however, two reasons why art 9.2 does not after all assist him. The first is that, as the CJEU decided in Case C-70/82 *Vigier v Bundesversicherungsanstalt für Angestellte* [1981] ECR 229, art 9 does not address affiliation conditions at all. At [19] the court said:

> "… where national legislation makes affiliation to a social security scheme conditional on prior affiliation by the person concerned to the national social security scheme, Regulation No 1408/71 does not compel Member States to treat as equivalent insurance periods completed in another Member State and those which must have been completed previously on national territory."

42. Thus even if Mr Garland were correct in his assertion that both his contributions to and his credits within the Irish scheme are to be treated as actual contributions he would not meet the contributions condition because, as the CJEU said in *Vigier*, art 9.2 does not require a Member State to take account, for the application of a qualifying condition, of contributions paid in a different Member State. If, nevertheless, Mr Garland could somehow overcome that difficulty he would be faced with the concluding words of the article: if his Irish contributions are to be treated as contributions to the British scheme, they must be treated as if they had been made to the British scheme, and in accordance with British law. As the European Court of Justice decided in *Kauer*, it is the legislation of the Member State whose scheme is under consideration which must be applied. Regulation 5(2)(b)(i) makes it quite clear that the qualifying condition is that 156 contributions must have been paid; credits are not counted. The successor provisions are to the same effect: Class 1, or employed persons', contributions must actually have been paid. As we have said, Mr Garland made 53 equivalent contributions to the Irish scheme and 78 to the British scheme, an aggregate of 131 and therefore too few to satisfy the condition. It is irrelevant, if it be the case, that Irish law treats credits in the same way as actual contributions (as Mr Garland argued, although he produced no supporting evidence).

43. Before leaving art 9.2 we should mention the reference in it to residence. The only point which needs to be made for the purposes of this decision is that the contribution test in British law did not and does not conflate contribution and residence—in other words, periods of residence have no bearing on the question, to which art 9.2 is directed, whether the person concerned has made sufficient contributions—and the amendment effected in April 1973 is therefore immaterial for present purposes. The CJEU reached the same conclusion, in a parallel but not identical situation, in *Hartmann Troiani*, to which we have already referred. The question in that case was whether a provision of German law requiring, for the exercise of a particular right, affiliation to the German national insurance scheme was satisfied by a person who, having once been affiliated to the German scheme, was, at the time of her application to exercise that right, affiliated to the Italian scheme. As we mentioned above, the Court decided that it was not,

because while art 9 may override residence conditions it does not override affiliation conditions.

44. Even if we should be wrong in our interpretation of art 9 it cannot assist Mr Garland in respect of Periods 1 and 2, because of art 94.1 of the same Regulation:

> "No right shall be acquired under this Regulation in respect of a period prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State."

45. The right Mr Garland is seeking to establish and exercise is the right to pay voluntary NICs in respect of periods prior to 1 January 1973, when the 1971 Regulation came into effect within Great Britain. It is perfectly plain that this provision defeats any claim he might have to do so, pursuant to either para 1 or para 2 of art 9: if he did not have the right to pay voluntary NICs before 1 April 1973, and he concedes he did not, Mr Garland did not acquire any such right by virtue of the Regulation. That was a core factor in the reasoning of Lloyd LJ in his refusal of permission to appeal to the Court of Appeal against the decision in UT 1:

> "[Mr Garland] relies on article 9 of the EC regulations on social security 1408/71, but that is subject to article 94(1) which prevents the use of that regulation to acquire a right (including a right to pay voluntary contributions) in respect of a period before … 1 January 1973. It seems to me plain beyond argument to the contrary that this is correct."

46. Mr Garland points, however, to further paragraphs of the same article, which were as follows:

> "2. All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of its application in the territory of that Member State or in a part of the territory of that State, shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.
>
> 3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialized prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State."

47. Neither of those provisions assists him. Paragraph 2 relates to rights acquired under the Regulation but, as we have explained, Mr Garland did not acquire any rights, in particular the right to pay voluntary NICs for periods before 1 January 1973, that is Periods 1 and 2, under the Regulation. Paragraph 3 shows, by its reference to "a contingency", that it relates, not to the right to pay contributions, but to the occurrence of an event which gives rise to the right to receive benefits. The relevant contingency in Mr Garland's case was his reaching his 65th birthday, which led to his becoming entitled (subject to the satisfaction of the relevant conditions) to the receipt of a pension. But as that occurred after the 1971 Regulation came into force para 3 is of no relevance.

48. The position is superficially different in respect of Period 3, but only because the 1971 Regulation was then in force in the UK. Article 94.1 was accordingly not engaged. But once it is recognised that, for the reasons we have already given, Mr Garland did not and cannot satisfy the relevant residence and contribution conditions the fact that art 94 did not apply in Period 3 becomes inconsequential; the outcome is identical to that

for Periods 1 and 2. The application of art 94 is merely an additional, and not the only, reason why Mr Garland must fail in respect of those periods.

49. We come next to Mr Garland's application for permission to appeal against Judge Richards' conclusion that the 2004 Regulation was irrelevant. He reached that conclusion for two reasons: that the Regulation came into force only in 2010, some 17 years after Mr Garland attained pension age, and because of the provisions of art 87(1), which was in these terms:

> "No rights shall be acquired under this Regulation for the period before its date of application."

50. We agree with Judge Richards that these two factors are bound to defeat Mr Garland's argument that the 2004 Regulation has some bearing on his case. The proposition that, despite art 87(1) and despite the absence of any other article suggesting that the Regulation was intended to have even limited retrospective effect, it could nevertheless affect Mr Garland's position at times between 27 and 60 years before it came into force is simply wrong. The CJEU made it abundantly clear that there is a presumption against retrospective effect in its judgment in Case C-290/00 *Duchon v Pensions-versicherungsanstalt der Angestellten* [2002] ECR I-356. In that case it was art 94.1 of the 1971 Regulation which was in issue, but what the Court said is of general application:

> "[21] … it should be borne in mind that it is settled case-law that the principle of legal certainty precludes a regulation from being applied retroactively, regardless of whether such application might produce favourable or unfavourable effects for the person concerned, unless a sufficiently clear indication can be found, either in the terms of the regulation or its stated objectives, which allows the conclusion to be drawn that the regulation was not merely providing for the future … Although the new law is thus valid for only for the future, it also applies, according to a generally recognised principle, in the absence of a provision to the contrary, to the future effects of situations which came about during the period of validity of the old law….
>
> [22] By providing that no right is to be acquired in respect of a period prior to the date of its application in the territory of the Member State concerned, Article 94(1) of Regulation No 1408/71 is in full accord with the principle of legal certainty mentioned earlier."

51. We turn, finally, to Mr Garland's seventh proposed ground. We have dealt above with the supposed conflation of residence and contributions conditions, and have explained why there is no such conflation in the British domestic legislation. The argument advanced, however, is that the two requirements are confused in F-tT 2. We do not detect any basis for this argument; on the contrary, at [53] to [56] Judge Richards carefully dissected the residence and contributions conditions, and analysed the impact of art 9 of the 1971 Regulation on their interpretation, in the process dealing with the reason for the introduction of the reference to residence in art 9.2. We perceive no arguable error of law in his approach.

52. Our conclusions, referred to the individual grounds on which Mr Garland was given permission to appeal, are as follows:

> (1) the 1971 Regulation does not permit Mr Garland's period of residence in Ireland to be taken into account in determining whether he satisfies the

residence requirement of the applicable British legislation with respect to Period 3;

(2) Mr Garland's actual contributions in Ireland are not to be taken into account in determining whether he satisfies the contributions test in respect of Period 3;

(3) his Irish credits are also not to be taken into account for that purpose;

(4) the 1971 Regulation does not enable a person retrospectively to satisfy a residence or contributions condition and to make payments of voluntary NICs for periods falling either before or after its coming into force (in this case Periods 2 and 3).

53. It follows that the appeal is dismissed.

54. We conclude with an observation. Mr Garland was directed, as long ago as April 2013, to pay HMRC's costs in respect of UT 1, which were summarily assessed at £5,100. He has refused to do so, essentially on the ground that (as he contends) UT 1 was wrongly decided. As we have explained, Mr Garland has exhausted the appeal process and he is compelled to accept, whether he likes it or not, that his attempt to establish a right to pay voluntary NICs for what we have identified as Period 1 has failed. There is no good reason why the general body of UK taxpayers should bear the costs of his unsuccessful campaign, and there is no question but that the costs direction was properly made, and that it should be complied with. It is not acceptable for a litigant, including Mr Garland, to disregard decisions of the courts and tribunals which he does not like and we trust that, on reflection, Mr Garland will recognise that he must pay the costs, and that he will do so without further prevarication.

Judge Colin Bishopp

Judge Greg Sinfield

Upper Tribunal Judges

Date of release: 17 October 2016