TC 04594

Appeal number: TC/2014/04152

NATIONAL INSURANCE CONTRIBUTIONS – whether appellant entitled to pay contributions voluntarily for a period between 1963 and 1984 when we was resident outside the EU – effect of Articles 9 and 94 of Regulation 1408/71 – whether prior residence in Ireland treated as residence in the UK – status of national insurance credits awarded in Ireland – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN AUGUSTINE GARLAND **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, London on 23 June 2015 (and having considered additional written submissions made by the Respondents and Appellant on various dates up to 3 August 2015)

The Appellant in person

Lesley Crawford, Officer of HM Revenue & Customs, for the Respondents

DECISION

1. The amount of basic state pension to which a person is entitled depends on the level of national insurance contributions ("NICs) that person has made. With a view to obtaining an increased basic state pension, the appellant has been corresponding with HMRC for over 40 years requesting the right to make voluntary payments of NICs ("Voluntary NICs")[1] for periods in which he was resident outside the United Kingdom.

2. The dispute as to whether the appellant was entitled to pay Voluntary NICs between 1950 and 1963 resulted in a decision of this Tribunal in *John Augustine Garland v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 273 (the "FTT Decision") which was the subject of an appeal to the Upper Tribunal in *John Augustine Garland v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKUT 471 (TCC) (the "UT Decision"). The appellant sought, unsuccessfully, to obtain permission to appeal to the Court of Appeal against the UT Decision.

3. The appellant now appeals against a decision of HMRC made on 27 November 2013 to the effect that he was not entitled to pay Voluntary NICs for the period 29 November 1963 to 1 January 1984.

Background and undisputed facts

4. The basic facts set out at [5] to [11] are not in dispute.

5. The appellant was born in Dublin, Republic of Ireland, on 30 May 1928, and he attained UK state pension age on 30 May 1993. He currently resides in Gibraltar but has also lived in the UK, Ireland, Kenya, Australia, the Isle of Man and various other countries.

6. Until 20 December 1948, when he lived in Ireland, he made 53 actual weekly contributions to the Irish equivalent of the UK national insurance scheme. There were also 46 weeks for which, although he did not pay any actual contributions to the Irish national insurance scheme, he was entitled to "credits" under Irish law (because, for example, he was unemployed or was sick for the weeks in question). Although those credits did not result from actual contributions to the Irish national insurance scheme, they were treated as actual contributions for Irish purposes.

7. On 20 December 1948, the appellant moved to the UK. He was employed at the Thomas More School in the UK from January 1949 until 31 July 1950. He registered into the UK's national insurance scheme on 31 January 1949 and paid 78 weekly

[1] The terminology used in the various statutory provisions differs. Until 5 April 1975, the contributions that the appellant seeks to make were referred to as "contributions of a non-employed person". Subsequently they were referred to as "Class 3" contributions. I use the expression "Voluntary NICs" to embrace both of these concepts.

NICs as an employed person during this period. He left the UK for Kenya on 1 August 1950 to take up employment for the Government of Kenya in the Kenyan Police Force and was employed there until 7 October 1963.

8. Apart from during his initial period in the UK from December 1948 to July 1950, the appellant has not been resident in the United Kingdom at any time relevant to this appeal. In addition, at no point in the period from 29 November 1963 to 1 January 1984, which is the subject of this appeal, was the appellant resident in either the UK or any Member State of the European Economic Community ("EEC") as it was then known. The appellant was resident in Ireland between January 1984 and July 1994. He then lived in the Isle of Man until 2003 and, since 2003, has been living in Gibraltar.

9. Based on his NICs record from 31 January 1949 to 31 July 1950, the appellant did not have sufficient qualifying years on reaching state pension age on 30 May 1993 to qualify for the minimum pension of 25% of the full rate.

10. It was established in 2008, following a full review of the appellant's case, that under the provisions of Article 9(1) of the EC Regulations on Social Security 1408/71 (the "1971 Regulation"), he satisfied the conditions to pay Voluntary NICs for the period during which he was resident in Ireland from 1 January 1984 to 31 July 1994. The appellant was subsequently invited to pay Voluntary NICs outside the statutory time limits. He accepted this invitation and the result was that he had sufficient qualifying years for a basic state pension of 28% of the full rate.

11. The appellant continued to pursue his request to pay Voluntary NICs for other periods. His claim for the period 1950 to 1963 was disposed of following the UT Decision (since he was not given permission to appeal to the Court of Appeal). However, undeterred he persisted with this claim to pay Voluntary NICs for the period from 29 November 1963 to 1 January 1984. HMRC rejected that application by letter dated 27 November 2013 and it is against that decision that the appellant now appeals.

Domestic law applicable to NICs and its relevance to the appellant

12. This appeal involves matters dating back over 50 years. It is no simple matter to find provisions of UK statute law as they were in force such a long time ago. HMRC helpfully prepared a bundle of authorities that included statutory extracts. The appellant did not suggest that these were not the statutory provisions as in force at the relevant times and I have therefore accepted that they were. I have reproduced relevant extracts from statutory provisions as an Annex to this decision.

13. Although the precise terms of the relevant regulations have changed over the years, a common thread runs through them. A person who was not "resident" or "present" in the UK for a particular period would not generally be **obliged** to pay NICs. However, the various regulations referred to in the Annex **permitted** a person who did not satisfy the requirements of "residence" or "presence" to pay Voluntary NICs provided certain other conditions were satisfied. The wording of those

conditions changed over the years. However, in summary, a precondition to being entitled to pay Voluntary NICs for a particular period was that either:

> (1) the person had been resident in the UK for a continuous period of three years (the "residence test") prior to that period; or
>
> (2) the person had previously made 156 weekly NIC contributions or had paid contributions of the "appropriate amount" for each of the three years preceding the period in question (the "contributions test").

14. It was common ground that, by reference to UK regulations alone, the appellant could not satisfy the residence test (since he had not lived in the UK for a continuous period of three years). It was also common ground that, since, as noted at [7] above, he had made only 78 weekly NIC contributions, he could not satisfy the contributions test. However, the appellant argues that the UK regime was overridden and/or modified by relevant provisions of EU law.

Relevant provisions of EU law

The 1971 Regulation

15. The 1971 Regulation has itself been modified on several occasions since it was made. HMRC provided relevant extracts from the 1971 Regulation which they contended were in force at all times material to this appeal. The appellant did not suggest that any different versions of these provisions applied at any particular times and I have therefore applied the 1971 Regulation in the form that HMRC supplied.

16. Article 9 of the 1971 Regulation provided as follows:

> **Admission to voluntary or optional continued insurance**
>
> 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 as self-employed persons.
>
> 2. 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. (emphasis added)

17. I have added the emphasis to the extract from Article 9(2) referred to above to bring out what seems to me to an oddity. Article 9(2) is stated to apply where a Member State imposes a condition related to the completion of periods of insurance. However, the consequence of Article 9(2) applying is not just that periods of insurance completed under the legislation of other Member States are to be taken account, but also that periods of residence are to be taken into account. The significance or otherwise of this point is discussed at [53] to [56] below.

18. At the times material to this appeal, Article 94 of the 1971 Regulation provided:

> **Transitional provisions for employed persons**
>
> 1. 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.
>
> 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**. [emphasis added]
>
> 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.
>
> 4. Any benefit which has not been awarded or which has been suspended by reason of the nationality or place of residence of the person concerned shall, on the application of the person concerned, be awarded or resumed with effect from 1 October 1972 or the date of its application in the territory of the Member State concerned or in a part of the territory of that State provided that the rights previously determined have not given rise to a lump sum payment.

19. I have added the emphasis in Article 94(2) as, for reasons I will come on to, I consider that it is significant in demonstrating that Article 94(2) is to be applied in determining the rights that a person has under the 1971 Regulation and not more generally.

The decision of the CJEU in Kauer

20. In Case C-28/00 *Kauer*, the European Court of Justice (as it was then known) considered the application of Article 94 of the 1971 Regulation. The case concerned Liselotte Kauer, an Austrian national. She worked in Austria from July 1960 to August 1964. She then left paid employment to look after her children who were born in 1966, 1967 and 1969. She moved to Belgium in 1970 where she continued to look after her children, did not have paid employment and did not contribute to any old-age insurance scheme. After a while she returned to Austria where she undertook paid employment from 1975. In 1994, Austria joined the European Union and after that, in due course, Ms Kauer qualified for a state pension in Austria.

21. Austrian domestic law provided that periods spent in Austria looking after children were treated in the same way as periods spent in paid employment for the purposes of determining entitlement to a pension under Austrian law. However, the Austrian tax authorities gave Ms Kauer no credit for the period of time that she had spent looking after her children while resident in Belgium, even though it was a

Member State of the European Union. Ms Kauer challenged this as being contrary to the 1971 Regulation.

22. The Austrian tax authorities (supported by the European Commission) disputed Ms Kauer's claim. The European Commission submitted that Article 94(1) of the 1971 Regulation precluded Ms Kauer's claim since its effect was that "a right not acquired before the entry into force of [the 1971 Regulation] in Austria cannot be acquired retroactively on the basis of that regulation" (see page I-1376 of the judgment).

23. However, the Court rejected those submissions and concluded, as recorded on page [I-1377] of the decision:

> …[I]n order to allow the application of [the 1971 Regulation] to future effects of situations arising under the period of validity of the old law, Article 94(2) of the regulation lays down the obligation to take into consideration … all periods of insurance, employment or residence completed under the legislation of any Member State 'before 1 October 1972 or before the date of its application in the territory of that Member State'. It follows, therefore, from that provision that a Member State is not entitled to refuse to take account of periods of insurance completed in the territory of another Member State… for the sole reason that they were completed before the entry into force of the regulation in this regard (Case C-227/89 *Ronfeldt* [1991] ECR I-323 paragraph 16).

The appellant's submissions

24. The appellant contends that Article 9 and/or Article 94 of the 1971 Regulation modified the position under UK domestic law.

25. His first argument is that his period of residence in Ireland (from birth until December 1948) must be treated in the same way as residence in the UK with the result that he can satisfy the residence test referred to at [13(1)].

26. In his second argument, he notes that, taking into account the weeks for which "credits" were given under Irish law, he made 99 contributions under the Irish equivalent of the national insurance scheme. He argues that Article 9(2) of the 1971 Regulation requires those 99 contributions to be treated in the same way as the actual 78 contributions that he made to the UK national insurance scheme while he was working in the UK. The result is that, in his submission, he should be treated as having made 177 weekly contributions to the UK national insurance scheme – enough to satisfy the contributions test summarised at [13(2)].

27. The appellant also made the following additional submissions which I have concluded I should not take into account in this decision:

> (1) He submitted that his employment in Kenya between 1950 and 1963 was a "continuation" of his employment in the UK. This was a live issue for the purposes of the appellant's claim to pay Voluntary NICs for the

period between 1950 and 1963 that was the subject of the FTT Decision and the UT Decision. I did not consider that this submission had any relevance to his entitlement or otherwise to pay Voluntary NICs for the period between 1963 and 1984 which is the subject of this appeal. In any event, this issue was fully considered in the FTT Decision at [33] to [43] and I concluded that it would be an abuse of process for the appellant to go over this ground again.

(2) He made submissions based on EC Regulation 833/2004 (the "2004 Regulation"). The 2004 Regulation was the successor to the 1971 Regulation. As noted at [9] of the UT Decision, it did not enter into force until 1 May 2010 which was after both (a) the period for which the appellant claims the entitlement to pay Voluntary NICs in this appeal and (b) the date on which the appellant reached state pension age. Moreover, Article 87(1) of the 2004 Regulation provides that no rights are to be acquired under it for period before its date of application. It follows, therefore, that the 2004 Regulation is not relevant to this appeal and the appellant's case stands or falls by reference to the 1971 Regulation.

Decisions in the appellant's prior proceedings

28. The FTT Decision and the UT Decision dealt with the appellant's claim to be entitled to pay Voluntary NICs for a period between 1950 and 1963 when he was resident in Kenya. It is important to be clear as to precisely what issues that might have a bearing on this appeal have already been decided by the FTT or the Upper Tribunal to determine whether the appellant is seeking to litigate again matters that have already been determined against him[2]. It is also relevant to the question of the extent to which I am bound by the UT Decision.

The FTT Decision

29. Paragraphs [23] to [32] of the FTT Decision deal with the question of whether the appellant made his request to pay Voluntary NICs within applicable time limits. In this appeal, HMRC take no point as to time limits and therefore, this aspect of the FTT Decision is not relevant to this appeal.

30. Paragraphs [45] to [51] of the FTT Decision dealt with the appellant's arguments under EU law. The following points emerge from that decision:

(1) The FTT concluded that Article 9 of the 1971 Regulation could not entitle the appellant to pay Voluntary NICs for the period between 1950 and 1963 in which he was resident in Kenya since, while he was in Kenya, he was not a person "resident in a territory of another Member State". However, there is no indication that the appellant put to the Tribunal the argument that he is advancing in this appeal (and that he advanced before the Upper Tribunal), namely that it was the appellant's **prior** residence in Ireland that mattered.

[2] I have already referred to paragraphs [33] to [43] of the FTT Decision in this context.

(2) There was no indication that the FTT was referred to the decision in *Kauer*.

The UT Decision

31. The UT Decision was devoted largely to an analysis of the appellant's arguments under EU law to the effect that his prior residence in Ireland should be treated as if it were UK residence for the purposes of determining his entitlement to pay Voluntary NICs. At [21] of the UT Decision, the Upper Tribunal stated:

> Mr Garland submitted that the 1971 Regulation gave him the right to make the payments subsequently because it provided that his residence in another Member State, Ireland, was to be aggregated with his period of residence in the United Kingdom. We do not agree. In our view, Article 94(1) of the 1971 Regulation is clear. It provides that no right shall be acquired under the 1971 Regulation in respect of a period prior to the date on which it came into force in the UK ie 1 January 1973 when the UK joined what was then the European Economic Community. We consider that "a period" in Article 94(1) means "any period". It follows that Mr Garland does not have any right under the 1971 Regulation to make payments of NICs in or in respect of the period from 1950 to 1963.

32. At first sight that might be seen to be an endorsement of the argument of the European Commission, referred to at [22], which the European Court of Justice rejected in *Kauer*. However, the Upper Tribunal went on to say:

> Article 94(2) of the 1971 Regulation does not contradict Article 94(1). The effect of Article 94(2) of the 1971 Regulation is that periods of residence completed before 1 January 1973 are taken into consideration for the determination of rights acquired under the 1971 Regulation after 1 January 1973. **That means that Mr Garland's residence in Ireland at any point is taken into account in respect of rights that arise after 1 January 1973**. That does not assist Mr Garland, however, as the right that he argues he is entitled to exercise relates to the period between 1950 and 1963. (emphasis added)

Moreover, the Upper Tribunal considered the judgment in *Kauer* and concluded, at [24], that its decision was confirmed by that judgment.

33. We consider that the Upper Tribunal was concluding that the appellant was seeking to pay NICs for a period between 1950 and 1963 during which the 1971 Regulation was not in force and could not give him any rights. In those circumstances, Article 94(1) of the 1971 Regulation could not operate to give him rights retrospectively. The appellant's situation was therefore different from that considered in *Kauer* as, at the point when Ms Kauer's Austrian pension entitlement fell to be determined, she **did** have rights under the 1971 Regulation and, accordingly, Article 94(2) of the 1971 Regulation required her period of residence in Belgium to be taken into account in determining that entitlement. That emerges from paragraph [25] of the UT Decision which is as follows:

> In view of our decision in relation to Article 94 of the 1971 Regulation, it is not necessary to address the effect of Article 9(2) of the Regulation in detail. We consider that Mr Garland's period of residence in Ireland before his departure for Kenya is relevant to determine his rights under the new rules under the 1971 Regulation but it does not create rights under the old rules retrospectively.

34. At [26] of the UT Decision, the Upper Tribunal concluded that:

> Mr Garland does not have any right to pay NICs under the 2004 Regulation for any period prior to 1 May 2010.

35. Finally, at [27] of the UT Decision, the Upper Tribunal concluded that the FTT had not made any error of law when it decided that Mr Garland was not entitled to make voluntary payments of NICs for the period 31 July 1950 to 13 October 1963.

Are any aspects of this appeal determined by the prior proceedings?

The period from 29 November 1963 to 31 December 1972

36. In relation to the period prior to 1 January 1973, the appellant is claiming to be entitled to pay Voluntary NICs even though he was not resident in any Member State of the EEC at that time and even though the 1971 Regulation was not in force in the UK at that time. That was exactly the same position that the Upper Tribunal considered in the UT Decision.

37. The appellant submitted that I was nevertheless not bound by the UT Decision. He argued firstly that the Upper Tribunal had failed to apply EU law properly, had misunderstood the decision in *Kauer* and had overlooked the decision of the Court of Justice of the European Union in *Stewart* (Case C-503/09). He argued that his rights under the Convention on Human Rights (and/or the Human Rights Act 1998), particularly those relating to his right to a fair hearing, and to protection from discrimination, would be infringed if this Tribunal was not able to make its own determination of the issues. In support of his submissions on human rights aspects, he referred to extracts from a textbook dealing with "the principle against doubtful penalisation" as well as extracts from a textbook on EU law on "legitimate expectation". He also referred to the International Covenant on Civil and Political Rights.

38. I reject those submissions for the following reasons:

> (1) Firstly, while the appellant is correct that EU law takes effect in UK law by virtue of the s2 of the European Communities Act 1972, it does not follow that his own interpretation of EU law can should prevail over that of the Upper Tribunal. As I have said at [31] to [33], the Upper Tribunal fully considered the principles of EU law involved, as well as the decision in *Kauer*. For reasons set in those paragraphs, I respectfully consider the UT Decision to be entirely consistent with the decision in *Kauer*. Even if I did not, I would still consider myself bound by the UT Decision and it

would be for the Court of Appeal, or the Supreme Court to reverse the effect of the UT Decision.

(2) I do not consider the decision in *Stewart* to be of any relevance to this appeal.

(3) I do not consider that it can seriously be argued that the doctrine of precedent infringes the right to a fair hearing before an independent and impartial tribunal. On the contrary, the doctrine of precedent ensures that principles of law that have been established by superior courts have to be applied consistently, enhancing the right to a fair and impartial hearing rather than detracting from it.

(4) I do not consider that EU law on "legitimate expectation" or the International Covenant on Civil or Political Rights had any relevance to this appeal. The appellant has not explained how applying the doctrine of precedent would amount to discrimination against him on any grounds.

39. I therefore conclude that I am bound by the UT Decision as regards the part of the appellant's claim relating to the period up to 1 January 1973. That part of the appellant's appeal is accordingly dismissed.

The period from 1 January 1973 to 1 January 1984

40. From 1 January 1973, the 1971 Regulation was in force in the UK, whereas during the period considered in the UT Decision, that Regulation was not in force. That means that the principles of law that the Upper Tribunal was considering were materially different from those that arise in relation to the appellant's claim for the period after 1 January 1973 in this appeal. Moreover, as I have explained at [32], the Upper Tribunal recognised this when they concluded that the appellant's residence in Ireland until 1948 **was** relevant to an analysis of rights that he acquired after 1 January 1973. For both of those reasons, I have concluded that the UT Decision is not binding on me as regards the period after 1 January 1973.

41. That leaves the question of whether I am bound to follow the same approach as this Tribunal followed in the FTT Decision. The conclusion in the FTT Decision was that since, at the material times, the appellant was resident in Kenya (which is not a Member State), Article 9 of the 1971 Regulation could not give him any rights. In this appeal, the appellant was similarly not resident in a Member State at any point during the period for which he claims to be entitled to pay Voluntary NICs. HMRC submitted that I should follow the FTT Decision as, while not binding on me, it is highly persuasive and because the conclusions that it expressed in relation to Article 9(1) of the 1971 Regulation were not doubted in the UT Decision. HMRC did not, however, submit that it was an abuse of process for the appellant to make submissions that ran contrary to the line of reasoning set out in the FTT Decision.

42. Given the statement of the Upper Tribunal referred to at [32], and given that there is no evidence that the FTT was referred to the argument that the appellant is making now, namely that it was his previous residence in Ireland that gives him rights under Article 9, I have concluded that I will not simply follow the conclusion set out in the

FTT and, instead, I will perform my own analysis of the appellant's claim for the period after 1 January 1973.

The claim for the period from 1 January 1973 to 1 January 1984 - the appellant's first argument relating to the "residence test"

Application of Article 94(2)

43. Article 94(2) requires account to be taken of periods of residence completed under the legislation of a Member State for the determination of rights acquired under the provisions of the 1971 Regulation. The parties were both agreed that Article 94(2) should be applied on the basis that the appellant's residence in Ireland between 1928 and 1948 was relevant for the purposes of Article 94(2) even though Ireland was not a Member State in that period and even though the EEC did not even exist in that period.

44. I do not consider that Article 94(2) **of itself** gives the appellant the right to count his period of residence in Ireland as a period of UK residence for the purposes of applying UK domestic law.

45. Article 94(2) is a provision dealing with transition from the period prior to that in which the 1971 Regulation was not in force to the period in which it is in force. It requires periods of insurance and residence to be taken into consideration "for the determination of rights acquired under the provisions of this Regulation". Article 94(2), therefore, does not set out a general principle that all periods of residence in one Member State are to be treated as periods of residence in any other Member State. I consider that Article 94(2) sets out an approach to be followed when determining what rights have been acquired under other provisions of the 1971 Regulation but does not set out a separate and free-standing right.

46. Therefore, the relevant question is whether Article 9 informed by Article 94 gives the appellant the right to treat his period of residence in Ireland between 1928 and 1948 as if it were residence in the UK for the purposes of the residence condition.

Application of Article 9(1)

47. As noted at [16], Article 9(1) provides as follows:

> 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 as self-employed persons.

48. Article 9(1), therefore, operates by "disapplying" provisions of UK law that would otherwise apply to persons resident in another Member State.

49. The relevant provisions of UK domestic law that would otherwise "apply" are those dealing with the "residence test" set out in the Annex. Those provisions "applied" in the period between 1 January 1973 and 1 January 1984 (since they prevented the appellant paying Voluntary NICs for that period as he failed the residence test). At the time they "applied", the appellant was not a resident of any Member State. I do not consider that it is relevant, for the purposes of Article 9(1), that the appellant had previously been resident in Ireland between 1928 and 1948 as the relevant provisions were not being "applied" to the appellant during that period. Therefore, Article 9(1), viewed in isolation, does not compel the conclusion that the appellant satisfied the residence condition between 1973 and 1984.

50. However, Article 9(1) must not be read in isolation. Rather, its application must be informed by Article 94(2) which requires that all periods of residence "completed under the legislation of a Member State" shall be taken into consideration for the determination of rights acquired under, inter alia, Article 9(1). That, however, cannot assist the appellant. The reason why the appellant does not acquire any rights under Article 9(1) is not because of any failure to take into consideration his residence in Ireland between 1928 and 1948. Rather, it is because that previous residence in Ireland is simply not relevant to the determination of the rights that he acquires under Article 9(1). As noted at [49], Article 9(1) is concerned with the question of whether a person is resident in a Member State at a time a domestic law provision would otherwise apply. It is not concerned with where that person has been resident previously.

51. Those reasons are similar to the reasons of the FTT set out at [46] of the FTT Decision. However, they also take into account the fact that the 1971 Regulation was in force in the UK during the period for which the appellant seeks entitlement to make Voluntary NICs in this appeal. I also note that the reasoning I have adopted suggests that HMRC were correct to permit the appellant to pay Voluntary NICs for the period between 1984 and 1994 when, as noted at [8], the appellant was resident in Ireland.

Application of Article 9(2)

52. Article 9(2) provides 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.

53. Under UK law, the satisfaction of either a "residence condition" or a "contributions condition" would enable a person to pay Voluntary NICs. Therefore, it can be said that under UK law admission to voluntary insurance was "conditional" on completion of periods of insurance (although it was not completely conditional on that since satisfaction of the residence condition would also entitle a person to pay Voluntary NICs). Therefore, I consider that the precondition for Article 9(2) to apply is satisfied.

54. However, while I have noted the oddity in Regulation 9(2) referred to at [17] above, I do not consider that it follows that the effect of Article 9(2) applying is that the appellant's residence in Ireland between 1928 and 1948 is to be treated for all purposes as UK residence. Rather, I consider that Article 9(2) simply requires that, **when conditions relating to periods of insurance are applied**, periods of residence in a Member State are to be treated as UK residence. It seems to me that this interpretation is consistent with the obvious purpose of Article 9 with Article 9(1) setting out how domestic conditions relating to "residence" are to be approached and Article 9(2) setting out how domestic conditions applicable to "periods of insurance" are to be approached. It is also consistent with the use of the phrase "to the extent required" in Article 9(2) which suggests that periods of residence in a Member State are to be taken into account only where domestic laws on periods of insurance also require an examination of periods of residence.

55. I did not hear any submissions as to whether there was a "cross over" between Article 9(1) and Article 9(2). My own research suggests that, when it was originally introduced, Article 9(2) of the 1971 Regulation did not mention "residence" at all. Article 9(2) was amended (so as to include the reference to "residence") by Regulation 2684/72. That Regulation does not include any specific explanation of the change to Article 9(2). However, the Recitals to the Regulation indicate that changes to the 1971 Regulation were made in accordance with Part VII of Annex II to the Act of Accession of 1972 (the treaty under which the UK, Ireland and Denmark agreed to join what was then the EEC). Part VII of Annex II indicates that the 1971 Regulation was to be amended for reasons connected with the accession of Denmark to the EEC.

56. I did not consider that any of these factors indicated that the amendments to Article 9(2) had been made so as to result in an intentional overlap between Article 9(1) and Article 9(2). I therefore concluded that Article 9(2) does not enable the appellant to satisfy the "residence test" and that instead Article 9(2) is at most relevant to the "contributions test" discussed at [57] to [62] below.

The appellant's second argument relating to the contributions condition

57. In order to succeed with his second argument argument, the appellant has to establish that the 1971 Regulation requires HMRC to treat the 46 "credits" that he obtained under the Irish national insurance regime in the same way as actual NICs made under UK law. If he cannot establish that, then the second argument must fail as, even if he could establish that the UK had to treat his payment of 53 weekly Irish national insurance contributions in the same way as UK NICs, he would still only have 131 weekly contributions for the purposes of the "contributions test" and would still fall short of the requirement for 156 contributions.

58. Officer Crawford submitted that HMRC are not required under the 1971 Regulation to treat these 46 "credits" in the same way as actual UK NICs. She submitted that, at most, Article 9 of the 1971 Regulations requires the Irish credits to be treated in the same way as equivalent credits that were available under the UK NIC regime. The appellant reached state pension age on 30 May 1993. Under UK law in force at that time, she submitted that "credits" awarded under the UK NIC regime, as

distinct from actual payments of NICs, would not be taken into account in calculating the basic state pension. She submitted that the law in this area had been changed with effect from 6 April 2010 but that this was not of any relevance to the appellant. In short she submitted that since UK NIC credits would not have been taken into account, Irish credits should not be taken into account either.

59. The appellant submitted that credits should be taken into account, but did not contradict Officer Crawford's submissions to the effect that UK credits did not, prior to 6 April 2010, count towards a UK basic state pension entitlement.

60. I accepted Officer Crawford's submissions for the reasons set out below.

61. I consider that, for reasons set out at [43] to [46] above, the key question is to consider what rights the appellant has under Article 9 of the 1971 Regulation. In answering that question, Article 94(2) provides that, all periods of insurance 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. Having noted the position of the parties on whether Ireland constituted a "Member State" summarised at [43], I have concluded that Article 94(2) does require the period for which the appellant was covered by the national insurance scheme in Ireland to be "taken into account" for the purposes of Article 9.

62. Article 9(2) is relevant to the contributions test (and Article 9(1) is not). Article 9(2) requires that 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 UK. I consider that this can only require that the period of insurance in Ireland that was covered by the 46 Irish credits should be treated as if it were a period of insurance in the UK that was similarly covered by UK credits. I accepted Officer Crawford's submissions that such a period would not have counted towards the pension entitlement of a person retiring prior to 6 April 2010. It follows that, even taking into account the appellant's rights under Article 9 and Article 94 of the 1971 Regulation, the appellant could not satisfy the "contributions test" and the appellant's second argument fails.

HMRC's submissions on Article 12 of the 1971 Regulation

63. In written submissions made after the hearing, HMRC submitted that the appellant had obtained a pension in Ireland based, in part, upon amounts made, or credited as made under the Irish national insurance system. In those circumstances, HMRC submitted that Article 12 of the 1971 Regulation prevented the appellant from obtaining right to benefits in the UK by reference contributions paid for that period of compulsory insurance and that this was a further reason why the appeal should fail.

64. To make good those submissions, HMRC would need to have produced evidence as to the appellant's pension rights in Ireland and the manner in which they have been calculated. They did not do so. In those circumstances, I have concluded that there

was no evidence before me that could support HMRC's submissions in this regard and I have, accordingly, not accepted them.

Conclusion

65. For the reasons set out at [39] above, the appellant's appeal, insofar as it relates to the period prior to 1 January 1973, is dismissed.

66. For the reasons set out at [43] to [62], the appellant's arguments relating to the application of the "residence test" and the "contributions test" to the period after 1 January 1973 both fail.

67. His appeal is accordingly dismissed.

68. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 21 AUGUST 2015

ANNEX – RELEVANT PROVISIONS OF UK LAW DEALING WITH VOLUNTARY NICs

Position up to 5 April 1975

1. Until 5 April 1975, the relevant provisions governing the payment of voluntary Class 3 NICs were contained in the National Insurance (Residence and Persons Abroad) Regulations 1948. Regulation 5 of these regulations provided 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.
>
> (b) The conditions referred to in the preceding sub-paragraph are:-
>
> (i) either that, subject to the provisions of sub-paragraph (c) of this paragraph, not less than 156 contributions of any class under the Act had been paid by him as an insured person, or alternatively, that he has been resident in Great Britain for a continuous period of not less than 3 years at any time before the week in question; and
>
> (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, or, in the case of a person to whom the proviso to regulation 4 applies within such longer period as the Minister may allow.
>
> (bb) Any contribution which a person is entitled to pay under sub-paragraph (a) of this paragraph may be paid –
>
> (i) by a person who is ordinarily resident in Great Britain or who has resided therein for an aggregate period of at least 10 years, at any time not later than the end of the sixth contribution year which includes the contribution week in respect of which it is payable, and
>
> (ii) by any other person at any time before the end of the benefit year next following the contribution year which includes the contribution week in respect of which the contribution is payable, or within such longer period ending not later than the end of the sixth contribution year following the contribution year which includes the said contribution week, as the Minister may in a particular case allow.

Position from 5 April 1975 to 6 July 1979

2. From 6 April 1975, the relevant provisions were to be found in the Social Security (Contributions) Regulations 1975. Regulation 115 of those regulations entitled people who were not resident in the UK (and who were not entitled to pay Class 3 NICs under Regulation 113 of those Regulations) nevertheless to pay Class 3 NICs if they satisfied the requirements set out in Regulation 115(2) which were as follows:

> 115…
>
> (2) The conditions referred to 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
>
> (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

3. Regulation 115(2)(a) therefore set out a condition as to residence. Regulation 115(2)(b) set out a condition as to contributions made under the Social Security Act 1975 and is not relevant to this appeal since the appellant made no contributions under that Act (as all his UK NIC contributions were made prior to 6 April 1975 when that Act came into force).

4. Regulation 115(2)(c) is potentially relevant. However, in terms that regulation appears to apply only to contributions made under the "former principal Act" (being the National Insurance Act 1965). It is not immediately obvious how it can apply by reference to NICs that the appellant paid in 1949 and 1950 (before the National Insurance Act 1965 came into force). However, HMRC took no point to the effect that contributions that the appellant had made in 1949 and 1950 were irrelevant. Accordingly, I have proceeded on the basis that Regulation 115(2)(c) is relevant to the appellant's contention that contributions paid, and treated as paid, to the Irish national insurance scheme should be treated in the same way as contributions made to the UK scheme.

Position after 6 July 1979

5. From 6 July 1979, the relevant provisions were contained in the Social Security (Contributions) Regulations 1979. By Regulation 121 of those regulations, persons not resident in the United Kingdom were entitled to pay Class 3 NICs if they satisfied conditions identical to those set out in Regulation 115(2) of the Social Security (Contribution) Regulations 1975.