



[2012] UKUT 471 (TCC)
Appeal number FTC/09/2012

NATIONAL INSURANCE – Class 3 Contributions – Non employed person – Entitlement to pay contributions in respect of period of employment in Kenya – NI (R&PA) regs 1948 r.5 - Council Regulations (EEC) No 1408/71 and (EC) No 883/2004 - held appeal dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

JOHN AUGUSTINE GARLAND

Appellant

- and -

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

Respondents

**Tribunal: Judge Greg Sinfeld
Judge Timothy Herrington**

Sitting in public in London on 18 October 2012

The Appellant in person

Rory Dunlop, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The issue in this appeal is whether the Appellant (“Mr Garland”) was entitled to pay non-employed UK National Insurance Contributions (“NICs”) for the period from 1950 to 1963 during which he was employed in Kenya. Mr Garland is a British citizen residing in Gibraltar. He receives a reduced UK basic state pension in proportion to the number of years for which he had paid NICs when he was a qualifying resident of an EU Member State. If Mr Garland is entitled to pay NICs for the period when he worked in Kenya and he duly does so then his basic state pension will be enhanced. For the reasons given below, we have decided that Mr Garland’s appeal must be dismissed.

Background

2. In 1970, Mr Garland applied to pay NICs for the period when he was in Kenya. This was refused but Mr Garland did not give up and the correspondence continued for almost forty years. In a notice of decision dated 9 October 2009, the Respondents (“HMRC”) ruled that Mr Garland was not entitled to pay the NICs for the period 31 July 1950 to 13 October 1963. A letter accompanying the notice of decision explained that HMRC considered that Mr Garland was not entitled to pay the NICs because he did not meet the contribution and residence conditions in Regulation 5(2)(b) of the National Insurance (Residence and Persons Abroad) Regulations 1948 SI 1948/1275 (“the R&PA Regulations”) when he was employed in Kenya.

3. Mr Garland appealed against that decision to the First-tier Tribunal (“FTT”). Mr Garland submitted that the provisions of two Council Regulations, (EEC) No 1408/71 (“the 1971 Regulation”) and (EC) No 883/2004 (“the 2004 Regulation”) gave him an entitlement to pay NICs in relation to the period that he lived in Kenya. The FTT rejected Mr Garland’s arguments. In a decision released on 27 April 2011, [2011] UKFTT 273 (TC), the FTT (Sir Stephen Oliver QC and Sandi O’Neill) dismissed the appeal and held that Mr Garland was not entitled to pay NICs for the years that he was in Kenya.

4. Mr Garland applied for permission to appeal to this Tribunal against the FTT’s decision. The FTT refused permission on 25 July 2011 and the Upper Tribunal refused permission on the papers in a decision dated 30 August 2011. Undeterred, Mr Garland applied, as he was entitled to do, for reconsideration of the decision of the Upper Tribunal at an oral hearing. In a decision issued on 13 February 2012, Judge Wallace granted Mr Garland permission to appeal to the Upper Tribunal on two grounds, namely:

- (1) The FTT was in error in treating the 2004 Regulation as applying at the time when the decision under appeal was made in 2009.
- (2) The FTT applied the 1971 Regulation and the 2004 Regulation incorrectly and that, on a correct interpretation, the contribution and residence conditions of the R&PA Regulations were satisfied for the period when Mr Garland was in

Kenya so that contributions and residence in Ireland prior to coming to Great Britain in 1948 fell to be aggregated with those when in Great Britain before going to Kenya.

Facts

5 5. The FTT set out the facts, which were not in dispute, at [12] – [19] of the decision as follows

10 “12. Mr Garland 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 (specific details not known). He arrived in the UK on 20 December 1948 and registered into the National Insurance scheme on 31 January 1949.

15 13. Mr Garland was employed in the UK at a school (Thomas More School) from January 1949 until 31 July 1950 and paid UK 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 (Kenyan Police Force) and was employed there until 7 October 1963.

20 14. Apart from his initial period in the UK from December 1948 to July 1950, Mr Garland has returned to the UK for brief periods only – March 1954 on leave for 3 months, July 1957 on leave for 3 months, at some point in 1961 for a few weeks and from 7 October 1963 to 28 November 1963 on leaving his employment in Kenya.

25 15. Mr Garland resided in Australia from 29 November 1963 to 8 December 1968. He then resided in various countries with which the UK does not have a reciprocal Social Security agreement (dates not known) until he went to live in Ireland from January 1984 to 31 July 1994. He went to live in the Isle of Man in 1994 and resided there until approximately mid 2003; and from approximately mid 2003, Mr Garland has resided in Gibraltar.

30 16. Based on his NICs record from 31 January 1949 to 31 July 1950, Mr Garland did not have sufficient qualifying years on reaching State Pension age on 30 May 1993 to qualify for the minimum pension of 25%.

35 17. It was established in 2008, following a full review of Mr Garland’s case, that under the provisions of Article 9(1) of the EC Regulations on Social Security 1408/71, he satisfied the conditions to pay non-employed NICs (or Class 3 NICs as they are now called) for the period during which he was resident in Ireland. This was confirmed by the Irish Social Security authorities as 1 January 1984 to 31 July 1994. This Article does not allow the UK, as a Member State, to count residence in another Member State as residence in the UK. However, what it does do is to counteract the conditions of UK domestic
40 legislation on the payment of Class 3 NICs provided that the person is resident in another Member State and has previously been subject to UK legislation

(i.e. by the payment of UK NICs). The residence condition under UK domestic legislation was suspended, and Mr Garland was invited to pay Class 3 NICs for the period he was resident in Ireland.

5 18. Mr Garland was subsequently invited to pay Class 3 NICs outside the statutory time limits for the 1984/85 to 1992/93 tax years and payment was made in January 2009.

10 19. The payment of Class 3 NICs gave Mr Garland sufficient qualifying years for a BSP of 28% of the full rate. The Pension Service awarded Mr Garland a BSP from 29 November 1993 (3 months backdated from his original claim of 28 February 1994) and the amount of arrears paid to him totalled £17,457.”

Legislation

6. During the period when Mr Garland was in Kenya, Regulation 5 of the R&PA Regulations provided:

15 “(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.

20 (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:-

25 (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

30 (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.

7. Article 9 of the 1971 Regulation, as amended, was 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.”

8. 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.

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.”

9. Article 90 of the 2004 Regulation provided that the 1971 Regulation was repealed with effect from the date of application of the 2004 Regulation. Article 91 of the 2004 Regulation stated that it entered into force on the date of its publication in the Official Journal of the European Union but that it would apply from the date of entry into force of Implementing Regulation. The Implementing Regulation (Regulation (EC) No 987/2009) entered into force on 1 May 2010 (see Article 97 of Regulation No 987/2009). This deals with the first ground of appeal ie that the FTT erred in [49] of its decision when it treated the 2004 Regulation as applying at the time when the

decision under appeal was made in 2009. The 2004 Regulation did not apply at that time but, as will be seen below, nothing turns on this point.

10. Article 3 of the 2004 Regulation lists the benefits to which the Regulation applies which include old-age benefits.

5 11. Article 5 of the 2004 Regulation is headed “Equal treatment of benefits, income, facts or events” and provides:

“Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) ...

10 (b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.”

12. Article 6 the 2004 Regulation is headed “Aggregation of periods” and provides:

15 “Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:

– the acquisition ... of the right to benefits,

– ...

20 conditional upon the completion of periods of ... residence shall, to the extent necessary, take into account periods of ... residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.”

13. Article 14(4) of the 2004 Regulation provides:

25 “If the legislation of any Member State makes admission to voluntary insurance or optional continued insurance conditional upon residence in that Member State, the equal treatment of residence in another Member State as provided under Article 5(b) shall apply only to persons who have been subject, at some earlier stage, to the legislation of the first Member State on the basis of an activity as an employed or self-employed person.”

30 14. Article 87 of the 2004 Regulation provides as follows:

“1. No rights shall be acquired pursuant to this Regulation for the period before its date of application.

2. Any period of insurance and, where appropriate, any period of employment, self-employment or residence completed under the legislation of

a Member State prior to the date of application of this Regulation in the Member State concerned shall be taken into consideration for the determination of rights acquired under this Regulation.

5 3. Subject to paragraph 1, a right shall be acquired under this Regulation even if it relates to a contingency arising before its date of application in the Member State concerned.

4. Any benefit which has not been awarded ... by reason of the ... place of residence of the person concerned shall, at the request of that person, be provided ... with effect from the date of application of this Regulation...

10 5. ...

6. If a request referred to in paragraph 4 or 5 is submitted within two years from the date of application of this Regulation in a Member State, the rights acquired under this Regulation shall have effect from that date, and the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the persons concerned.”

FTT’s decision

15. The FTT dealt with Mr Garland’s submission that Article 9 of the 1971 Regulation gave him the right to pay Class 3 NICs for the period when he lived in Kenya under Regulation 5(2) of the R&PA Regulations at [46] of the decision. Having set out Article 9(1) of the 1971 Regulation, the FTT concluded:

“In effect, where the person is resident in another Member State (as Mr Garland was when he lived in the Republic of Ireland from 1984 to 1994) and in the course of his working life he has been subject to UK legislation as an employed person (as Mr Garland was in 1949/50), then the UK legislative provisions that make his right to make voluntary contributions conditional on being resident in the UK do not apply to him. Article 9(1) operates to qualify Mr Garland’s period of residence in the Republic of Ireland (1984 to 1994) as a period for which he may make “voluntary” Class 3 NICs. But it does not in any way impact on the periods during which Mr Garland was working in Kenya: this is because while he was in Kenya he was not a person ‘resident in a territory of another Member State’.”

16. The FTT dealt with Mr Garland’s submissions in relation to the 2004 Regulation at [48] to [49] of the decision. The FTT referred to Articles 2 and 6 of the 2004 Regulation and then set out Mr Garland’s submission and the FTT’s conclusion as follows at [48]:

“[Mr Garland] says, any UK legislative provision that makes optional insurance conditional upon the completion of periods of insurance, employment or residence is to take into account periods of insurance, employment and residence completed under the legislation of any other Member State. That, we observe, is quite correct; but the provision only

applies to the periods of Mr Garland’s insurance, employment or residence while in the EU. It has no application to the periods in the years 1950 to 1963 while Mr Garland was employed in Kenya.”

5 17. The FTT then considered Mr Garland’s submission in relation to Article 87 of the 2004 Regulation. In relation to the issue of whether the transitional provisions in Article 87 gave Mr Garland the ability to make payments in respect of periods before the 2004 Regulation came into force, the FTT concluded at [49] that

10 “Those provisions, as we read them, do not give Mr Garland any rights either to make voluntary contributions during the periods while he was in Kenya or to take those periods into account for any other NI purposes. This is because those periods are not periods “of insurance and, where appropriate ... of employment ... or residence completed under the legislation of a Member State” (i.e. the UK or the Republic of Ireland) prior to 2004 when the regulation came into force.”

15 18. For the reasons set out above, the FTT rejected Mr Garland’s arguments based on the 1971 Regulation and the 2004 Regulation.

20 19. In the decision granting permission to appeal, Judge Wallace commented that the FTT in [49] of its decision had treated the 2004 Regulation as applying from 2004, whereas it came into force in 2004 but did not apply until 2010, and that was arguably an error of law. The Judge also stated that the effect of the transitional provisions in the 2004 Regulation was unclear. Judge Wallace further commented that the FTT did not address the effect of Article 9(2) of the 1971 Regulation which applied at the time of the decision under appeal and may be relevant to Mr Garland’s situation.

Discussion

25 20. Mr Garland submitted that, correctly interpreted, the 1971 Regulation and the 2004 Regulation meant that he was entitled to pay the NICs for his period in Kenya. Mr Garland stated that he had applied to make the payments at a time when the 1971 Regulation applied. He submitted that the effect of Article 9(2) of the 1971 Regulation was that the periods of residence in two Member States could be
30 aggregated so that his residence in Ireland prior to coming to Great Britain in 1948 should be aggregated with his years of residence in Great Britain before going to Kenya. He contended that the term “contingency” in Article 94(3) referred to his residence in Ireland and “benefit” in Article 94(4) referred to any benefit under the Regulation. If his interpretation is correct then Mr Garland’s period of residence for
35 the purpose of the R&PA Regulations is extended to 22 years and 2 months.

21. Mr Garland can only pay NICs for the period when he worked in Kenya if he had a right to make payments under Regulation 5 of the R&PA Regulations in the period between 1950 and 1963. Mr Garland accepted that he did not have the right to make the payments at the time because the R&PA Regulations limited the right to persons
40 who had resided in Great Britain for a continuous period of not less than 3 years or had made 156 NIC contributions. Mr Garland had only lived in Great Britain for

some 19 months and had not made the necessary number of contributions before he went to Kenya. 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.

22. 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.

23. It is clear from the definition of employed person in Article 1 of the 1971 Regulation that the term "contingency" in Article 94(3) refers to an event in respect of which benefits are paid, eg reaching retirement age, and not the qualifying fact or event such as residence. We take "benefit" in Article 94(4) to mean the benefits described in Article 4 of the 1971 Regulation which include old-age benefits.

24. Our interpretation of the effect of Article 94(1) is confirmed by the decision of the Court of Justice of the EU ("CJEU") in Case C-28/00 *Liselotte Kauer v Pensionsversicherungsanstalt der Angestellten* [2002] ECR I-1367 which was cited to us by Mr Rory Dunlop, who appeared on behalf of HMRC. The case concerned whether a period spent by Ms Kauer raising a family in Belgium must be counted towards her pension entitlement in Austria. The Austrian Government and the European Commission argued that Article 94 of 1971 Regulation did not confer rights retroactively to the application of the 1971 Regulation in Austria. At [21] and [22] of the judgment, the CJEU held that:

"21. In 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 reiterated above.

22. Equally, in order to allow the application of Regulation No 1408/71 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, for the purposes of determining rights to benefit, 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 purposes of establishment of a retirement pension, for the sole reason that they were completed before the entry into force of the regulation in its regard.”

5 The CJEU stated at [36] of the judgment that “the very purpose of Article 94(2) is to preserve the effects of situations, such as completion of periods of insurance or substitute periods treated as such, arising under the old law, in order to determine rights under the new rules”.

10 25. 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.

15 26. The same reasoning as we have applied to the 1971 Regulation applies with equal force to the 2004 Regulation. Article 87(1) of the 2004 Regulation provides that no rights are acquired under the Regulation in relation to the period before its date of application ie 1 May 2010. Mr Garland does not have any right to pay NICs under the 2004 Regulation for any period prior to 1 May 2010.

Decision

20 27. In conclusion, our view is that, for the reasons set out above, the FTT did not make 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. Our decision is that Mr Garland’s appeal against the decision of the FTT must be dismissed.

25

30 **Greg Sinfield**
Upper Tribunal Judge

35 **Timothy Herrington**
Upper Tribunal Judge

Release date: 13 March 2013