DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the Poole First-tier Tribunal dated 23 March 2018 under file reference SC192/17/00009 does not involve any error of law. The decision of the First-tier Tribunal stands.

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

REASONS FOR DECISION

The issue raised by this appeal

1. The fundamental question arising on this appeal is whether the Appellant can rely on his residence in Australia before March 2001 when calculating his entitlement at Step 2 of the transitional rate of the new state pension under Part 1 of the Pensions Act 2014. The short answer to that question is that he cannot. I appreciate that response will come as a disappointment to the Appellant. This decision explains why consideration of both international agreements and domestic legislation drives me to that conclusion.

The Upper Tribunal oral hearing

2. I held an oral hearing of this appeal at Field House in London on January 31, 2019. The Appellant attended and was represented by his wife. The Secretary of State was represented by Ms Julia Smyth of Counsel, instructed by the Government Legal Department. I am grateful to them both for their well-focussed submissions. That hearing also gave rise to some practical issues which I touch on in the Postscript at the end of these reasons.

The factual background

3. The underlying facts of this case are not in dispute and can be stated briefly. The Appellant was born in the United Kingdom in December 1951. He and his wife emigrated to Australia in 1977 but returned to the UK in 2013 (when he was 61). As the Appellant made his pension claim in August 2016, in advance of his 65th birthday in December 2016, he was necessarily making a claim for the new state pension and not the old retirement pension.

The new state pension arrangements

4. Individuals who reached state pension age before April 6, 2016 could claim the old retirement pension (ORP). Since that date, anyone reaching state pension age must make a claim for the new state pension (NSP), introduced by the Pensions Act 2014.

5. The standard type of ORP is the Category A retirement pension, based on the individual claimant's national insurance record. Entitlement to such a pension is governed by section 44 of the Social Security Contributions and Benefits Act 1992. A claimant qualified for the full rate of the ORP if he satisfied the contributions condition for 30 tax years. In 2016/17 the full rate of the ORP (Category A retirement pension) was £119.30 a week. A person with less than a 30-year contributions record would

qualify for a reduced rate retirement pension calculated on the basis of 1/30th of the full rate ORP for each qualifying year.

6. The NSP, in place since April 6, 2016, also depends on the claimant's contributions record. Entitlement to the NSP is governed by Part 1 of the Pensions Act 2014. The default requirement for the NSP is 35 qualifying years (section 2 of the 2104 Act). In 2016/17 the full rate of the NSP was £155.65 a week. A claimant with less than 35 qualifying years, but more than the minimum of 10 qualifying years, is entitled to 1/35th of the full rate NSP for each qualifying year. However, there are special transitional rules for anyone with qualifying years before April 6, 2016 (in practice, of course, the great majority of NSP claimants for some years to come). The resulting transitional rate of the NSP may be more or less, or the same as, the usual full rate, depending on the individual's circumstances. The transitional rules are designed to ensure that anyone who reaches state pension age after April 6, 2016 receives at least the same cash entitlement as they would have done under the previous ORP scheme, based on their own contributions.

Calculating the transitional rate of the new state pension: an outline

7. The calculation of the transitional rate of the NSP is governed by sections 4 and 5 of, and Schedule 1 to, the Pensions Act 2014. Shorn of unnecessary detail, for present purposes there are three steps in this process. The first step ('Step 1') is to calculate the person's total pension under the old scheme (aggregating their ORP and any entitlement to graduated retirement benefit). The second step ('Step 2') is to calculate what would have been the person's entitlement as if the NSP scheme had applied throughout their working life. The third step ('Step 3') is to take whichever of those figures is the higher (known as the 'foundation amount' or 'starting amount') as their transitional rate NSP.

Calculating the Appellant's transitional rate of the new state pension

8. In the present case the Department for Work and Pensions (DWP) took the following approach to calculating the Appellant's entitlement to the NSP. The Appellant's wife indicated she had no issue with the arithmetic set out below. She was understandably much more concerned with the principles.

9. Starting with Step 1, and having regard only to his UK national insurance contributions record, the Appellant had 14 qualifying years up to and including the 2015/16 tax year. Under the old rules this produced an ORP entitlement of £55.67 a week (being 14/30 x £119.30 p.w.), together with a small graduated retirement benefit of £3.06 a week. However, the process of calculating the Appellant's transitional rate NSP is complicated by the fact he lived in Australia for 35 years. The DWP's case, in short, was that the effect of the social security reciprocal agreement between the UK and Australia, as implemented in domestic legislation by the Social Security (Australia) Order 1992 (SI 1992/1312; 'the 1992 Order') and section 299 of the Pensions Act 2004, enabled the Appellant to rely on his Australian residency from November 1977 (when he and his wife emigrated) to February 2001 (when the reciprocal agreement terminated). That right accordingly provided the Appellant with a further 23 qualifying years, to add to his 14 qualifying years spent in the UK, giving him a total of 37 qualifying years. As such, the DWP accepted that under Step 1 the Appellant comfortably (but notionally) qualified for a full ORP of £119.30 (and so a total of £122.36 with the addition of the graduated retirement benefit).

10. Turning to Step 2, the DWP's position was that if the NSP regime had applied throughout the Appellant's working life then, based on his 14 qualifying years, he would only have been entitled to a NSP of £62.26 (being 14/35 x £155.65 p.w.). Of course, if his Australian years had counted in the same way as under Step 1, then he

again would have had 37 qualifying years and, on that assumption, would be entitled to the full NSP of £155.65. However, the DWP's position was that, in contrast to the position under Step 1, there was in law no facility for taking into account his Australian residency in doing the Step 2 calculation, whether that was before or after February 2001.

11. Step 3 was then a straightforward comparison. The figure arrived at under Step 1 (£122.36) was more than the total arrived at under Step 2 (£62.26) and so the Appellant's transitional rate NSP was £122.36. The effect was that the Appellant did not qualify for the full NSP (£155.65), even though he had reached pension age after the Pensions Act 2014 came into force on April 6, 2016.

12. The Appellant and his wife expressed their unhappiness with this outcome. The appeal file (at p.50) includes a screen print of a note of a telephone call received following notification of the transitional rate NSP: "CUST CALLED … CUST THOUGHT SP [state pension] ALL SORTED AND FULL AMOUNT WOULD BE IN PAYMENT, HE IS VERY UNHAPPY THAT THIS SITUATION WAS NOT SORTED MONTHS AGO". A further record of a telephone conversation on December 12, 2016 reports the following explanation and response (at p.64):

> "Explained that under NSP SP is calculated under new and old rules and Australian residence can only be included in the old rules calculation up to a maximum of 30 years combined.
>
> Customer states been treated unfairly always been told that he would get 35 years combined years and a SP of £155.65 NSP. The customer wants full Australian credits taken into account and a UK pension based on 35 years and £155.65 a week".

13. Plainly the Appellant was not satisfied with the DWP's explanation and lodged his appeal with the Tribunal.

The First-tier Tribunal's decision

14. The First-tier Tribunal's admirably concise decision notice also stood as its statement of reasons. Having formally refused the appeal and confirmed the Secretary of State's decision under appeal, the material parts of the Tribunal's reasoning read as follows (with one minor typographical error corrected):

> "5. [The Appellant] argues that the new rules have been modified by the Social Security (Australia) Order 1992. If this is correct the new rules will be more advantageous to him than the old rules.
>
> 6. The Order modified the Social Security Act 1975 and the Child Benefit Act 1975 in order to give effect to the Australian Reciprocal Agreement. The modifications were to the benefit of UK citizens living in Australia. That agreement ceased on 28/02/2001, but section 299 of the Pensions Act 2004 protects people such as [the Appellant] who were resident in Australia for a period before 06.04.2001. This means that under the old rules his pension is calculated by reference to an additional 23 qualifying years.
>
> 7. There has been no equivalent Order to modify the 2014 Act so far as it relates to the new rules. This is no doubt because the reciprocal agreement no longer exists. This means that [the Appellant] does not have the additional qualifying years under the new rules, with the result that a calculation under those rules would be to his disadvantage."

The grounds of appeal in the Upper Tribunal proceedings

15. As developed at the Upper Tribunal hearing, the Appellant's principal submission was that there was no basis for the DWP's argument that the Australian years could count for the purposes of Step 1 but not for Step 2 when calculating the transitional rate of the NSP. Ms Smyth's written response to the appeal, on behalf of the Secretary of State, had argued that "the policy intent was that residence in Australia in the absence of a current reciprocal agreement should not apply to new state pension" (p.101). But where, the Appellant's wife maintained, was the evidence to support this so-called "policy intent'? This assertion, she argued, was merely an expression of opinion on behalf of the DWP with no basis in law. There was, she said, no clear statement in black and white in the legislation to the effect that preserved Australian residency rights did not apply to the NSP under the Pensions Act 2014. In the absence of such a clear statement, it could not be assumed that the protection had been removed.

The Upper Tribunal's analysis

Introduction

16. I fully understand the frustration expressed by the Appellant and his wife in the course of these proceedings. However, their principal argument (as summarised in the previous paragraph) cannot stand with the traditional approach to statutory interpretation. Legislation must be read on its own terms and in its context. Oftentimes, what the legislation does not say can be just as important as what it does say. The present appeal illustrates that point well.

The starting point

17. The starting point must be that entitlement to UK social security benefits is governed by UK domestic legislation. Such entitlement can be affected by international agreements, of which there are two broad categories. First, our (current) membership of the European Union provides for the co-ordination (but not the harmonisation) of social security rules across the EU. Second, the UK Government has over the years, both before and after our accession to (what is now) the EU, entered into a series of individual reciprocal agreements with other states making provision for e.g. mutual recognition of residency in each country to count for the purposes of qualifying for social security benefits in the other country.

The UK-Australia Reciprocal Agreement

18. The governments of the UK and Australia first signed a reciprocal agreement on social security matters in 1958. Such agreements are, by definition, mutually beneficial. Many UK citizens live, work and retire in Australia – some, like the Appellant and his wife, later return to retire in the UK. Likewise, many Australians build up a national insurance record in the UK before returning home. As Professor Terry Carney has observed, "the prime objectives of these agreements are to provide for the transfer, from one country to the other, of social security rights accumulated in the first country and to accommodate the increasing mobility of Australia's population" (*Social Security Law and Policy*, The Federation Press, Sydney, 2006, p.181). The most recent *Agreement on Social Security Between the Government of the United Kingdom and Northern Ireland and the Government of Australia* is dated October 1, 1990 ('the Reciprocal Agreement'). The scope of that agreement was defined by Article 2, which establishes the following points.

19. First, the Reciprocal Agreement was applicable, within the territory of the UK, to what were then the main social security statutes, namely the Social Security Acts 1975 to 1989 (Article 2(1(a)(i)). The ORP (Category A) was at that time governed by

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

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

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

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

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

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

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

26. Accordingly, Article 2 of the 1992 Order was of critical significance. It was the key that unlocked the Reciprocal Agreement at a domestic level and gave effect to its various provisions, including Article 3 of the Agreement governing retirement

pensions. But, obviously if tautologically, the 1992 Order only had legal effect so long as it itself was in force.

The termination of the UK-Australia Reciprocal Agreement

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

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

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

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

benefits by March 1, 2001 (or who had made a claim for benefits before that date but where their entitlement started on or after that date).

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

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

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

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

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

34. Section 299 in full reads as follows:

> **'Claims for certain benefits following termination of reciprocal agreement with Australia**
> **299.** — (1) This section applies to claims for–
> (a) retirement pension,
> (b) bereavement benefit, or
> (c) widow's benefit,
> made on or after 1st March 2001 (the date from which the termination of the reciprocal agreement with Australia had effect).
> (2) This section also applies to claims for retirement pension or widow's benefit made before 1st March 2001 if the claimant only became entitled to the pension or benefit on or after that date.
> (3) For the purposes of such claims–

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

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

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

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

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

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

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

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

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

(ii) for bereavement benefit,

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

(5) An order made under–

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

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

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

(6) For the purposes of this section–

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

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

(c) "the relevant UK legislation" is–

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

(ii) the Social Security Administration Act 1992;

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

(iv) the Social Security Administration (Northern Ireland) Act 1992;

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

(7) In this section–

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

"bereavement benefit" means bereavement payment, widowed parent's allowance or bereavement allowance payable under the Social Security

> Contributions and Benefits Act 1992 or the Social Security Contributions and Benefits (Northern Ireland) Act 1992;
> "widow's benefit" means widow's payment, widowed mother's allowance or widow's pension payable under either of those Acts.
> (8) This section shall be deemed to have had effect at all times on and after 1st March 2001.
> (9) Nothing in this section affects Article 2(2) of the Social Security (Australia) Order 2000 (S.I. 2000/3255) or Article 2(2) of the Social Security (Australia) Order (Northern Ireland) 2000 (S.R. 2000 No. 407) (which provide for cases where a person was in receipt of benefit on 28th February 2001 or had claimed a benefit to which he was entitled on or before that date).'

35. There is one other notable feature of section 299 of the Pensions Act 2004, which came into force on Royal Assent on November 18, 2004 (section 322(2)(c)(iv)). It has not been amended in any respect since enactment. More particularly, there is no reference to either the Pensions Act 2014 or the NSP in section 299. Indeed, if one examines the Pensions Act 2014 itself, it makes various amendments to other provisions of the Pensions Act 2004, but no change to section 299. Parliament could have chosen to do so but did not. For example, the 2014 Act does not amend section 299(1) of the 2004 Act so as to provide that "This section applies to claims for – … (d) state pension", with further consequential amendments to e.g. subsections (6) and (7). The only possible inference from those omissions is that section 299 applies to the benefits it mentions and to the extent that it provides, but no further. It was designed to ensure that e.g. ORP claimants would continue to be able to claim the advantages provided by the Reciprocal Agreement (and in particular recognition of periods of Australian residency before March 2001) but only for the social security benefits within the scope of that instrument.

Reciprocal agreements in social security today

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

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

38. The Appellant's wife questioned why the 2016 Order did not also include a list of countries which were <u>not</u> covered by the provisions making modifications on account

of the Pensions Act 2014. There are two reasons for that, one being principled and one being practical. The principled reason is that the omission of the Reciprocal Agreement with Australia is sufficient in itself to show it is not included (and, in any event, it has been terminated). The practical reason is that the list of countries is not static (think of the nation building changes in the former Yugoslavia since 1991), and keeping the 2016 Order up to date with a list of states that are *not* covered would be both time-consuming and prone to confusion.

Drawing those threads together

39. It follows I agree with Ms Smyth's careful and compelling analysis of the legislative jigsaw. In short, the Reciprocal Agreement, which allows claimants to rely on periods of Australian residency when claiming certain UK social security benefits, (a) no longer exists; (b) was given effect in domestic law by the 1992 Order, but that has been revoked by the 2000 Order; (c) now limps on but only to the extent permitted by section 299 of the 2004 Act; and in any event (d) never applied to the new state pension under the Pensions Act 2014. The recognition of Australian residency before March 2001 that used to apply under the Reciprocal Agreement for the benefit of retirement pension claimants has been preserved and continued by section 299 of the Pensions Act 2004. However, those advantages apply only to the benefits specifically mentioned in section 299 and to no other social security benefits. As such, the DWP was correct to have regard to the Appellant's pre-March 2001 Australian residency when calculating Step 1 of his transitional rate new state pension (which looks at how the ORP would be calculated) but to ignore it under Step 2 (which is premised on the NSP rules applying to the calculation).

40. What all this means, in plain English, is as follows:

- Claimants of UK social security benefits <u>cannot</u> rely on any period of residency in Australia on or after March 1, 2001;
- Claimants of UK social security benefits <u>can</u> rely on any period of residency in Australia before March 1, 2001 <u>but only</u> for those benefits and in the circumstances set out in section 299 of the Pensions Act 2004;
- Consequently, a claimant of the UK's new state pension (NSP) under the Pensions Act 2014 can rely on their pre-March 1, 2001 residency in Australia when calculating their Step 1 entitlement to the transitional rate NSP but not when calculating their Step 2 entitlement to that transitional rate.

Postscript

41. Finally, there are two matters I should mention by way of a postscript.

42. The first is that the Appellant's wife told me that she and her husband had had several telephone conversations with members of staff in the ANZAC department within the DWP's International Pension Centre. She said they had always been assured that he would receive the full rate of the new state pension. Ms Smyth's response was that it was very regrettable if they were given the wrong information. I do not have chapter and verse on each of those telephone conversations. It is clear that in at least one of those conversations the Appellant and his wife were correctly advised as to the true legal position (see paragraph 12 above). However, that is not to say they were not misadvised on a previous occasion – I simply do not know. However, that is ultimately a customer service issue and not one that affects the First-tier Tribunal's decision. Whatever may or may not have been said at any earlier stage, the DWP's decision maker and the Tribunal correctly applied the relevant law.

43. The second matter is that Ms Smyth handed in a bundle of the relevant primary and secondary legislation on the day of the hearing, providing a copy each for the Appellant and myself. I recognise that Ms Smyth was only seeking to be helpful and indeed the relevant statutory materials were referred to in the Secretary of State's written response to the appeal, which had been provided some weeks earlier. However, I also acknowledged that it was only fair to give the Appellant the opportunity to make any further submissions in writing after the hearing. I have also considered those extra observations but they have not persuaded me for the reasons set out above. In an ideal world such materials will be provided further in advance. It is not just that it is unrealistic to expect a litigant in person to read and digest such a bundle on the day, but its very production may only add to the stress of the occasion. I recognise this could have been avoided had I made specific directions for the production of a bundle in advance of the hearing. I am sorry if the result was that the Appellant and his wife were rather "thrown" by the appearance of the bundle at the hearing.

Conclusion

44. For all these reasons, the decision of the First-tier Tribunal does not involve any error of law. I therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 18 February 2019

Nicholas Wikeley
Judge of the Upper Tribunal