



TC01135

Appeal number: TC/2010/02284

***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***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JOHN AUGUSTINE GARLAND

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS (NICs)**

Respondents

**TRIBUNAL: SIR STEPHEN OLIVER QC
SANDI O'NEILL**

Sitting in public in London on 25 November 2010

The Appellant in person

Graeme Foster, of HMRC, for the Respondents

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DECISION

1. Mr John Garland appeals against a decision issued on 9 October 2009 under Section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999.
5 The issue concerns Mr Garland’s entitlement to pay UK National Insurance Contributions (NICs) as a non-employed person within the meaning of Regulation 5 of the National Insurance (Residents & Persons Abroad) Regulations 1948 (“the R&PA Regs”) for the period during which he was employed in Kenya from 1 August 1950 until 7 October 1963.

10 2. Mr Garland appeared in person. He has been engaged in this dispute for some 40 years. We were provided with correspondence between him and HMRC (and their predecessors) going back to 1970. There was no dispute as to the underlying facts. The correspondence and other papers provided for the Tribunal covered the ebb and flow of the arguments between Mr Garland and the government departments
15 responsible for the National Insurance arrangements.

3. We first issued this decision in draft. This was because our attention had been drawn to the decision of the Court of Appeal in *Kearney v HMRC* [2010] EWCA 287 We asked for written submissions on whether the Kearney decision impacted in any way on the circumstances of Mr Garland. This matter is dealt with in paragraphs 26-
20 32 of this Decision.

4. The decision appealed against in the present case is expressed as follows:

“My decision is that you cannot pay United Kingdom non-employed National Insurance Contributions for the period 31 July 1950 to 15 October 1963”.

25 We now set out the statutory provisions relied upon by HMRC as the basis for the Decision appealed against.

Non-employed UK NICs

5. The receipt of a “Basic State Pension” (BSP) and other benefits is reliant on a person accruing a specified number of qualifying years for NI purposes. A qualifying
30 year is one in which the minimum NICs have been made. Regulation 5 of the R&PA regs provides for the payment of non-employed NICs for periods when a person is resident abroad to enable that person to satisfy the contribution conditions for entitlement to BSP and certain other benefits – by making a year a qualifying year in circumstances in which that year would not otherwise be a qualifying year.

35 6. Regulation 5 states:

(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.

5 (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:-

10 (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]

15 (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 –

25 (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

30 (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.

35 **Use of foreign insurance/residence to satisfy the conditions to pay voluntary NICs**

7. There are provisions within the European Community (EC) Regulations on Social Security 1408/71 which may allow for periods of residence/insurance in another Member State to be used to help satisfy the qualifying conditions to pay 40 voluntary contributions in another Member State.

8. The provision which covers this is Article 9 which states:

5 (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 another member State shall not apply to persons resident in 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.

10 (2) Where under the legislation of a member State, admission to voluntary or optional continued insurance is conditional upon completion of 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.

Benefit entitlement

15 9. Mr Garland wishes to pay non-employed NICs for the period when he was employed in Kenya in order to increase the number of qualifying years he currently has for a BSP.

20 10. The law (Section 44 of the Social Security Contributions & Benefits Act 1992) states that a person will be entitled to a Category A State Pension if that person is over pension age and satisfies the relevant contribution conditions.

25 11. For Mr Garland to get a full BSP he needs to have sufficient NICs to cover 44 of the years in his UK working life. Where a person does not have enough NICs to cover all of the years needed for a full pension the law allows for a reduced rate pension to be paid. The reduction is in proportion to the shortfall in the National Insurance record. The law states that the minimum amount of pension that can be paid is 25% of the standard rate.

Background

30 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.

35 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.

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.

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 5 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.

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 10 1993 to qualify for the minimum pension of 25%.

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 15 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 legislation on the payment of Class 3 NICs provided that 20 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.

18. Mr Garland was subsequently invited to pay Class 3 NICs outside the statutory 25 time limits for the 1984/85 to 1992/93 tax years and payment was made in January 2009.

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) 30 and the amount of arrears paid to him totalled £17,457.

20. Save for HMRC's interpretation and application of Article 9 of 1408/71 as having the effect of displacing the Decision appealed against (to which reference will be made later), we observe that the above points are not in dispute. We now address the points of contention between the parties.

35 **Are the conditions of Regulation 5(2) of R&PA Regs satisfied?**

21. HMRC submit that under Regulation 5(2) of the R&PA Regs Mr Garland has failed to meet the necessary conditions to pay non-employed NICs for the period 1 August 1950 to 7 October 1963. He failed, say HMRC, to meet the contribution and residence conditions in Regulation 5(2)(b)(i) in that:

5 (i) He did not reside in Great Britain for a continuous period of not less than three years at any time before the week in question. It is not in dispute that prior to the period in question Mr Garland has been resident in Great Britain from 20 December 1948 until 31 July 1950. This period being less than three years, he does not, say HMRC, satisfy the necessary residents condition; and

10 (ii) He did not have sufficient NICs paid as an insured person to meet the contribution condition. 156 conditions are needed, and prior to the period in question Mr Garland's National Insurance record held only 78 contributions.

Do the EC provisions alter Mr Garland's position?

15 22. HMRC say that the provisions of Article 9 of the EC Regulations on Social Security 1408/71 did not count towards the qualifying conditions for the period for which Mr Garland wishes to pay unemployed NICs as that period predates both the UK and Ireland's entry into the European Union on 1 January 1973.

Application of the time limits

23. HMRC contend in addition that Mr Garland's application to pay non-employed NICs for the period 1 August 1950 to 7 October 1963 was outside the permitted time period in Regulation 5(2) of the R&PA regs for two reasons.

20 24. First, say HMRC, Mr Garland initially made an approach about paying these NICs in or around October 1970. That is not, as we understand the position, in dispute. We note that Mr Garland's appeal letter to the Tribunal states: "In 1970 I heard whilst abroad that there were changes to the National Insurance policy and I then commenced my letter writing which has now lasted 40 years ...". Secondly, say
25 HMRC, at the time in question Regulation 5(2)(bb) of the R&PA Regs allowed payment for Class 3 contributions to be made up to a maximum of six years after the end of the relevant contribution year. Mr Garland's employment in Kenya ended on 3 October 1963, and the 1962/63 contribution year ended in December, 1963. It followed, therefore, that even if it had been permissible for Mr Garland to pay
30 voluntary UK NICs for the period in question, when he made his initial requests of the Department, the six year time limit relating to the period 1 August 1950 to 7 October 1963 had already expired.

35 25. On the face of it, and looking entirely at the application of Regulation 5(2) of the R&PA Regs, HMRC are, we think, correct. We have, in this connection, taken into account the explanation given by HMRC which is set out in further detail in the Appendix to this Decision.

Our concerns about the application of the *Kearney* decision

40 26. Mr Garland referred us to the recent decision of the Court of Appeal in *Kearney*. In that case the Court of Appeal upheld the decision of the General Commissioners that Me Kearney (who had served with the Police in Kenya from

1948 until 1965) had satisfied the burden of showing that his failure to make NICs between 1948 and 1965 was due to ignorance but was not “the result of any failure on his part to exercise due care and diligence.”

5 27. The question in *Kearney* related to regulation 32(1) of the NI (Contributions) Regulations 1969. This provides:

10 “(1) Where a person was entitled to pay a contribution under any of the provisions of the regulations referred to in regulation 32(2) of these regulations (... periods abroad) but he failed to pay that contribution in the period provided for payment in the said provisions applicable and his failure is shown to the satisfaction of the Secretary of State to be attributable to ignorance or error on his part which was not due to any failure on his part to exercise due care and diligence, that contribution may be paid within such further period as the Secretary of State may direct”.

15 28. Mr Foster, representing HMRC, stated at the Tribunal that in the circumstances HMRC would accept that Mr Garland had shown “due care and diligence”. But that, said Mr Foster, was not an issue. Mr Kearney’s case had been concerned with section 32(1) of the 1969 Regulations and not, he pointed out, with regulation 5(2) of the R&PA regs.

20 29. Since the hearing we reviewed the documents and statutory material provided by the parties and the arguments presented at the hearing. We were not sure what difference there was between the positions of Mr Kearney and Mr Garland. We invited both parties to comment on this. The invitation took the form of a Directive that read as follows:

25 “Before we decide this appeal we will need a reasoned statement of HMRC’s grounds for saying that the Kearney decision is distinguishable from the present appeal of Mr Garland. This decision is to be sent out in draft to both parties with a direction that both parties have sixty days in which to make written submissions:

30 (i) Why Regulation 32(1) does not apply in Mr Garland’s case and
(ii) Given that HMRC accept that Mr Garland showed due care and diligence, why Regulation 32(1) cannot be relied upon by Mr Garland to enable him to make good the deficiency in his voluntary contributions during his time in Kenya.”

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30. The answers to the two questions given by HMRC are:

40 “1. Regulation 32(1) is in point when a request to pay voluntary contributions is made for a period outside the statutory time limits. However, before those statutory time limits come into play it is necessary for the contributor to have met the basic conditions for entitlement to pay so that he could have paid if he had asked to do so

5 within the time limit. As Mr Garland could not meet any of the conditions in Regulation 5(2) and was not therefore allowed to pay in the first instance, the statutory time limits, and consequently extending those statutory time limits under Regulation 32(1), were not relevant to his case.

10 2. Regulation 32(1) cannot be relied upon in Mr Garland's case because he first needs to have satisfied Regulation 5(2). The rules within Regulation 32(1) have no direct bearing on whether or not a customer meets the conditions in Regulation 5(2)."

15 31. The reasoning behind those answers of HMRC is set out in the Appendix to this Decision. We note HMRC's comment that the position of Mr Kearney as having satisfied Regulation 5(2) "is not completely free from doubt". However we cannot see that Mr Kearney's success will affect the outcome of Mr Garland's claim. HMRC's reasoning is, in our view, correct.

20 32. Mr Garland's response to the questions raised in the Direction noted that he, in common with Mr Kearney, had acted with due care. That is correct but it does not satisfy us that the outcome in Mr Kearney's case governs the result in Mr Garland's case.

Other issues: The relevance of regulation 3 of the R&PA Regs

25 33. Mr Garland referred us to regulation 3. Where applicable, this requires the payment of contributions to continue notwithstanding the fact that the employment is outside Great Britain. So far as relevant it reads as follows:

30 "(1) Where a person employed in an employed contributor's employment ceases to be so employed in Great Britain but is employed (by the same or a different employer) outside Great Britain in continuation of an employed contributor's employment that employment outside Great Britain shall be treated as an employed contributor's employment for the period for which contributions are payable in respect of it under ... this regulation, provided the employer has a place of business in Great Britain, and the person concerned is ordinarily resident therein.

35 (2) Where under the preceding paragraph employment outside Great Britain is treated as an employed contributor's employment, the following provisions shall apply with respect to the payment of contributions under the Act:-

40 (a) weekly contributions ... shall be payable in respect of such employment during the period of twelve months from the commencement thereof."

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34. Mr Garland contends that the Department failed to grant him a formal decision as to the application of Regulation 3 to the circumstances of his case. He says that his service in Kenya (with HM Overseas Civil Service) can, on the strength of regulation 3, be properly taken into account for the payment of missing contributions. In response to HMRC's statement that this matter had already been conclusively determined against him following a decision of the Isle of Man authorities in April 2000, Mr Garland contends that he (and this Tribunal) are not bound by the Isle of Man decision.

35. For reasons that we will give, we think that we are bound by the Isle of Man decision. But, before we explain why, we need to point out that consideration of the effect of regulation 3 is outside the scope of this appeal. This appeal is against the decision dated 9 October 2009 that Mr Garland "cannot pay UK non-employed NI Contributions for the period 31 July 1950 to 13 October 1963." That decision was expressed in terms of regulation 5(2) of the R&PA Regs. It relates to Mr Garland's claim to pay non-employed NICs while he was employed in Kenya; it does not relate to any claim to have his employment in Kenya treated as an employed contributor's employment.

36. We turn now to the Decision on Regulation 3. The Decision made by the Isle of Man Authority on 14 April 2000 was made under Section 17(1) of the Social Security Administration Act 1992 as applied to the Isle of Man and was in the following terms:-

That in respect of Mr Garland's employment by the Kenya Government, which commenced on 31 July 1950, the provisions of Regulation 3 of the R&PA Regs, as then applying, were not satisfied in his case, in that:-

- (a) his employment outside Great Britain was not in continuation of an employed contributor's employment; and
- (b) he was not ordinarily resident in Great Britain, but were so satisfied, in that:-
- (c) his employer had a place of business in Great Britain.

37. Mr Garland sought and obtained a Statement of Grounds in respect of that Decision. He subsequently requested the Isle of Man Authority to state a case, but that application was rejected because it was made out of the statutory time limit. It would have been open to Mr Garland to challenge that refusal by means of a petition of Doleance, being the Manx equivalent of Judicial Review, but he did not take such action.

38. HMRC have explained the function of the Isle of Man Authority. The primary legislation, under which the decision was made, mirrors the UK legislation, but as the decision makes clear, it is made under Section 17(1) of the Social Security Administration Act 1992 as applied to the Isle of Man. The Social Security (Isle of Man) Order 1977 which came into operation on 1 January 1978 provides (at article 2)

for the modification of the Social Security Act 1975 and in particular that references to the Secretary of State shall be construed as including references to the Isle of Man Board of Social Security.

5 39. Schedule 1 of the Order contains the reciprocal agreement. Paragraph 2 provides that:-

10 “(1) Subject to paragraph (5) of this Article, for the purposes of all or any of the provisions of the systems of social security established by the Acts –

15 (a) acts, omissions and events and in particular residence, presence, employment (including employment as a mariner or airman), the occurrence of an industrial accident or the development of any prescribed disease, the payment, crediting or treating as paid of contributions (including graduated contributions and payments in lieu of graduated contributions), the refund of contributions paid in excess of the annual maximum amounts payable and the claiming or payment of benefits; and
20 (b) the operation of any provisions as to exception from liability to pay contributions,

25 having effect for all or any of those purposes in one territory shall have corresponding effect for all or any of those purposes in the other territory.”

30 Subparagraph (3) provides:-

35 “Subject to paragraph (4) of this Article, any appeal from a determination of any claim or question arising under or in connection with the Acts shall be made, and any question with a view to the review of any such decision shall be raised, in the territory in which such decision was given.”

40 Subparagraph (4) modifies the provision in respect of disablement and subparagraph (5) excludes from the agreement the provisions of the systems relating to mobility. Neither subparagraph is relevant to the circumstances of this case. For convenience the Order is attached to this submission.

45 40. The reciprocal agreement was made between the Secretary of State for Social Services and inter alia the Chairman of the Isle of Man Board of Social Security. The Secretary of State for Social Services was in due course replaced by the Secretary of State for Social Security and then the Secretary of State for Work and Pensions and at the time the decision was made by the Isle of Man Authority, the Isle of Man Board of Social Security had been replaced by the Minister for Health and Social Security.

That however does not affect the validity of the Order. Further, although responsibility for National Insurance Contributions passed from the Department for Social Security to the Inland Revenue (as it then was) by means of the Social Security Contributions (Transfer of Functions etc) Act 1999, the Minister for Health and Social Security remained responsible for National Insurance Contributions on the Isle of Man until a Manx Transfer of Functions Order took effect from 1 April 2010.

41. It follows say HMRC that the decision of the Isle of Man Authority is binding upon the United Kingdom Authorities including the Tribunal. It is not open to Mr Garland to re-litigate that decision before the Tribunal or to go behind it. Had Mr Garland sought an identical decision employing Section 8 of the Transfer of Functions Act from Her Majesty's Revenue and Customs that request would have been declined as having already been determined. However here, the decision of the Isle of Man was made in respect of Regulation 3 of the National Insurance (Residents and Persons Abroad) Regulations 1948, as applied in the Isle of Man. The decision made by the Commissioners for Her Majesty's Revenue and Customs is made in respect of Regulation 5 of the corresponding Regulations. (It might, say HMRC, have been thought more logical and appropriate for the original decision-maker to have decided the Section 17 question by reference to all relevant paragraphs of the Regulations but it is clear from his decision that he did not do so). HMRC submit, therefore, that our consideration is limited to Regulation 5 of the R&PRA Regs.

42. We cannot fault the contentions of HMRC on that aspect of this appeal.

43. Were the matter relevant, we think that the Decision of 14 April 2000 was, on the facts as we understand them, correct. There was no continuity of employment between Mr Garland's job with Thomas More School in London and his post as an officer in the Kenya Police Force. The contracts of employment were between him and two wholly different employers. On the facts the employment with Thomas More School had nothing whatever to do with the circumstances of the employment in Kenya. The duties of the employments were completely different. The pay and other terms of employment were different. Nor could Mr Garland realistically say that he was ordinarily resident in the United Kingdom in the relevant sense. There are, we accept, special rules and concessions that determine ordinary residence for purposes of tax because it is an annual imposition. But those rules and concessions are not readily applicable to the contribution rules.

44. For the reasons we have given in relation to Mr Garland's arguments on regulation 3 of the R&PA Regs, we are against him.

Other issues : the effect of regulation 9 of EC 1408/1971 and of Regulation (EC) 833/2004

45. Mr Garland relies on Article 9 of EC 1408/1971 as establishing his right to make the Class 3 NICs while he was in the Republic of Ireland (during the years 1984-1994). This has been accepted by HMRC. The Article, he says, further

establishes his eligibility to pay Class 3 NICs for the period when he lived in Kenya under Reg 5(2) of the R&PA Regs.

46. Regulation 9 is as follows:

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“(1) The provisions of the legislation of any Member State that make admission to voluntary or optional continued insurance conditional upon residents 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.”

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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”.

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47. For those reasons we agree with the construction adopted by HMRC. The effect of Article 9.1 is to remove the conditions of UK domestic legislation on the payment of Class 3 NICs provided that the person in question is resident in another Member State and has previously been subject to UK legislation (i.e. by the payment of UK NICs).

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48. Mr Garland contends that Regulation (EC) 883/2004 advances his case and he relies on three provisions for this. He refers first to Article 2 which provides that the Regulation is to apply to nationals of a Member State ... who are or have been subject to the legislation of one or more Member State ...” He then refers to Article 6 which, so far as is relevant reads as follows:

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“... the competent institution of a Member State whose legislation makes ... the access to ... optional continued or voluntary insurance ... conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.”

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Thus, he 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

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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 49. To the same effect is Article 87.2. This is one of the Transitional Provisions. Paragraphs 1 and 2 read as follows:

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

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(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.”

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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.

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25 50. For those reasons we are against Mr Garland on his arguments so far as they are based on EC law.

51. 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.

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SIR STEPHEN OLIVER QC

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RELEASE DATE: 27 APRIL 2011

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APPENDIX
(written explanation by HMRC)

5 Mr Kearney first approached the then Department of health and Social Security (DHSS) in 1971 about the payment of voluntary National Insurance Contributions (NICs) for periods spent abroad. In a letter sent to him by the DHSS dated 15 September 1971 he was told that:

10 “... your application to pay contributions at the Class 3 rate whilst abroad is in order.”

This meant that the Department had accepted that he satisfied at least one of the conditions or Regulation 5(2) of the National Insurance (Residents & Persons Abroad) Regulations 1948 (“the R&PA Regs”) and he was allowed to pay voluntary
15 NICs for the preceding six years (the maximum allowed under the time limits) from 1965 until 1971. He was subsequently allowed to continue to pay voluntary NICs until 1988.

20 In the intervening years Mr Kearney continued to pursue his case to be allowed to pay for a period earlier than 1965. He was eventually issued with a decision by HMRC in 2006 under section 8 of the Social Security Contributions (Transfer of Functions, Etc) Act 1999. The decision was that Mr Kearney was not entitled to pay for years earlier than 1965 and that decision was based on Regulation 32(1) of the National Insurance
25 (Contributions) Regulations 1969 (“the 1969 Regs”), that being the relevant regulation governing an extension of the time limits for paying voluntary NICs.

The Court of Appeal concluded that it would allow Mr Kearney’s appeal and re-
30 instate the decision given by the General Commissioners that, in considering the terms of Regulation 32(1), although Mr Kearney was ignorant of the fact that he could have paid voluntary NICs for the period during which he was abroad, that ignorance was not due to his failure to exercise due care and diligence. He was therefore allowed to pay for the period in question (1948 to 1965).

35 HMRC is obliged to point out that the position with regard to Mr Kearney as having satisfied Regulation 5(2) of the R&PA Regs is not completely free from doubt. His original request to pay voluntary NICs for the period from 1965 to 1971 was accepted by the DHSS in September 1971 so when HMRC came to give a section 8 decision in 2006 the question of his entitlement to pay in the first instance was not a matter that
40 was given consideration. HMRC accepted that, as it was found in 1971 that his application to pay was in order, and as he had subsequently paid voluntary NICs for years from 1965 to 1988, there were factors considered in 1971 which suggested that at least one of the conditions in Regulation 5(2) was met.

45 HMRC proceeded on that basis and the decision given to Mr Kearney was therefore not on the question of his entitlement to pay in the first instance under Regulation 5(2) of the R&PA Regs, but on whether he satisfied the conditions set out in Regulation

32(1) of the 1969 Regs and was therefore allowed to pay outside of the normal time limits. The subsequent appeals before the General Commissioners, the High Court and the Court of Appeal were therefore specifically related to the question of whether the conditions set out in Regulation 32(1) were met.

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As far as Mr Garland's case is concerned, HMRC established that he did not satisfy the conditions of Regulation 5(2) of the R&PA Regs and was therefore never entitled to pay voluntary NICs in the first instance. The decision given to Mr Garland that he was not entitled to pay voluntary NICs was therefore based not on the time limits for

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payment, but on the fact that he did not satisfy the basic conditions for entitlement to pay. As he could legally not satisfy the basic conditions, and could not therefore have paid voluntary NICs even if he had sought to do so within the relevant time limits, the question of whether those time limits could be extended under the terms of Regulation 32(1) of the 1969 Regs was not relevant, and was not a matter under consideration.

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That is, Regulation 32(1) cannot be considered in Mr Garland's case because he does not satisfy the primary condition that would allow him to pay in the first place (i.e. Regulation 5(2)) and the question of time limits for payment is therefore irrelevant and does not need to be considered.

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