

R(P) 3/09**(Secretary of State for Work and Pensions v Yates [2009] EWCA Civ 479)****Mr J Mesher
Commissioner
1 July 2008****CP/3638/2006****CA (Lord Clarke MR, Rix and Carnwath LJJ)
10 June 2009****Retirement pension – Category B pension frozen at level in force when spouse ceased to live in Great Britain – higher Category B pension payable on death of spouse – whether should include increases in benefit rates up to date of his death**

The claimant's late husband went to live in Canada in 1976 and his category A retirement pension and graduated retirement benefit (GRB) were frozen at the November 1975 rate in accordance with the provisions of regulations 4 and 5 of the Social Security (Persons Abroad) Regulations 1975 (the Persons Abroad Regulations). Those provisions create exceptions to the general disqualification when absent from Great Britain in section 113 of the Social Security Contributions and Benefits Act 1992 in relation to, *inter alia*, retirement pension and GRB but (by regulation 5(3)) retain the disqualification for increases in the rate of benefit. The claimant married her husband in September 2001. She was a Canadian citizen and had never lived in the United Kingdom. She was then awarded a Category B retirement pension as his spouse, based on his contributions, also frozen at the 1975 rate under regulation 5(3)(aa). Her husband died on 27 May 2002 and she was then awarded a higher weekly rate of Category B pension in her own right, together with the equivalent of half his GRB, based on November 1975 rates. The claimant appealed to the appeal tribunal, arguing discrimination under Article 14 of the European Convention on Human Rights. The same point was under consideration in *R (Carson) v Secretary of State for Work and Pensions*, which was decided by the House of Lords in favour of the Secretary of State in May 2005 ([2005] UKHL 37, [2006] 1 AC 173). The tribunal dismissed her appeal and she appealed to the Commissioner. The Commissioner allowed her appeal, basing his reasoning purely on the construction of regulation 5 of the Persons Abroad Regulations and holding that she was disqualified only in respect of any up-rating order since she first became entitled to a pension in her own right, as the provisions of the Persons Abroad Regulations must be considered week by week, and from 27 May 2002 the claimant ceased to fall within regulation 5(3)(aa) relating to married women, and (b) (relating to widows and widowers) did not apply to past up-rating orders. Therefore, the disqualification from up-rating had to be considered under (c) as from that date. The Secretary of State appealed to the Court of Appeal, arguing that, once the extent of disqualification was decided in relation to each up-rating order, the position was then fixed in relation to that up-rating order, even though the benefit is calculated and paid on a weekly basis.

Held, allowing the appeal, that:

1. while the Commissioner's interpretation had force on a strict reading of the wording of the regulation, there was a strong incentive to read any ambiguity in the regulations so as to accord with the evident policy intention in section 113 to deprive those absent from the country from any entitlement to the benefits covered, but to restore it only to the extent that Regulations provided (paragraph 37);
2. the insertion of sub-paragraph (aa) into regulation 5(3) to deal with a particular problem, without sufficient regard to its relationship to the paragraph as a whole should not be allowed to disrupt the scheme of the paragraph, which is that disqualification from the benefit of up-rating is generally treated as applying for the whole of the period of the order, based on the position at the appointed date and in this context the ordinary "week by week" approach is displaced (paragraph 38);
3. therefore sub-paragraph (aa) provided the means of establishing the claimant's status under the current and previous up-rating orders and there was no reason to revisit the basis of her disqualification under the Persons Abroad Regulations (paragraph 39 and 40).

The Court of Appeal remitted the case to the Upper Tribunal so that the matter could be reviewed in the light of the final decision of the European Court of Human Rights in *Carson*.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed in part.
 - (a) The decision of the Sutton appeal tribunal dated 19 April 2006 disallowing the appeal against the Secretary of State's decision dated 22 April 2002, relating to the period from 8 September 2001 to 26 May 2002, is not erroneous in point of law, for the reasons given below, and therefore stands.
 - (b) The decision of the same appeal tribunal disallowing the appeal against the Secretary of State's decision dated 28 June 2002 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to give the decision that the appeal tribunal should have made on that appeal on the basis that the construction of the British legislation is not affected by the application of the Human Rights Act 1998 or the principles of European Community law (Social Security Act 1998, section 14(8)(a)(i)). That decision is set out in paragraph 2 below.
2. My decision under paragraph 1(b) is that the appeal against the decision of 28 June 2002 is allowed and that the substituted decision is that the claimant is entitled to a category B retirement pension from and including 27 May 2002 at the basic rate identified in sections 48A(4) and 44(4) of the Social Security Contributions and Benefits Act 1992 as at 8 September 2001 (£72.50), plus inherited graduated retirement benefit at the weekly rate calculated in accordance with paragraph 35 below. If the mechanics of the calculation are not agreed on behalf of the claimant's estate, the case may be referred back to me (or, if necessary or expedient, to another Commissioner) for further decision.

Introduction

3. This is a complicated and unusual case, involving highly technical provisions on the circumstances in which a recipient of a category B retirement pension resident in Canada can take advantage of up-rating orders of which her deceased husband, through whose contributions she qualified for the pension, had not been able to take advantage in the calculation of his own retirement pension and of which she had not been able to take advantage during his life. The claimant sadly died on 8 January 2008. Her appeal to the Commissioner is being carried on by Ms W as one of the executors under her will (as is proper in accordance with paragraph 4 of Commissioner's decision R(SB) 8/88 although evidence has not yet been provided of grant of probate in British Columbia). Ms W has authorised the claimant's late husband's son to represent her, as he had been representing the claimant. I refer to him below as the claimant's representative. Because my view of the case took me into questions that had not been raised in the already massive written submissions and because of the practical difficulties of arranging any sort of oral hearing, I issued a draft decision on 10 January 2008 and invited the parties' comments. The claimant's representative in a letter dated 31 January 2008 agreed entirely with my draft decision and indicated that if that decision were maintained (as it has been except to a very small extent) he no longer wished to pursue any human rights or

European Community law arguments. There is therefore no need to issue this decision as merely an interim decision, pending further such argument. It is a final decision. The Secretary of State's response, after two grants of extension of time, was dated 19 May 2008. I have taken account of it below, although it has not caused me to alter my view on the main issues of law.

4. At the hearing before the appeal tribunal in January 2003 the argument proceeded on the basis that the claimant's representative could not dispute the two decisions under appeal within the terms of the British social security legislation. His arguments were that certain provisions of the secondary legislation were inapplicable because they were discriminatory contrary to Article 14 of the European Convention on Human Rights or were inconsistent with European Community law. At that time an appeal against Stanley Burnton J's first instance judgment in *R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), [2002] 3 All ER 994, in which he rejected a human rights challenge to the difference of treatment between pensioners resident in countries with which the United Kingdom had a reciprocal treaty arrangement (eligible for up-rating on the terms of the relevant treaty) and those resident in other countries outside the European Union (not eligible), was pending before the Court of Appeal. The sole member of the appeal tribunal (who from now on I shall call the chairman) rightly declined to adjourn the hearing, in the light of the claimant's representative having made a special journey from Canada and the Department's having failed to make any meaningful attempt to respond to his human rights arguments. But she ruled that she would defer the making of her decision until the appeal in *Carson* had been determined. In the event, although the Court of Appeal gave judgment on 17 June 2003 ([2003] EWCA Civ 797, [2003] 3 All ER 577), Ms Carson and the other claimant whose case was heard with hers (Ms Reynolds) appealed to the House of Lords, who gave judgment against the claimants on 26 May 2005 ([2005] UKHL 37, [2006] 1 AC 173). The appeal tribunal's exceptionally detailed statement of reasons (running to 19 typed pages), which seems to have incorporated the notice of decision, was signed on 19 April 2006, with an apology for the long lapse of time.

5. I am afraid that I have added to that already unfortunate delay. I granted the claimant leave to appeal on 14 November 2006 and directed submissions on some detailed questions of interpretation of the British legislation, in particular the Social Security (Persons Abroad) Regulations 1975 (SI 1975/563). Extensions of time were sought on behalf of the Secretary of State to deal with those questions and further points raised after the completion of the first round of written submissions. There was then some administrative confusion in the Commissioners' office in seeking the claimant's representative's views on the Secretary of State's further submission dated 14 August 2007 (which in the end were to rely on his submission dated 21 March 2007). It was not then until January 2008 that I decided that fairness required the issue of a draft decision to give the parties, and in particular the Secretary of State, the opportunity to comment on new points. I too apologise for the lapse of time since leave to appeal was granted.

The facts and the adjudication history

6. The essential facts were not in dispute before the appeal tribunal, whose findings I summarise. The claimant's former husband (H) was born on 2 March 1911 in England. On 2 March 1976 he became entitled to a Category A retirement pension, having the contribution record for 100 per cent of the basic rate of pension.

In 1976 he emigrated to Canada. It is not in dispute that the rate of H's pension was "frozen" at the November 1975 rate and that he was not allowed to benefit from any up-ratings after that date. On 8 September 2001 H married the claimant, who was born on 29 March 1927 in Canada. She was a Canadian citizen and resided there all her life. She never visited Britain. Following an enquiry by H to the Pensions and Overseas Benefits Directorate (POBD), the claimant completed a retirement pension claim form on 11 November 2001. The claim was treated as made on 8 September 2001. By a decision dated 22 April 2002 the claimant was awarded a Category B retirement pension (described on the decision-making pro forma at pages 4C and 5 as a Category BL pension) from and including the first Monday following 8 September 2001 (10 September 2001) at the rate of £7.90 per week. That was the rate prescribed in the predecessor of paragraph 5 of Part I of Schedule 4 to the Social Security Contributions and Benefits Act 1992 as at November 1975. The rate as at September 2001 was £45.20. The claimant appealed against the decision of 22 April 2002.

7. On 25 May 2002 H died. In a letter dated 3 June 2002 the claimant informed the POBD of that and asked if she was entitled to any additional benefits. The POBD carried out a "conversion" on widowhood (page 13), showing her entitlement to a Category B retirement pension, rather than a Category BL, at £13.30 per week and the inheritance of half of H's graduated retirement benefit (GRB) of £1.18 per week. A letter dated 28 June 2002 informed the claimant of her entitlement to the increased rate from and including 27 May 2002. She appealed against the decision on the increased rate as well.

8. The appeal tribunal disallowed both appeals. On the basis mentioned in paragraph 4 above, although the chairman very helpfully went through the British legislation, it was accepted without much discussion that the Secretary of State was right in the conclusion that the effect of regulations 5(3)(aa) and (b) of the Persons Abroad Regulations was that the claimant's Category B retirement pension, both initially and after the conversion on H's death, was frozen at the rates in operation as at November 1975. The appeal tribunal rejected the argument that the amendment introducing regulation 5(3)(aa) was invalid on human rights grounds, as well as the wider human rights arguments for the claimant.

The general structure and application of the legislation

9. The text of the relevant legislation as in force on 6 April 2002 is set out in an appendix to this decision. The provisions of the Social Security Contributions and Benefits Act 1992 on entitlement to Category B retirement pensions on the contributions of a spouse or former spouse are in a somewhat confusing state because of the gradual coming into force of sections 48A and 48B, replacing sections 49 and 50. In the case of a woman claiming on a husband's or former husband's contributions, sections 48A and 48B were operative by 2001. The claimant satisfied the conditions of entitlement to a Category B retirement pension in section 48A(1) and (2) from 8 September 2001. She had attained pensionable age and was married to a person who had attained pensionable age, was entitled to a Category A retirement pension and satisfied the contribution conditions. By virtue of section 48A(3), the weekly rate payable was that specified in paragraph 5 of Part I of Schedule 4. Although that pension was called in the POBD documents and elsewhere a Category BL retirement pension, that is only a convenient administrative label to distinguish a Category B pension payable at that rate from one paid at a higher rate.

In the legislation itself there is only one category of Category B retirement pension as a whole.

Disqualification of persons abroad

10. However, the claimant was on the face of it disqualified for receiving the retirement pension to which she was entitled because she was absent from Great Britain. That is the effect of section 113(1)(a) of the Contributions and Benefits Act. The claimant's representative has argued, on the basis of ordinary and dictionary meanings of the words, that the claimant was not caught by section 113(1)(a) because she had never been in Great Britain and so could not be absent from it. I need only spend minimal time on this point. As pointed out in the Secretary of State's submission of 14 August 2007, it was firmly established by the 1960s that in its context the phrase "absent from Great Britain" includes persons who have never been in Great Britain (Commissioners' decisions R(U) 18/60 and R(U) 16/62). That basic position has been accepted and applied in many other Commissioners' decisions since and is reflected in Lord Hoffmann's description of the rule in section 113(1) in Carson [2006] 1 AC 173 at [9] as restricting entitlement to "inhabitants of the United Kingdom". The Social Security Act 1975 and the Contributions and Benefits Act both used the same form of words at a time after its meaning had been authoritatively established. There is no possibility of now applying any different meaning.

The Persons Abroad Regulations

11. Regulation 4(1) of the Persons Abroad Regulations, as authorised by section 113(1), provides that the disqualification in section 113(1)(a) is not to apply to retirement pensions of any category or GRB. But that is subject to regulation 5 and to the rest of the Regulations (not relevant in the present case).

12. The claimant fell within the general conditions in regulation 5(3), excluding the effect of certain annual orders up-rating benefits from the operation of regulation 4(1). She was not ordinarily resident in Great Britain immediately before the date on which any of the up-rating orders made after November 1975 came into force. It is fundamental to the operation of regulation 5 that in theory each succeeding up-rating order must be looked at in turn to see if the conditions for not applying the general rule in regulation 4 are met, rather than simply identifying a date at which entitlement was frozen. Thus, for instance, if the claimant had by chance come to live and be ordinarily resident in Britain during the 1980s, at a time when both she and H were married to other people, she would have been able to take the benefit of up-rating orders that came into operation during that period, even though her incidental residence here seems to supply little rational reason for treating her better than if she had never set foot here in relation to a claim entirely dependant on her much later marriage to H. The legislation on up-rating (initially section 124 of the Social Security Act 1975, replaced with some modification from 25 July 1986 by section 63 of the Social Security Act 1986 and consolidated from 1 July 1992 into section 150 of the Social Security Administration Act 1992) imposes a duty on the Secretary of State to examine in each tax year whether the sums specified in various provisions, including what are now section 44(4) of and Schedule 4 to the Contributions and Benefits Act, have retained their value in relation to the general level of prices. If not, he is to lay a draft order before Parliament to increase the sums specified by a percentage not less than the percentage increase in prices.

13. For the present, I shall also assume that the general condition in regulation 5(1) has been satisfied throughout. All the regulations made in consequence of up-rating orders have provided that regulation 5 was to apply to the additional benefit payable by virtue of the order. However, I shall have to come back below to a point about the effect of the specification in regulation 5(1) of up-rating orders under section 63 of the Social Security Act 1986.

14. In relation to each up-rating order, working backwards from the day of entitlement in question, it must be asked whether any of the circumstances specified in regulation 5(3) applied to the claimant immediately before the date the order came into force (the appointed date). If one did, she is not entitled to the additional benefit that would, but for the effect of regulation 5, have been payable directly or indirectly by virtue of that order. I shall have to come back below to what that test entails given the very long period involved in the present case and the interposition of the consolidating Contributions and Benefits Act.

15. There has been considerable confusion in the present case, including it seems to me in the Secretary of State's submission of 14 August 2007, about the category within regulation 5(3) into which the claimant fell at various stages. The issue has now been squarely faced in the submission of 19 May 2008. It is simplest for me to state my conclusions without detailing the twists and turns of all the submissions.

The decision of 22 April 2002 and regulation 5(3) of the Persons Abroad Regulations

16. In relation to the award with effect from 10 September 2001 made by the decision of 22 April 2002, before its supersession by the decision of 28 June 2002, the position is relatively straightforward. The claimant fell within the terms of regulation 5(3)(aa). As from 8 September 2001, she was a married woman. Before the appointed date of all the up-rating orders coming into force after November 1975 and up to and including that coming into force in April 2002, the claimant's husband was entitled to a Category A retirement pension and was not ordinarily resident in Great Britain. Thus, subject to the points that I have already reserved for further examination in paragraphs 13 and 14 above (see paragraphs 40 to 49 below) and to the question of whether the amendment introducing sub-paragraph (aa) into regulation 5(3) was validly made in the light of the procedure adopted in relation to the Social Security Advisory Committee (SSAC) (see paragraphs 37 to 39 below), the claimant could not receive the additional benefit that would otherwise have been paid by virtue of all those up-rating orders.

The decision of 28 June 2002 and regulation 5(3) of the Persons Abroad Regulations

17. In relation to the decision of 28 June 2002 and the claimant's entitlement from and including 27 May 2002, things are not nearly so simple. To clear some ground, I need to say what was the nature of that decision. I have no doubt that it took the form of a supersession of the decision of 22 April 2002 on the ground of a relevant change of circumstances (H's death). I also have no doubt that the relevance of the change of circumstances was that the rate of Category B retirement pension payable to the claimant ceased to be identified by section 48A(3) of the Contributions and Benefits Act and became identified by section 48A(4) and that she became entitled to GRB inherited from him (see the separate discussion in paragraphs 31 to 33 below). The claimant did not acquire a new entitlement to Category B retirement pension under section 48B. In my judgment, section 48B applies only where the claimant's spouse

has died before the claim for a Category B retirement pension is made. Here, the claimant had already claimed and been awarded a Category B retirement pension, even though administratively labelled category BL. She was not able to make a further claim for a Category B retirement pension. If a claimant's husband has died before the claim for Category B retirement pension is made, section 48B will apply and section 48A will not be needed at all. Thus section 48A must apply where the husband is alive at the date of the claim. If section 48A(4) is to have any application, it must be interpreted as operating where the rate of pension is initially set by section 48A(3), but the claimant's husband subsequently dies. That is precisely the circumstances of the present case.

18. As from 27 May 2002 the claimant ceased to be a married woman. She no longer had a husband. Therefore, she could not fall within regulation 5(3)(a) or (aa), since both are restricted to the case of a married woman. She could fall within regulation 5(3)(b), which applies in the case of a widow or widower. But in its terms it only applies where the claimant is a widow or widower immediately before the appointed date of any particular order. In the context, only the status in relation to the deceased spouse whose contributions qualify the claimant for a Category B retirement pension, and not any former spouses, can be relevant. Thus, the claimant would only come within that provision in relation to the up-rating order made with effect from April 2003 and subsequent orders. That effect, on both Category B retirement pension and GRB, is not disputed on behalf of the claimant.

19. That leaves only regulation 5(3)(c), which makes provision in any other case, ie the case of someone who is not a married woman (regulation 5(3)(a) and (aa)) and is not a widow or widower to whom regulation 5(3)(b) applies in relation to a particular up-rating order. Sub-paragraphs (d) to (f) do not apply to retirement pension of any category or to GRB. In my judgment, as from 27 May 2002 the claimant could only fall, in relation to her Category B retirement pension, within regulation 5(3)(c) in relation to all the up-rating orders taking effect before that date. In paragraphs 16 and 17 of the Secretary of State's submission of 17 August 2007 it was argued that regulation 5(3)(c) had no application to the claimant's case, in effect (if I understood the argument correctly) because all of the up-rating orders prior to 27 May 2002 had been taken care of by the application of regulation 5(3)(aa) in the decision of 22 April 2002. In my draft decision, I expressed the view that that could not be right, for the following reasons. The fundamental question continues to be whether, week by week, the claimant is disqualified for receiving her Category B retirement pension, so that the provisions of the Persons Abroad Regulations must be considered week by week. As from 27 May 2002, the claimant no longer fell within regulation 5(3)(a) or (aa) and sub-paragraph (b) did not apply to past up-rating orders. Therefore, regulation 5(3)(c) has to be considered in relation to the potential disqualification from 27 May 2002 onwards. That is reinforced by the fact that the rate of pension to which the claimant would otherwise have been entitled ceased to be identified in paragraph 5 of Part I of Schedule 4 to the Contributions and Benefits Act and became identified under section 48A(4), effectively by section 44(4) which sets out the weekly rate of the basic pension. As up-rating of different amounts under different provisions is involved, even though all within one award of Category B retirement pension, I do not see how that could all already have been taken care of in the earlier decision.

20. The Secretary of State's submission of 19 May 2008 put it this way:

“13. I would submit that when [H] died, the claimant was simply getting more of the same i.e. more Category B retirement pension. Indeed, there was a continuous period of entitlement to a Category B pension under section 48A from September 2001 (when the claimant married [H]) until her death. On widowhood, the rate payable simply switched from the married person's rate under subsection (3) to the surviving spouse's rate under subsection (4). Whilst I would agree that regulation 5 must be applied in relation to each successive up-rating, I would submit that once the disapplication has bitten in relation to an individual it cannot then be lifted simply because that individual subsequently falls within a different subparagraph of the regulation.

14. There are only two dates which matter in the claimant's case: 2001 and 2002. On the first of these it was right for the Secretary of State to apply regulation 5(3)(aa) of the Persons Abroad Regulations because [the claimant] was then, on any view, a married woman (she had just married [H] and he did not die until the following year). She could not have fallen into 'any other case' (the words which are a precondition for the application of regulation 5(3)(c) at that date).

15. On the second of these dates, the Commissioner appears to be of the view that, when her husband died, [the claimant] then fell within regulation 5(3)(c), because at that date she was a widow, not a married woman, so the words 'in any other case' then applied. However, I would submit that the disapplication of annual up-rating had already applied in her case, so that there was no occasion to apply the same regulation again. She did not fall to be treated as 'any other case', because she had fallen into regulation 5(3)(aa) when the disapplication first applied to her in 2001.

16. Taking the Commissioner's approach to its logical conclusion, the claimant would fall within regulation 5(3)(b) the following year i.e. in April 2003 (she would be a person who immediately before the appointed date is a widow) and so she would then qualify for the April 2002 rate. That cannot be right. She continued to receive her Category B pension at that stage and the disapplication had already been applied to her. Hence, to use the Commissioner's own words everything had already 'been taken care of in the earlier decision' in line with the policy intention.”

21. I do not accept that submission. The essential disagreement with the view that I had expressed in the draft decision is in the second halves of paragraphs 13 and 15 of the submission. In my judgment, the approach there is not consistent with the point in the chain of statutory provisions at which regulation 5(3) of the Persons Abroad Regulations comes to be applied. To get to that point, regulation 4 must have lifted the disqualification for receipt of benefit under section 113(1) of the Contributions and Benefits Act for being absent from Great Britain that would otherwise have been in operation. Although section 113(1) talks of disqualification for a period, the position must be considered week by week, in case the claimant becomes present here. Of course, in practice, once it is established that a claimant is absent from Great Britain, there is no need for the authorities to re-examine the position unless and until information is received about some relevant change, but that does not alter the underlying principle. Thus, when the supersession of the decision of 22 April 2002

was being considered following H's death on 25 May 2002, what was in issue was the rate of benefit that should be paid to the claimant from and including the benefit week commencing 27 May 2002. The chain of statutory provisions had to be applied to her as at that week, which inevitably meant considering whether any, and if so which, sub-paragraph of regulation 5(3) applied to her at that time. The fact that consideration had been given in the past to the same past up-rating orders when applying the chain of provisions as at an earlier date was not relevant.

22. And paragraph 16 of the submission of 19 May 2008 makes a bad point. The claimant would not, as from April 2003, have been able to take advantage of the April 2002 up-rating order under regulation 5(3)(b). Regulation 5(3)(b) would not apply to her at all in relation to that order because she was not a widow immediately before its appointed date. Thus regulation 5(3)(c) ("any other case") would have continued to apply in relation to the April 2002 order. It has been accepted for the claimant that it is regulation 5(3)(b) that prevented her taking advantage of the April 2003 or subsequent up-ratings.

23. There is support for the above approach in the documents presented to the SSAC on behalf of the then Department of Social Security in relation to the seeking of agreement that the proposal to make the regulations that became the Social Security (Persons Abroad) Amendment (No 2) Regulations 1994 (S1 1994/1832) (the 1994 Amendment Regulations) did not need to be referred to the SSAC. Those documents were attached to the Secretary of State's submission of 8 February 2007 and are at pages 249 to 263 of the papers. I shall return to them below when looking at whether the introduction of regulation 5(3)(aa) by those Regulations was valid. However, there was some helpful discussion of the general structure of regulation 5 in the Department's note (Annex B to SSAC 23/94) in relation to a proposal to make a regulation (which became regulation 5(8) and the Schedule) validating what the Department said were overpayments caused by a mistaken interpretation of regulation 5(3)(c) adopted between September 1988 and August 1991.

24. The problem was said to have arisen particularly in cases where a person already entitled to a pension became entitled to a different category or a higher rate. The note continued:

"6. The most common example of this type of case is a wife with a retirement pension on her husband's insurance who, on being widowed, becomes entitled to a higher rate of pension, still based on the husband's insurance. A hypothetical example is at Annex 2. Regulation 5(3)(c) applies in this case. It disqualifies a person for receiving upratings

'if they had become entitled to a retirement pension or to graduated retirement benefit before the appointed date' (the appointed date being the date of the uprating).

Adjudication advice, which was applied from September 1988 and which was based on legal advice, meant that, for the purposes of deciding which uprating applied to the increased pension on widowhood, the existing entitlement was disregarded. The increased pension award therefore included upratings which had taken effect after the widow first became entitled to retirement pension.

7. The changed interpretation was contrary to the policy intention which is that, where entitlement to a pension derives from a spouse, the

disqualification for upratings should apply from the date at which the spouse's pension is frozen, or the spouse's death, if the spouse has not claimed a pension.

8. Because the interpretation was not beyond doubt, the Office of the Chief Adjudication Officer sought Counsel's opinion. Counsel firmly supported the Department's understanding of the regulation. The changed interpretation involved reading the regulation as meaning 'become entitled to a retirement pension of the relevant category ...'. Counsel said that she could see no justification for an interpretation which involved importing words into the regulation."

25. The hypothetical example in Annex 2 was of a Mr and Mrs A who emigrated to Australia in 1987. Mr A became entitled to a UK pension at the full basic rate in December 1988, when Mrs A also became entitled to a pension on her husband's insurance. They were disqualified for receiving subsequent up-ratings. In May 1991 Mr A died. The example continued:

"Regulation 5(3)(c) applies in this case. It disqualifies a person for receiving upratings **'if they had become entitled to a retirement pension or to graduated retirement benefit before the appointed date'** (the appointed date being the date of each uprating). To arrive at the correct rate the Adjudication Officer has to look at each uprating and decide whether, when it came into force, the conditions existed for disqualification of payment of the uprating.

Mrs A is disqualified for receiving upratings which came into force after she became entitled to a retirement pension. Her pension as a widow should have been awarded at the full basic rate, but frozen at the 1988 uprating, ie she should have received £41.15.

However, the interpretation used from 1988-1991 treated Mrs A as having no existing entitlement. The award of her new rate took in the upratings from 1989-1991. She received £52.00."

26. The Department's view in 1994 was thus clearly that someone in the same circumstances as the claimant in the present case would fall within regulation 5(3)(c) on being widowed after a period of receipt of Category B retirement pension on her husband's contributions during his life. The view was also that from the date of widowhood all the past relevant up-rating orders had to be examined afresh by reference to the conditions of regulation 5(3)(c) when they would have to have been examined already in relation to the earlier award of the pension at the lower rate. Of course, I am not bound in any way by that expression of view and must make my own judgment of the proper construction of regulation 5(3). I entirely agree with the author of the Secretary of State's submission of 19 May 2008 that he cannot be estopped by what was said to the SSAC in 1994 from now advancing other arguments as to the true meaning of regulation 5(3). However, those 1994 views seem to me to be consistent with the actual terms of regulation 5(3) and with the overall context of the Persons Abroad Regulations, in contrast to the arguments now made for the Secretary of State.

27. Regulation 5(3)(c) was not amended in 1994 to incorporate a condition equivalent to that in the new regulation 5(3)(aa). Despite the description of the policy intention in paragraph 7 of Annex B to SSAC 23/94 (paragraph 24 above) and the

Department's evident belief in 1994 that the proposed amendments would do everything necessary to bring the Persons Abroad Regulations into line with that policy intention, they patently failed to do so. That is shown by the inconsistency of the hypothetical example set out in paragraph 25 above with the expressed policy intention. The problem was masked in that example by making both Mr A and Mrs A become entitled to their retirement pensions on the same date. But the description of the rule to be applied after Mr A died was entirely accurate, that Mrs A was disqualified for receiving up-ratings that came into force after **she** had become entitled to a retirement pension. The example did not grapple with the question of how the application of that rule in a case where Mrs A became entitled to her retirement pension much later than Mr A (as by marriage) could possibly result in the outcome described in paragraph 7 of Annex B. I can see no way in which it could possibly do so.

28. What then is the effect of regulation 5(3)(c) in the present case? The words are in my judgment clear and have only one possible meaning. They prevent the lifting of the disqualification by virtue of regulation 4(1) only in respect of up-rating orders coming into force after the first day of the **claimant's** entitlement to retirement pension. Accordingly, the claimant cannot from and including 27 May 2002 be disqualified for receiving any additional benefit payable by virtue of up-rating orders coming into force before that date (10 September 2001). In practice, from 27 May 2002 her Category B retirement pension is frozen at the rate set in section 44(4) of the Contributions and Benefits Act as from 9 April 2001, ie £72.50 per week.

29. The claimant's representative submitted in the document dated 14 March 2007 that the proper construction of regulation 5(3)(c) should lead to the result that the claimant was only disqualified for receiving additional benefit by virtue of up-rating orders subsequent to the date of H's death. In effect, he submitted that the adjudication advice adopted between September 1988 and August 1991 was correct. That would lead to her pension being frozen at the rate of £75.30 instead of £72.30. I reject that submission. The claimant's representative did not dispute that after reading my draft decision. However, because of the relevance of the argument to the calculation of entitlement to GRB, I set out below the gist of what was said in the draft decision.

30. The crucial question is the meaning of "if that person had become entitled to a retirement pension ... before the appointed date". On that question, the fundamental argument made for the claimant was that a Category B retirement pension based on a deceased husband's contributions is of a different type from a Category B retirement pension based on a living husband's contributions. Therefore, it was said, because regulation 5(3)(c) concerns only the first type, the reference to a retirement pension should be taken as a reference only to that type of retirement pension. And the claimant only became entitled to that type of Category B retirement pension from 26 May 2002. As indicated in paragraph 17 above, I do not consider that there is such a fundamental difference in the Contributions and Benefits Act. The claimant became entitled to a Category B retirement pension under section 48A from 10 September 2001 and continued to be entitled to a Category B retirement pension under the same section from 26 May 2002. The change was that the rate of the pension became set under subsection (4) of section 48A rather than subsection (3). But even if the claimant had become entitled to a fundamentally different Category or type of retirement pension from 26 May 2002, that would not remove the obstacle

of the phrase “a retirement pension”. I cannot agree with the claimant’s representative that that phrase must in some way be restricted to the particular type of Category B retirement pension to which the claimant became entitled from 26 May 2002. The actual words used are general and unrestricted, and in a provision that deals with a large number of different situations not specifically covered by sub-paragraphs (a) to (b) (or by sub-paragraphs (d) and (e)). By contrast, in other sub-paragraphs there is specific reference to particular Categories of retirement pension. The inescapable result is that sub-paragraph (c) requires the application of the disqualification for absence from Great Britain to up-rating orders in force after the claimant in question becomes entitled to any Category or type of retirement pension or to GRB.

Graduated retirement benefit

31. Graduated retirement benefit (GRB) is relevant only to the decision of 28 June 2002, as the claimant had no entitlement of her own, not having paid any graduated contributions prior to 6 April 1975. Her only entitlement was by way of “inheritance” on H’s death. It might be thought that the application of regulation 5(3)(c) of the Persons Abroad Regulations would produce the same result as for the claimant’s Category B retirement pension, allowing her the benefit of the effect of up-rating orders prior to 10 September 2001 on the amount of GRB payable for each unit of graduated pension (see regulation 2 of the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978 (SI 1978/393)), even though H had not been able to have those increases paid to him during his life by virtue of regulation 5(3)(c). I conclude that that is the result, but the mechanism is different and must be worked through separately.

32. The difference lies in the way in which a widow’s entitlement to “inherited” GRB is defined. It is not defined, as it is for Category B retirement pension, by reference to a particular amount specified in the primary legislation. It is defined, by the preserved section 37(1) of the National Insurance Act 1965, as equal to half of the weekly rate of her former husband’s GRB. At the date of his death, H was receiving GRB at a weekly rate of £1.18, which would appear to justify the claimant’s inheritance of 59p. But the crucial provision in section 37(2) must be examined closely. That defines the weekly rate for the purposes of subsection (1). What, first, does “the weekly rate appropriate to the amount of graduated contributions paid by him” mean? Subsection (2) does not refer to the amount paid or payable to the deceased spouse immediately before his death, or even to the amount to which he was entitled, but to the weekly rate appropriate to the amount of graduated contributions paid. Does that point to a calculation using whatever amount is specified in section 36(1) as most recently up-rated before the date of the spouse’s death, regardless of whether the spouse had been able to benefit from the past up-ratings because of absence from Great Britain? The issue is finely balanced, as the word “appropriate” does not supply any hard-edged test. But, second, does the phrase in brackets (“whether or not he or she was receiving or entitled to receive any such benefit”) affect the result? In my judgment it does. No doubt the primary purpose was to allow an inheritance where for some reason the deceased spouse was not entitled to GRB at all, as by not having claimed the benefit. But if that is allowed, why should the claimant in the present case not be allowed to receive her half-share of the amount that H was not entitled to receive because of his absence from Great Britain from 1976 as well as her half-share of £1.18?

33. I concluded in my draft decision that the claimant's entitlement to GRB from 27 May 2002 should not have been half of £1.18, the amount actually in payment to H immediately before his death, but should have been half of the amount generated by the graduated contributions he had paid and the amount specified in the preserved section 36(1) of the National Insurance Act 1965 as at that date. I still consider that that is the "appropriate" rate under section 37(2). But, taking account of the Secretary of State's submission of 19 May 2008, I now think that I stopped at too early a point. Taking the rate of GRB identified above as appropriate, it is necessary to go on to look at the effect of regulation 5(3)(c) of the Persons Abroad Regulations. That is because the adoption of that appropriate rate to calculate the claimant's inherited GRB involves the identification of additional benefit that would be payable to her indirectly by virtue of the up-rating orders enacted since H became entitled to GRB. However, as I have decided above, regulation 5(3)(c) bites only on up-rating orders whose appointed date falls after **the claimant** became entitled to a retirement pension or GRB. For the reasons given in paragraph 30 above, although the context is the calculation of GRB, I am satisfied that the crucial date is that at which the claimant first became entitled to retirement pension of any kind, ie 10 September 2001. Accordingly, since no other sub-paragraph of regulation 5(3) applied to her as at 27 May 2002, she was able to take advantage of the appropriate rate for each unit of H's graduated contributions as specified in section 36(1) of the National Insurance Act 1965 down to April 2001 (9.06 pence). But she was not able to take advantage of the increase in that amount to 9.21 pence by the up-rating order whose appointed date was 6 April 2002.

Did the appeal tribunal err in law?

The appeal against the decision of 28 June 2002

34. The appeal tribunal's failure to apply the meaning of regulation 5(3) of the Persons Abroad Regulations and to calculate the amount of Category B retirement pension to be paid to the claimant from and including 27 May 2002 (regardless of whether or not it should have spotted the GRB point) requires me to set aside the appeal tribunal's decision on the appeal against the Secretary of State's decision of 28 June 2002 as erroneous in point of law. Although there was agreement on behalf of the claimant that the Secretary of State had accurately applied the provisions of regulation 5(3) of the Persons Abroad Regulations, that agreement was based on the erroneous assumption (indeed an assertion on behalf of the Secretary of State: see page 76) that the relevant provisions were sub-paragraphs (aa) and (b). Those were the only provisions mentioned by the appeal tribunal in the statement of reasons. In my judgment, the limited scope of those provisions and the need to apply sub-paragraph (c) as from 26 May 2002 in relation to earlier up-rating orders emerges sufficiently clearly from a proper reading of regulation 5(3) that it was an error of law for the appeal tribunal to fail to consider and apply sub-paragraph (c) despite the effects of section 12(8)(a) of the Social Security Act 1998.

35. I can then substitute a decision on the undisputed facts as to the amount of the claimant's Category B retirement pension to be paid from and including 27 May 2002. But I am not in a position to carry out the calculation of one-half of the appropriate rate of H's GRB using April 2001 figures, so as to produce the precise amount of the claimant's GRB entitlement with effect from that date. The calculation adopting the principles set out in paragraphs 31 to 33 above will have to be carried out by the Secretary of State. If the mechanics of the calculation are not

agreed on behalf of the claimant, the case may be referred back to me or to another Commissioner for further decision. It is not in dispute that the claimant is not entitled to subsequent up-ratings of whatever is the right weekly rate of GRB.

The appeal against the decision of 22 April 2002

36. My conclusion in paragraph 16 above does not in itself enable me to say whether or not the appeal tribunal went wrong in law in disallowing the appeal against the Secretary of State's decision of 22 April 2002. I need to consider the particular questions reserved in paragraphs 13, 14 and 16 above.

The validity of regulation 5(3)(aa) of the Persons Abroad Regulations

37. When granting leave to appeal I raised the question of whether, in the light of the decision of the Court of Appeal in *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623, R(IB) 3/03, and of the Tribunal of Commissioners in CSIB/803/2005 and CSIB/818/2005, now reported as R(IB) 2/07, there had been any defect in the procedure by which the SSAC agreed that the proposal for the regulations that became the 1994 Amendment Regulations should not be referred to it. As noted in paragraph 23 above, copies of the relevant documents were attached to the Secretary of State's submission of 8 February 2007. In relation to the introduction of the new regulation 5(1)(aa), document SSAC 23/94 made it clear to the SSAC that the proposal would be:

“adverse to the small number (about 50 a year) of women marrying a man whose pension is already frozen but restores the policy intention that they should be treated in the same way as other women who were already married to such a pensioner when his pension was frozen.”

The covering letter and Annex B setting out the background explained that the existing terms of the regulation only froze a newly married woman's pension at the rate in force at the date of the marriage and that the introduction of the new subparagraph (aa) would, for subsequent claims, substitute a freezing at the date of freezing of the husband's pension. There was also a list of the countries with which reciprocal agreements were in force allowing residents the benefit of up-ratings and a mention in the minutes of discussion with the SSAC of the absence from that list of Australia, New Zealand, South Africa and Canada.

38. I have no doubt that the SSAC was not misled about the nature and geographical scope of that particular amendment and that the amendment was validly made in accordance with the procedure in sections 170 to 174 of the Social Security Administration Act 1992. In particular, the proposal did not need to be formally referred to the SSAC for report as there was nothing to undermine the SSAC's agreement under section 173(1)(b) that the proposal should not be referred.

39. The claimant's representative has submitted that the Department got the interpretation of regulation 5(3)(c) wrong in explaining its proposals for the new provisions validating what it saw as past overpayments. He objected to the terms of the minutes of the discussion with the SSAC, in the reference to the payments having been found to be contrary to the law, when all that had happened was that the Department had changed its view on a question of interpretation that almost by definition was open to different answers. I can now add to that that the Department seems to have been mistaken in its suggestion that it was bringing the Persons Abroad Regulations entirely into line with the policy intention expressed in paragraph 7 of Annex B to SSAC 23/94. The claimant's representative submitted

that those misunderstandings tainted the SSAC's agreement not to have the proposals as a whole referred to it. That argument does not work. R(IB) 2/07 shows clearly that each particular provision within a set of proposed regulations must be considered separately. There was no misleading in relation to the provision introducing the new regulation 5(3)(aa) and that is the end of the argument relying on *Howker*.

The interposition of the Contributions and Benefits Act

40. The argument raised here, very briefly, turns on the fact that, with effect from 1 July 1992, paragraph 5 of Part I of Schedule 4 to the Contributions and Benefits Act, as yet untouched by any up-rating orders, specified the rate of Category B retirement pension where the predecessor of section 48A(3) (section 50(1)(a)(i)) applied as £32.55. Applying regulation 5 of the Persons Abroad Regulations as at 8 September 2001 and looking back at the up-rating orders that had come into force after November 1976 down to April 1992 by reference to the definitions in regulation 5(2), could it be said that the additional benefit in the form of the excess of £32.55 over £7.90 (the November 1975 rate) would have been payable in September 2001 "by virtue of (either directly or indirectly)" those up-rating orders?

41. The claimant's representative said that the answer is no. He said that the £32.55 would be payable by virtue solely of the original provision in the Contributions and Benefits Act. Primary legislation must prevail over inconsistent secondary legislation. The Secretary of State's representative said that the answer is yes. He pointed out that the Contributions and Benefits Act was a consolidating provision and that the most recent up-rating order before 1 July 1992 (the Social Security Benefits Up-rating (No 2) Order 1991 (SI 1991/2910)) had changed the amount specified in paragraph 9 of Part I of Schedule 4 to the Social Security Act 1975 to £32.55. The up-rating orders throughout have operated by altering the amounts specified in whatever primary legislation was in force at the relevant time. I agree in substance with the Secretary of State's representative on this question. There is no inconsistency between primary legislation and secondary legislation. Since the Contributions and Benefits Act merely adopted the amount specified in the Social Security Act 1975 as at 1 July 1992 (after the operation of successive up-rating orders from 1976 to 1991), I conclude that the additional benefit otherwise payable in the excess of £32.55 over £7.90 was payable indirectly by virtue of those up-rating orders. Therefore, the interposition of the Contributions and Benefits Act made no difference to the normal operation of regulation 5 of the Persons Abroad Regulations.

The specification of orders under section 63 of the Social Security Act 1986 in regulation 5(1)

42. I put the question in this way in my directions of 14 November 2006:

"Does it matter that regulation 5(1), after its amendment in 1988, restricts the operation of regulation 5 as a whole to cases where regulations have been made in consequence of an up-rating order under section 63 of the Social Security Act 1986, when the up-rating orders in the present case prior to April 1988 would have been made under section 124 of the Social Security Act 1975, or does section 17(2)(b) of the Interpretation Act 1978 have the effect that the earlier orders are to be regarded as having been made under section 63 of the 1986 Act?"

I must confess at once that that question incorporates a mistake that may be significant. Section 63 of the Social Security Act 1986 was one of its provisions that came into force on the passing of the Act on 25 July 1986 (section 88(5)). Therefore, up-rating orders made after that date, rather than those from April 1988, were made under the 1986 Act. I have checked the up-rating orders that came into force in April 1987 (SI 1987/45, made on 20 January 1987) and April 1988 (SI 1987/1978, made on 19 November 1987). Both were made in exercise of the powers in section 63 of the Social Security Act 1986. There was no up-rating order made in 1988. The order in force from April 1989 was made in 1989. The amendment to regulation 5(1) of the Persons Abroad Regulations by regulation 3 of the Social Security Benefit (Persons Abroad) Amendment Regulations 1988 (SI 1988/435), substituting “section 63 of the Social Security Act 1986 (up-rating of benefits and increments in guaranteed minimum pensions)” for “section 124 or 126A of the [Social Security Act 1975] (up-rating of benefits and increments in guaranteed minimum pensions) as the case may be”, came into force on 11 April 1988.

43. There is no problem in relation to the up-rating orders made after 11 April 1988, even after section 63 of the Social Security Act 1986 became section 150 of the Social Security Administration Act 1992. Before the consolidation in 1992, the orders were made in exercise of the power in the section expressly identified in regulation 5(1) of the Persons Abroad Regulations. From the consolidation onwards, the reference in regulation 5(1) is, by virtue of section 17(2)(a) of the Interpretation Act 1978, to be construed as a reference to section 150 of the Administration Act. The Administration Act repealed and re-enacted section 63 of the Social Security Act 1986. I can see nothing in the Administration Act, or in the Persons Abroad Regulations, to indicate any contrary intention. As a matter of straightforward practicality, the reference in regulation 5(1) as in force at 18 September 2001 is to be construed as a reference to section 63 of the Social Security Act 1986 in relation to up-rating orders made after 11 April 1988 in exercise of the power in that section and to section 150 of the Administration Act in relation to subsequent orders.

44. I consider that there is also no problem in relation to the up-rating orders that came into force in April 1987 and April 1988. Those orders were made in exercise of the power in section 63 of the Social Security Act 1986, as specified in regulation 5(1) in force at the relevant date (8 September 2001). It does not matter that, at the time the orders were made, regulation 5(1) still referred to sections 124 and 126A of the Social Security Act 1975. And, in any event, for the period from 25 July 1986 to 10 April 1988 that reference would, by virtue again of section 17(2)(a) of the Interpretation Act 1978, have been construed as a reference also to section 63 of the Social Security Act 1986.

45. The problem arises in relation to the up-rating orders made in exercise of the power in section 124 of the Social Security Act 1975, ie those from 1976 to 1986 in the present case. Regulation 5(1) does not specifically refer to those orders. Is the reference to section 63 of the Social Security Act 1986 to be construed as a reference also to section 124 of the Social Security Act 1975? The representative of the Secretary of State said that the answer is yes. The claimant’s representative said that the answer is no. The arguments have revolved around the interpretation of section 17(2)(b) of the Interpretation Act 1978:

“(2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, –

...

- (b) in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision.”

46. There is a case for avoiding all those arguments by a process of interpretation of regulation 5(1) of the Persons Abroad Regulations, as amended in 1988, without the need for assistance from any rules in the Interpretation Act 1978. If the amendment to regulation 5(1) had come into force on the same date as, or closely following, that on which the Social Security Act 1986 came into force, I would have been inclined to say that the substitution should be taken as referring both to section 63 of the Social Security Act 1986 and to section 124 of the Social Security Act 1975 according to which section was in force when the order in question was made. The amendment could be regarded as merely up-dating the references as appropriate to the date of each order. But the amendment did not come until nearly two years later. In the meantime, regulation 5(1) would have operated quite happily on orders under section 63 by virtue of section 17(2)(a) of the Interpretation Act 1978. What was the purpose of making the substitution at that stage? It could be argued that the same result follows, because it is inconceivable that the Secretary of State intended, by the mere change of the statutory reference in regulation 5(1), henceforth to allow in the calculation of all retirement pensions for persons ordinarily resident abroad the benefit of all the up-rating orders made before 25 July 1986. However, that result does not follow quite so easily and I ought to consider the Interpretation Act 1978.

47. It must be common ground that the repeal of sections 124 to 126A of the Social Security Act 1975 by Schedule 11 to the Social Security Act 1986 did not affect the validity of any of the up-rating orders made under those provisions. That would follow from section 16 of the Interpretation Act 1978 regardless of the precise scope of section 17(2)(b). Then the claimant’s representative argued that section 124 of the Social Security Act 1975 cannot be regarded as having been repealed and re-enacted with modifications in section 63 of the Social Security Act 1986, because the pre-July 1986 up-rating orders could not have been made under the re-enacted provisions. Therefore, those orders are not, under section 17(2)(b) of the Interpretation Act 1978, to have effect as if made under section 63 and cannot be regarded as referred to by the reference to orders made under section 63. The representative submitted that the old orders could not have been made under section 63 because the procedure in both Acts was specific to each year in question, given the necessary basis of a review of general price increases in each year and the need for an individual provision each year providing that regulation 5 of the Persons Abroad Regulations was to apply to the up-rating. The procedure is summarised in paragraph 12 above.

48. I do not accept those submissions. First, I have no doubt that section 124 of the Social Security Act 1975 was repealed by the Social Security Act 1986 and re-enacted as section 63. The question whether that condition is met is to be answered before looking at the consequences of the re-enactment. Second, the claimant’s representative sought to give too narrow a meaning to “could have been made” in section 17(2)(b) of the Interpretation Act 1978. By definition, in a case to which

section 17(2)(b) could potentially apply, secondary legislation has been made in exercise of a legislative power that no longer exists in the sense that the specific section giving the power has been repealed. Thus, if section 17(2)(b) is ever to be able to apply, the question that it poses must be taken as whether, if the re-enacted provision had been in force at the date on which the relevant piece of secondary legislation was made, that secondary legislation could have been made in exercise of the power in the re-enacted provision.

49. Asking that question in the present case, I cannot see why the facts that the extent of the Secretary of State's obligation to up-rate benefits depended on the increase in the general level of prices in the particular period under review and on the point in each tax year in which the Secretary of State chose to carry out his review mean that the up-rating orders actually made could not have been made if section 63 of the Social Security Act 1975 had been in force at the time. The essential process and the extent of the duty and power to lay an up-rating order before Parliament was the same under both Acts. By 1986, the original scheme of the Social Security Act 1975 had been amended by section 1 of the Social Security and Housing Benefits Act 1983 and section 16 of the Social Security Act 1985 so that the level of price increases was calculated historically over the tax year and did not involve a prospective estimate in the review of what the increase would be by the time of the next up-rating order. Accordingly, I conclude that the pre-July 1986 up-rating orders could have been made under section 63 of the Social Security Act 1986 within the proper meaning of section 17(2)(b) of the Interpretation Act 1978. Therefore, they are to have effect as if made under section 63. One consequence of that is that they are included within the reference in regulation 5(1) of the Persons Abroad Regulations to orders under section 63.

50. Accordingly, my conclusion in relation to the claimant's appeal against the decision of 22 April 2002, as no challenge is now made to the appeal tribunal's conclusions against the human rights arguments for the claimant, is that the appeal tribunal came to the correct result in law on the effect of the British legislation and the rate of the claimant's Category B retirement pension for the period from 10 September 2001 to 21 May 2002.

The Commissioner's decisions on the appeal

51. In relation to the appeal against the Secretary of State's decision of 22 April 2002, in the light of the conclusion in the previous paragraph, even if it were said to be an error of law for the appeal tribunal not to have investigated the difficult issues of law that I have explored (which I doubt), the error was not a material one. It did not make any difference to the outcome. Accordingly, the appeal to the Commissioner against that decision of the appeal tribunal is dismissed.

52. In relation to the appeal against the Secretary of State's decision of 28 June 2002, I have already concluded in paragraphs 27 and 34 above that the appeal tribunal erred in law and that its decision disallowing the appeal has to be set aside. It is plainly expedient for me to substitute the decision that the appeal tribunal should have made, as there is no dispute as to the facts. That decision is set out in paragraph 2 above.

APPENDIX TO DECISION CP/3638/2006

RELEVANT LEGISLATION AS AT 6 APRIL 2002

The Social Security Contributions and Benefits Act 1992*Section 44(4)*

- (4) The weekly rate of the basic pension shall be £75.50

Section 48A

48A. – (1) A person who –

- (a) has attained pensionable age, and
- (b) on attaining that age was a married person or marries after attaining that age,

shall be entitled to a Category B retirement pension by virtue of the contributions of the other party to the marriage (“the spouse”) if the following requirement is met.

(2) The requirement is that the spouse –

- (a) has attained pensionable age and become entitled to a Category A retirement pension, and
- (b) satisfies the conditions specified in Schedule 3, Part I, paragraph 5.

(3) During any period when the spouse is alive, a Category B retirement pension payable by virtue of this section shall be payable at the weekly rate specified in Schedule 4, Part I, paragraph 5 [£45.20].

(4) During any period after the spouse is dead, a Category B retirement pension payable by virtue of this section shall be payable at a weekly rate corresponding to –

- (a) the weekly rate of the basic pension, plus
- (b) half of the weekly rate of the additional pension,

determined in accordance with the provisions of sections 44 to 45B and Schedule 4A below as they apply in relation to a Category A retirement pension, but subject to section 46(2) above and the modification in section 48C(4) below.

Section 48B(1)

48B. – (1) A person (“the pensioner”) whose spouse died –

- (a) while they were married, and
- (b) after the pensioner attained pensionable age,

shall be entitled to a Category B retirement pension by virtue of the contributions of the spouse if the spouse satisfied the conditions specified in Schedule 3, Part I, paragraph 5.

Section 48C(1)

48C. – (1) Subject to the provisions of this Act, a person's entitlement to a Category B retirement pension shall begin on the day on which the conditions of entitlement become satisfied and shall continue for life.

Section 113(1)

113. – (1) Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Parts II to V of this Act, and an increase of such benefit shall not be payable in respect of any person as the beneficiary's wife or husband, for any period during which the person –

- (a) is absent from Great Britain; or
- (b) is undergoing imprisonment or detention in legal custody.

The Social Security (Persons Abroad) Regulations 1975

Regulation 4(1)

4. – (1) Subject to the provisions of this regulation and of regulation 5 below, a person shall not be disqualified for receiving widow's benefit, bereavement benefit, child's special allowance, a guardian's allowance, a retirement pension of any category or graduated retirement benefit by reason of being absent from Great Britain.

Regulation 5 (application of disqualification in respect of up-rating of benefit)

5. – (1) Where regulations made in consequence of an order under section 63 of the Social Security Act 1986 (up-rating of benefits and increments in guaranteed minimum pensions) provide for the application of this regulation to any additional benefit becoming payable by virtue of that order, the following provisions of this regulation shall, subject to regulation 12 below and the provisions of those regulations, have effect in relation to the entitlement to that benefit of persons absent from Great Britain.

- (2) In this regulation and in regulation 5A –
 - (a) references to additional benefit of any description are to be construed as referring to additional benefit of that description which is, or but for this regulation would be, payable by virtue (either directly or indirectly) of the said order; and
 - (b) "the appointed date" means the date appointed for the coming into force of the said order.
- (3) Subject to paragraph (8) and the Schedule below, where a person is not ordinarily resident in Great Britain immediately before the appointed date the provisions of these regulations (except this regulation) shall not, unless and until he becomes ordinarily resident

in Great Britain, affect his disqualification while he is absent from Great Britain for receiving –

- (a) in the case of a woman who immediately before the appointed date was a married woman and was not entitled to a Category B retirement pension, any additional Category B retirement pension, if immediately before that date her husband was entitled to a Category A retirement pension and was not ordinarily resident in Great Britain;
- (aa) in the case of a married woman, any additional Category B retirement pension if immediately before the appointed date her husband was entitled to a Category A retirement pension and was not ordinarily resident in Great Britain (whether or not she was married to him immediately before that date);
- (b) in the case of a person who immediately before the appointed date is a widow or widower, any additional Category B retirement pension, if the former spouse had died before the appointed date;
- (c) in any other case, any additional retirement pension of any category or any additional graduated retirement benefit, if that person had become entitled to a retirement pension or to graduated retirement benefit before the appointed date;

[(d) to (f) and paragraphs (4) to (7) not relevant]

(8) The Schedule below shall have effect in relation to disqualification of persons for receiving additional benefit in the circumstances specified in that Schedule (being certain cases in which a person was awarded a widow's benefit or a retirement pension or a higher rate of retirement pension between 1st September 1985 and 7th August 1991.

Sections 36(1) and 37(1) and (2) of the National Insurance Act 1965 as continued in force by the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978 (Schedule 1)

36. – (1) Subject to the provisions of this Act, graduated retirement benefit shall be payable to any person who is over pensionable age and who is entitled to a retirement pension, and shall be an increase in the weekly rate of his retirement pension equal to 9.21 pence for each unit, ascertained in accordance with subsections (2) and (3) of this section, of the graduated contributions properly paid by him as an insured person, the result being rounded to the nearest whole penny, taking ½p as nearest to the next whole penny above.

37. – (1) Subject to the provisions of this section –

- (a) where a man, having paid graduated contributions as an insured person, dies leaving a widow, and she either has attained pensionable age at the time of his death or remains his widow when she attains that age; or
- (b) where a woman, having paid graduated contributions as an insured person, dies after 5th April 1979 leaving a widower,

and she and he have both attained pensionable age at the time of her death,

then section 36 of this Act shall apply as if the increase in the weekly rate of the retirement pension of the widow or widower as the case may be, provided for by subsection (1) thereof were the amount there specified by reference to his or her graduated contributions with the addition of one-half of the weekly rate of the graduated retirement benefit of his or her former spouse (any amount including $\frac{1}{2}$ p being rounded to the next whole penny above); and where a man, having paid graduated contributions as an insured person, dies after 5th April 1979 leaving a widow and she has attained pensionable age at the time of his death, section 36 shall apply as if the increase in the weekly rate of her retirement pension provided for by subsection (1) thereof were one-half of the weekly rate of the graduated retirement benefit of her former husband (any amount including $\frac{1}{2}$ p being rounded to the next whole penny above).

(2) For the purposes of subsection (1) of this section, the weekly rate of the deceased spouse's graduated retirement benefit shall (whether or not he or she was receiving or entitled to receive any such benefit) be taken to have been the weekly rate appropriate to the amount of graduated retirement contributions paid by him or her (determined as if any orders which have come into force under section 124 of the [Social Security Act 1975] (increases in rates of benefit) since the date of the deceased spouse's death had come into force before that date), excluding any addition under section 37(1) of this Act, but including any addition under section 36(4) thereof (and for the purpose of calculating the addition under section 36(4) taking into account any addition under section 37(1); and where at his or her death he or she had attained pensionable age but had not become entitled to graduated retirement benefit, that addition shall be computed as if he or she had become entitled to graduated retirement benefit immediately before his or her death.

Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978, regulation 2

2. The provisions of sections 150 and 155 of the Social Security Administration Act 1992 (annual up-rating of benefits and effect of alterations of rates of benefit) shall apply to –

- (a) the amount of graduated retirement benefit payable for each unit of graduated contributions;
- (b) increases of such benefit under the provisions of Schedule 2 to these Regulations; and
- (c) any addition under section 37(1) of the 1965 Act (addition to weekly rate of retirement pension for widows and widowers) to the amount of such benefit,

as if that amount, those increases and that addition were included in the sums mentioned in section 150(1) and (3) and graduated retirement benefit were a benefit referred to in section 155(2).

The Secretary of State appealed to the Court of Appeal. The decision of the Court of Appeal follows.

DECISION OF THE COURT OF APPEAL

Mr Daniel Kolinsky (instructed by the solicitor, Department for Work and Pensions) appeared for the appellant.

Mr Frank Yates (litigant-in-person) was not present.

Judgment (reserved)

LORD JUSTICE CARNWATH:

Introduction

1. This is the Secretary of State's appeal against a decision of Mr Commissioner Mesher (as he then was) dated 1 July 2008. Permission to appeal was granted by the Commissioner because of the importance of the legal principle involved.
2. The issue in short concerns the circumstances in which, under the social security legislation, a recipient of a "Category B" retirement pension who is resident abroad can take advantage of increases in rates arising under up-rating orders. Such orders, normally made annually, are designed to increase rates to reflect general increases in prices. However there are special rules for those ordinarily resident abroad, who are generally disqualified from the benefit of annual increases in retirement pension, subject to exceptions: Social Security (Persons Abroad) Regulations 1975 (SI 1975/563) (the Persons Abroad Regulations). The issue is whether, as the Commissioner found, the claimant fell within one of those exceptions.
3. The appeal is by the Secretary of State. Unfortunately, the claimant died in January 2008, before the Commissioner's decision was given. Her step-son, who had presented her case throughout the proceedings, has continued to represent her with the agreement of her executors. They have not appeared before us, but have written asking for the decision to be upheld for the reasons given by the Commissioner. I am grateful to Mr Kolinsky, who appeared for the Secretary of State, for his skilled explanation of these difficult provisions, and his fair presentation of the issues.

Facts

4. Mr Yates was born on 2 March 1911 in England. On 2 March 1976, at the age of 65, he became entitled to a "Category A" retirement pension, and a "graduated retirement benefit" (GRB). In 1976 he emigrated to Canada. As a consequence, his pension and GRB were frozen at the November 1975 rate, in accordance with the general rule.
5. On 8 September 2001 he married the claimant, Mrs Yates. She was a Canadian citizen, and had never visited this country. She also was over pensionable age at that time, and thus became entitled to a Category B retirement pension from the week following the marriage. That was also calculated at the November 1975 rate. That was confirmed by a decision of the Secretary of State on 22 April 2002.
6. On 25 May 2002, Mr Yates died. As his widow Mrs Yates became entitled to a higher weekly rate of Category B pension (matching the weekly rate of a Category A pension), together with the equivalent of half his GRB. This was confirmed by a

decision dated 28 June 2002. The Department's calculations were again based on November 1975 rates.

7. Mrs Yates appealed to the appeal tribunal, which gave its decision rejecting the appeal on 19 April 2006. The very long delay was partly attributable to an argument by the claimant based on alleged discrimination under Article 14 of the European Convention on Human Rights. The same point was under consideration in another case (*R (Carson) v Secretary of State for Work and Pensions*), which was decided by the House of Lords in favour of the Secretary of State in May 2005 ([2005] UKHL 37, [2006] 1 AC 173). This issue has still not been finally resolved. A reference in the same matter is due to be heard by the Grand Chamber of the European Court of Human Rights. We are not directly concerned with the human rights aspect, being bound by the House of Lords decision. But the Secretary of State accepts that, if his appeal succeeds, the case should be remitted to the Upper Tribunal so that the matter can be reviewed in the light of the final decision of that court.

8. There was further delay before the Commissioner, for which he apologised. His task was not made easier by the need for written arguments to be exchanged between the Department's representative (for which several extensions had to be given) and the claimant's step-son in Canada, who was representing her. The final decision was issued on 1 July 2008. The Commissioner agreed with the Department that Mrs Yates' entitlement to pension and GRB at the time of her marriage in September 2001 was properly based on the November 1975 rates. However, he held that for the remainder of the up-rating year following her husband's death in May 2002, and thereafter, she was entitled to be paid by reference to the rates current in that year. The Secretary of State appeals.

9. The precise figures are not important for the discussion of the legal issues. It is sufficient to note, by way of illustration, that Mr Yates' basic Category A pension, at November 1975 rates, was only £13.30 a week as compared to the equivalent 2002 rate of £75.50. The difference reflects the movement in general prices since 1975, the most significant increases arising in the early years. His GRB represented a relatively small addition to his weekly rate of pension (£1.18 at November 1975 rates).

The statutory framework

10. Most of the relevant provisions are to be found in the Social Security Contributions and Benefits Act 1992 (the 1992 Act). That was a consolidation Act, and reproduced a number of provisions formerly in the Social Security Act 1975 (the 1975 Act). Unless otherwise stated, references in what follows are to the 1992 Act.

Category B pension

11. The right to a Category A retirement pension arises from a claimant's own contributions (section 44). A Category B pension is given to a married person "by virtue of the contributions of the other party to the marriage"; the claimant must also have reached pensionable age (section 48A). The rate is specified as a single weekly figure by Schedule 4 Part 1 of the 1992 Act. The right continues following the death of the spouse, but at a different, higher weekly rate corresponding to the basic rate of Category A pension, as fixed by section 44 (section 48A(4)).

Graduated retirement benefit

12. Rights to GRB were derived from a different source, the National Insurance Act 1965, sections 36 to 37. GRB is not part of the modern scheme under the 1992

Act, but former entitlements were preserved by regulations made under the 1975 Act. By section 36 of the 1965 Act, GRB was payable to a person over pensionable age, entitled to a retirement pension; it took the form of an increase in the weekly rate of the retirement pension, calculated by reference to his “graduated contributions”. On her husband’s death, Mrs Yates became entitled to an amount equivalent to half his GRB, by virtue of section 37.

13. The Commissioner noted the differences between the statutory regime for GRB and that for Category B pension, but concluded that for the purposes of the Persons Abroad Regulations the same issue arose (Decision: paragraphs 31–33). His reasoning in that respect has not been challenged by either side before us. Since the additional amount is relatively small, and in order to avoid further complicating the matter, the ensuing discussion will be confined to Category B, on the understanding that the treatment of GRB will follow the same approach.

Up-rating of benefits

14. Provision for “up-rating” of benefits was originally introduced by the 1975 Act. The first order was made in July 1975 and came into effect in November 1975. The working of the system was described in *Metzger v DHSS* [1977] 3 All ER 444, in which Sir Robert Megarry V-C took the opportunity to express his views on the statutory language:

“The word ‘up-rating’ is a recruit to the English language which does not notably enrich it: ... I suppose that there are some who would applaud the word as being a visible sign that within its parameters ours is hopefully an ongoing language.” (page 445)

One can only speculate as to how he might have reacted to the Persons Abroad Regulations. They involve an unusually tortuous sequence of general disqualification, general reinstatement, and specific re-application of disqualification, the effect of which (as in this case) may need to be traced back over decades.

15. For present purposes it is sufficient to adopt the Commissioner’s helpful summary of the sequence of legislation dealing with up-rating in general:

“The legislation on up-rating (initially section 124 of the Social Security Act 1975, replaced with some modification from 25 July 1986 by section 63 of the Social Security Act 1986 and consolidated from 1 July 1992 into section 150 of the Social Security Administration Act 1992) imposes a duty on the Secretary of State to examine in each tax year whether the sums specified in various provisions, including what are now section 44(4) of and Schedule 4 to the Contributions and Benefits Act, have retained their value in relation to the general level of prices. If not, he is to lay a draft order before Parliament to increase the sums specified by a percentage not less than the percentage increase in prices.” (paragraph 12)

16. Category A and B pensions are included in the list of benefits subject to the duty under section 150. The section is also treated as applying to GRB (Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978 (SI 1978/393), regulation 2).

Disqualification for absence from GB

17. Section 113(1) of the 1992 Act provides, subject to regulations, a general disqualification from benefits for those absent from the UK:

“Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Parts II to V of this Act, and an increase of such benefit shall not be payable in respect of any person as the beneficiary’s wife or husband for any period during which the person –

- (a) is absent from Great Britain ...”

18. As I have said, the relevant Regulations are the Social Security (Persons Abroad) Regulations 1975. Regulation 4 removes the section 113 disqualification for certain benefits, including retirement pension and GRB. But that in turn is subject to Regulation 5 which restores the disqualification in certain specified cases, defined by reference to whether the claimant is “ordinarily resident in Great Britain immediately before the appointed date”. The “appointed date” for these purposes is the date fixed for each up-rating order to come into effect.

19. To understand the Commissioner’s reasoning and the submissions of the Secretary of State, it is necessary to set out the relevant parts of the regulations in full:

4. – (1) Subject to the provisions of this regulation and of regulation 5 below, a person shall not be disqualified for receiving widow's benefit, bereavement benefit, child's special allowance, a guardian's allowance, a retirement pension of any category or graduated retirement benefit by reason of being absent from Great Britain.

5. – (1) Where regulations made in consequence of an [up-rating order] ... provide for the application of this regulation to any additional benefit becoming payable by virtue of that order, the following provisions of this regulation shall ... have effect in relation to the entitlement to that benefit of persons absent from Great Britain.

(2) In this regulation ...

- (a) references to additional benefit of any description are to be construed as referring to additional benefit of that description which is, or but for this regulation would be, payable by virtue (either directly or indirectly) of the said order; and
- (b) ‘the appointed date’ means the date appointed for the coming into force of the said order.

(3) ... , where a person is not ordinarily resident in Great Britain immediately before the appointed date the provisions of these regulations (except this regulation) shall not, unless and until [s]he becomes ordinarily resident in Great Britain, affect [her] disqualification while [s]he is absent from Great Britain for receiving –

- (a) in the case of a woman who immediately before the appointed date was a married woman and was not entitled to a Category B retirement pension, any additional Category B retirement pension, if immediately before that date her husband was entitled to a Category A retirement pension and was not ordinarily resident in Great Britain;
- (aa) in the case of a married woman, any additional Category B retirement pension if immediately before the appointed date

- her husband was entitled to a Category A retirement pension and was not ordinarily resident in Great Britain (whether or not she was married to him immediately before that date);
- (b) in the case of a person who immediately before the appointed date is a widow or widower, any additional Category B retirement pension, if the former spouse had died before the appointed date;
 - (c) in any other case, any additional retirement pension of any category or any additional graduated retirement benefit, if that person had become entitled to a retirement pension or to graduated retirement benefit before the appointed date;
- ...”

It will be noted that regulation 5 is expressed to have effect only where it is applied “by regulations made in consequence of the [up-rating order]”. I understand that the relevant up-rating orders since 1975 have all been accompanied by regulations having such effect.

The issue

20. The central issue relates to the position immediately following the date of Mr Yates’ death in May 2002. The Secretary of State submits that the only relevant time for assessing whether the conditions are met in any year is the time immediately before the appointed date for the up-rating order for that year; and that the Commissioner fell into error by reconsidering the question by reference to the position at 27 May 2002, when Mr Yates died. Before considering that issue in more detail, it is helpful to identify the common ground as between the Commissioner (whose reasoning I take to have been implicitly adopted by the claimant) and the Secretary of State.

Common ground

21. It has never been in dispute that Mr Yates’ Category A pension and GRB were correctly calculated by reference to November 1975 rates. The reasons for this are not discussed in the decision. I take it to be because, as a non-resident, he was disqualified from benefiting from any subsequent up-rating orders by virtue of paragraph 5(3)(c). He did not fall within (a), (aa) or (b), but, (under (c)), viewed at the appointed date of each subsequent up-rating order, he had become entitled to a retirement pension before that date.

22. Turning to Mrs Yates, it is common ground, as I understand it, that, when she first became entitled to Category B pension, following her marriage on 8 September 2001, she was disqualified from the enhancement attributable to the current up-rating order under paragraph (aa). That is because she was then a married woman, and immediately preceding the appointed date for that order (April 2001), her husband had been entitled to a Category A pension and was not ordinarily resident. As the parenthesis to (aa) makes clear, it did not matter that she was not married to him at that date.

23. It also seems to be accepted that the same process of reasoning can be applied retrospectively in relation to every up-rating period back to 1975. Viewed as at September 2001, she was a married woman, whose husband, immediately before the appointed date of any of the twenty-six or so up-rating orders since 1975, had

fulfilled the same conditions of non-residence and entitlement to pension. Again it does not matter that she was not married to him at the time of any of those orders. In the Commissioner's words:

“Before the appointed date of all the up-rating orders coming into force after November 1975 and up to and including that coming into force in April 2002, the claimant's husband was entitled to a Category A retirement pension and was not ordinarily resident in Great Britain. Thus ... the claimant could not receive the additional benefit that would otherwise have been paid by virtue of all those up-rating orders.” (paragraph 16)

24. That (at first sight, somewhat surprising) exercise is necessary to achieve the statutory purpose of in effect freezing her entitlement at the same date as that of her husband. It would not be enough to disqualify her from enhancements attributable to the 2001 and 2002 orders. That would simply take one back to the base established by the 2000 order. As the Commissioner explained:

“It is fundamental to the operation of regulation 5 that in theory each succeeding up-rating order must be looked at in turn to see if the conditions for not applying the general rule in regulation 4 are met, rather than simply identifying a date at which entitlement was frozen... ” (paragraph 12)

On the other hand, (perhaps even more surprisingly) he thought that the process would have been broken if at any time in that period Mrs Yates had become ordinarily resident in this country, whether or not at the time married (to Mr Yates or any one else). As he explained in the following passage:

“Thus, for instance, if the claimant had by chance come to live and be ordinarily resident in Britain during the 1980s, at a time when both she and H were married to other people, she would have been able to take the benefit of up-rating orders that came into operation during that period, even though her incidental residence here seems to supply little rational reason for treating her better than if she had never set foot here in relation to a claim entirely dependant on her much later marriage to H.” (paragraph 12)

Had it been necessary to consider the correctness of that part of his reasoning, I might have required further assistance. However, the Commissioner's general approach to the years before 2002 is not in dispute, at least so far as it applies to the facts of this case. It ensured that, as one would expect, Mrs Yates' pension entitlement, which was entirely dependent on the contributions of her husband, was calculated by reference to the same level of rates as his.

25. Finally, it is agreed that at 8 April 2002 (the effective date of the 2002 up-rating order) Mrs Yates continued to fall within (aa), as a non-resident married woman whose husband, immediately before that date, had fulfilled the conditions of non-residence and entitlement to Category A pension. Accordingly, she was disqualified from receiving any enhancement to her Category B pension benefit attributable to that up-rating order. Again the same exercise can be applied to all the years since 1975. Accordingly, there is no dispute that at that stage her pension was correctly treated as “frozen” at November 1975 rates.

26. I then come to the dispute in relation to the position in May 2002, following Mr Yates' death.

27. The Secretary of State submits that her status under (aa) of the Regulations was fixed at the time of the up-rating order, and remained unchanged until the next up-rating order in April 2003. By that time she fell under (b) as a person who was a widow immediately before the appointed date for that order, and whose spouse had died before that date. Accordingly, he says, she continued to be disqualified from any enhancement to Mrs Yates' Category B pension attributable to that up-rating order, and (presumably, although the basis is less clear) all preceding orders.

28. The Commissioner did not agree. He held that it was necessary to consider separately her position in May, immediately following her husband's death, when she became entitled to the higher rate of a widow's pension. At that time she did not fall within either (aa) (because she was no longer a married woman), or (b) (because, although she was a widow, her husband had not died before the 2002 appointed date). Accordingly she fell within (c).

29. The consequence, as he found, was that for the purposes of calculating her entitlement at that stage, she was only disqualified in respect of any up-rating order since she first became entitled to a pension in her own right, there being nothing in (c) to tie her disqualification to the position of her husband. The Commissioner explained:

“What then is the effect of regulation 5(3)(c) in the present case? The words are in my judgment clear and have only one possible meaning. They prevent the lifting of the disqualification by virtue of regulation 4(1) only in respect of up-rating orders coming into force after the first day of the claimant's entitlement to retirement pension. Accordingly, the claimant cannot from and including 27 May 2002 be disqualified for receiving any additional benefit payable by virtue of up-rating orders coming into force before that date (10 September 2001). In practice, from 27 May 2002 her Category B retirement pension is frozen at the rate set in section 44(4) of the Contributions and Benefits Act as from 9 April 2001, ie £72.50 per week.” (paragraph 28)

He rejected the claimant's argument that the rate should be treated as frozen at the rate applicable in May 2002, on the base that she had become entitled to a “different type” of pension. He held that the category of pension remained the same, the only change being to the rate; and in any event it was enough under (c) that it remained a “retirement pension” (paragraph 30).

30. The Secretary of State, as I understand it, does not challenge that view of the effect of paragraph (c) if it applied. The arguments are over whether it applied. Before considering those arguments, in order to do justice to the Commissioner's reasoning, I should quote the relevant passage in full:

“17. In relation to the decision of 28 June 2002 and the claimant's entitlement from and including 27 May 2002, things are not nearly so simple. To clear some ground, I need to say what was the nature of that decision. I have no doubt that it took the form of a supersession of the decision of 22 April 2002 on the ground of a relevant change of circumstances (H's death). I also have no doubt that the relevance of the change of circumstances was that the rate of Category B retirement pension payable to the claimant ceased to be identified by section 48A(3) of the Contributions and Benefits

Act and became identified by section 48A(4) and that she became entitled to GRB inherited from him

18. As from 27 May 2002 the claimant ceased to be a married woman. She no longer had a husband. Therefore, she could not fall within regulation 5(3)(a) or (aa), since both are restricted to the case of a married woman. She could fall within regulation 5(3)(b), which applies in the case of a widow or widower. But in its terms it only applies where the claimant is a widow or widower immediately before the appointed date of any particular order. In the context, only the status in relation to the deceased spouse whose contributions qualify the claimant for a Category B retirement pension, and not any former spouses, can be relevant. Thus, the claimant would only come within that provision in relation to the up-rating order made with effect from April 2003 and subsequent orders. That effect, on both Category B retirement pension and GRB, is not disputed on behalf of the claimant.

19. That leaves only regulation 5(3)(c), which makes provision in any other case, ie the case of someone who is not a married woman (regulation 5(3)(a) and (aa)) and is not a widow or widower to whom regulation 5(3)(b) applies in relation to a particular up-rating order. Sub-paragraphs (d) to (f) do not apply to retirement pension of any category or to GRB. In my judgment, as from 27 May 2002 the claimant could only fall, in relation to her Category B retirement pension, within regulation 5(3)(c) in relation to all the up-rating orders taking effect before that date. In paragraphs 16 and 17 of the Secretary of State's submission of 17 August 2007 it was argued that regulation 5(3)(c) had no application to the claimant's case, in effect (if I understood the argument correctly) because all of the up-rating orders prior to 27 May 2002 had been taken care of by the application of regulation 5(3)(aa) in the decision of 22 April 2002. In my draft decision, I expressed the view that that could not be right, for the following reasons. **The fundamental question continues to be whether, week by week, the claimant is disqualified for receiving her Category B retirement pension, so that the provisions of the Persons Abroad Regulations must be considered week by week.** As from 27 May 2002, the claimant no longer fell within regulation 5(3)(a) or (aa) and sub-paragraph (b) did not apply to past up-rating orders. Therefore, regulation 5(3)(c) has to be considered in relation to the potential disqualification from 27 May 2002 onwards. That is reinforced by the fact that the rate of pension to which the claimant would otherwise have been entitled ceased to be identified in paragraph 5 of Part I of Schedule 4 to the Contributions and Benefits Act and became identified under section 48A(4), effectively by section 44(4) which sets out the weekly rate of the basic pension. As up-rating of different amounts under different provisions is involved, even though all within one award of Category B retirement pension, I do not see how that could all already have been taken care of in the earlier decision." (emphasis added)

31. As noted at the end of paragraph 18, there appears to have been no dispute about the application of paragraph (b) from April 2003 onwards.

The argument

32. Mr Kolinsky submits that the Commissioner was wrong to focus attention on the position in May 2002. As indicated by its introduction, the function of paragraph

5(3) is to ascertain the extent of the disqualification in relation to each up-rating order by reference to the situation “immediately before the appointed date”. The position is then fixed in relation to that up-rating order unless the claimant becomes ordinarily resident in Great Britain, even though the benefit is calculated and paid on a weekly basis. Following the death of Mr Yates, the claimant’s rate of benefit had to be adjusted to take account of the fact that she was no longer a married woman, but there was no need to reconsider the position under the Persons Abroad Regulations, because her status for the purpose of that annual up-rating order had already been established.

33. The difficulty with that simple approach, as I see it, is that it tells only part of the story. The drafting of paragraph 5(3) leaves an unresolved tension between the introduction and parts of what follows, in particular sub-paragraph (aa). It is true that the introduction directs attention to the position at the appointed date for the particular order. If one stopped there, the natural reading would be that the position at that date governs the application of the paragraph for the whole period of that up-rating order, subject only to the possibility of the claimant becoming ordinarily resident during that period. That focus is also reflected in the opening words of paragraphs (a) and (b).

34. However, (aa) has a different emphasis. The question whether the claimant is a married woman is not linked to the appointed date or any other specific date. On the contrary, the appointed date is made relevant only to determining the position of the husband. Further, since it is provided that this question can be answered without regard to whether they were married at that date, it follows that it may refer to a different, earlier date. As has been seen, it is that difference which enabled the Secretary of State to determine that, on Mrs Yates’ marriage in September 2001, she was subject to the disqualification by reference to her husband’s position at the appointed day for the 2001 order in April, and indeed at all earlier appointed days back to 1975.

35. The tension may have something to do with the statutory history. As the Commissioner explained (paragraph 23ff), sub-paragraph (aa) was part of amendments made in 1994. Their purpose was to regularise certain overpayments made as a result of what was thought to be a misinterpretation of the provision, and to clarify the position for the future. The thinking behind the change was explained in a letter dated 23 March 1994, and enclosed paper, for the Social Security Advisory Committee. Apart from regularising past payments, the proposed amendment would, it was said:

“... restore the policy intention that, where a woman becomes entitled to retirement pension on marrying a man who is receiving a frozen pension, her pension is frozen at the same uprating as his, rather than at the later uprating in force on the date of marriage.”

A note to the Committee explained that it would be “adverse to a small number (about 50 a year)”, and that it would –

“... restore the policy intention that they should be treated in the same way as other women who were already married to such a pensioner when his pension was frozen.”

36. The Commissioner took some comfort from the fact that the Department at that time seemed to have regarded sub-paragraph (c) as relevant to a case such as the

present. However, he rightly accepted that the Department's historic view of the interpretation of the existing regulation is not in any way binding on anyone. On the other hand, in construing the amendment, I think it is legitimate for us to have regard, so far as it assists, to the prior statement as to the purpose of the amendment, given in a formal letter on behalf of the Secretary of State who would be responsible for making it. Whether it achieved that purpose is of course a different matter.

37. I have not found this an easy question to resolve. I see the force of the Commissioner's interpretation, on a strict reading of the wording of the regulation. However, it makes no sense in practical terms. The general statutory policy (under section 113) is to deprive those absent from the country from any entitlement to such benefits, but to restore it only to the extent that Regulations provided. It is hard to see any reason for restoring the benefit for husbands at rates frozen by reference to the time when they left the country, while allowing a more generous rate for their wives, whose entitlement is equally dependent on their husbands' contributions. There is therefore a strong incentive to read any ambiguity in the Regulations so as to accord with the evident policy intention.

38. I think Mr Kolinsky is correct in principle to read the introduction as governing the scheme of paragraph 5(3). Disqualification from the benefit of up-rating is generally treated as applying for the whole of the period of the order, based on the position at the appointed date. In this context the ordinary "week by week" approach is displaced. The difficulty arises because the 1994 draftsman inserted sub-paragraph (aa) to deal with a particular problem, without sufficient regard to its relationship to the paragraph as a whole. However, the drafting defect should not be allowed to disrupt the scheme of the paragraph. The operation of the sub-paragraph should be limited to what is necessary to achieve its purpose.

39. The only date, other than the appointed date, when it is necessary to apply sub-paragraph (aa) is when a woman becomes entitled for the first time to a Category B pension on her marriage. Sub-paragraph (aa) provides the means of establishing her status under the current and previous up-rating orders, until the appointed date for the next order. That is its agreed effect in relation to Mrs Yates' marriage in September 2001. There is no similar requirement in respect of the change of circumstances in May 2002, on her husband's death. Although she changed from married woman to widow, she remained entitled to the same category of pension, albeit at a different rate. There was no reason to revisit the basis of her disqualification under the Persons Abroad Regulations.

40. For those reasons, I have reached the conclusion that the Commissioner was wrong to attempt to redetermine Mrs Yates' status under the regulations as at May 2002. Her status remained as it was at the appointed date in April. Accordingly, paragraph (c) was not relevant.

41. That is sufficient to decide the appeal. However, I have some doubt in any event whether the Commissioner's interpretation of the effect of sub-paragraph (c) is itself correct. As appears from the passage quoted in paragraph 29 above, he interpreted it as "preventing the lifting of the disqualification" only in relation to up-rating orders coming into force after the date of her own first pension entitlement (rather than that of her husband). That was because sub-paragraph (c), unlike sub-paragraph (aa), refers only to the pension of the claimant, and makes no reference to the historical entitlement of her spouse.

42. At first sight that seems correct. However, a similar argument could be made in respect of sub-paragraph (b), as it applied from April 2003, although no issue has been taken as to the Department's approach in that respect. That also lacks any express link to the history of the husband's pension entitlement; the only reference to him is to the date of his death. To my mind, it provides no better reason than (c) for treating the rate of **her** pension as frozen by reference to the date of **his** first entitlement.

43. I agree, however, that it would be very odd if the fact of his death altered radically the level of rates by reference to which her pension is calculated. The answer may be that, once the disqualification status of a particular pensioner has been established in relation to current or previous up-rating orders, that continues from year to year so long as the particular form of pension falls within one of the relevant sub-paragraphs. Thus, in this case, the level of rate for her pension was settled following her marriage under sub-paragraph (aa), disregarding up-rating orders since 1975. That then provided the base for the following year, and so on. On that view, it would not be necessary to find in each of the sub-paragraphs a separate basis for linking her pension to her husband's entitlement. The same approach could also be applied to sub-paragraph (c), and, if correct, would be another reason for allowing the appeal. However as the point has not been taken by the Secretary of State before us, I express no concluded view.

Conclusion

44. My first acquaintance with the Persons Abroad Regulations has not been a happy experience. The drafting is lamentable. It is regrettable that in 1994, when problems were identified, the opportunity was not taken to rewrite the whole provision in clear language. This lack of clarity is particularly unfortunate in regulations dealing with individual pension rights, which ought to be comprehensible without expert legal advice. Even with legal expertise the task is difficult. That is apparent from the fact that the very experienced Commissioner required 18 pages of closely packed reasoning to unravel it; and that, even so, I have felt bound to disagree with his conclusion.

45. There may be a more fundamental issue. Section 113, the enabling provision in the 1992 Act, is a straightforward, albeit draconian, exclusion of those "absent from Great Britain" from any right to benefits under Parts II to V of the Act, "except where Regulations otherwise provide". The 1975 Regulations seem to go much further than one would ordinarily expect by way of exceptions. For the benefits in question they involve in effect tearing up the section and starting again with a different scheme, constructed by reference to the ordinary residence of the claimant or her spouse, and directed only to annual increments of benefit. It seems surprising, and possibly objectionable in principle, that such a radical change of approach should have been effected without direct Parliamentary sanction. It may be said that the practice dates back now for more than thirty years, and has survived several re-enactments of the statutory provisions. No point has been taken before us on the principle as such; but the unconventional pedigree adds yet further complexity.

46. In conclusion, I pay tribute to the Commissioner's detailed examination of the issues, which has resolved many points of contention, and cleared the way for the relatively narrow dispute in this court. However, I respectfully disagree with his conclusion on that issue. I would therefore allow the appeal and (for the reasons

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explained in [7] above) remit the matter to the Upper Tribunal for final determination.

LORD JUSTICE RIX:

47. I agree.

LORD CLARKE OF STONE-CUM-EBONY MR:

48. I also agree.