DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

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

The decision of the Liverpool First-tier Tribunal dated 28 February 2017 under file reference SC068/16/01947 involves no material error on a point of law. The First-tier Tribunal's decision accordingly stands.

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

REASONS FOR DECISION

The issues raised by this appeal to the Upper Tribunal

1. The important issues raised by this appeal to the Upper Tribunal are twofold.

2. The first issue ("Ground 1") concerns rule 27(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; hereafter "the SEC Procedure Rules"). The Appellant's submission is that rule 27(1) vests the Secretary of State with an automatic right to an oral hearing of an appeal before the First-tier Tribunal, irrespective of the Appellant's own wish for a hearing on the papers. Perhaps counterintuitively, the Appellant asserts this amounts to a contravention of the principle of equality of arms and hence a breach of Article 6(1) of the European Convention on Human Rights (or 'ECHR'; in this decision I also refer to the European Court of Human Rights as either the 'ECtHR' or the 'Strasbourg court'). The Appellant's principal argument is that rule 27(1) is only ECHR-compliant if it is construed so as to vest the First-tier Tribunal with a discretion to decide *not* to hold an oral hearing in circumstances where a claimant argues that there should be a hearing on the papers.

3. The second, and potentially even more significant issue ("Ground 2"), concerns the consequences of the effective abolition of the Category B retirement pension for new claims, as implemented by section 23 of, and paragraph 60 of Schedule 12 to, the Pensions Act 2014. In short, the Appellant's submission was that the elimination of the prospect of a Category B pension payable to his spouse based on his national insurance contributions, and without the introduction of any transitional rules to protect his wife, himself and his family, was unlawful both as regards ECHR and European Union law.

The Upper Tribunal's decision in summary

4. The Appellant's appeal to the Upper Tribunal is dismissed. The decision of the Liverpool First-tier Tribunal ("the Tribunal"), dated 28 February 2017, does not involve any material error of law. The Tribunal's decision accordingly stands.

The background: some key facts

5. The Appellant, who now lives in Canada, was born in the United Kingdom on 21 April 1951. He worked in the telecoms industry in Lancashire from leaving school in 1967 until 1972, when he emigrated to Canada. Throughout his working life there he paid voluntary Class 3 national insurance contributions into the British scheme. Such Class 3 contributions only give rise to entitlement to retirement pensions and bereavement benefits. The Appellant's wife, LK, is a Canadian national who has

never lived or worked in the United Kingdom; she was born on 11 January 1955 and they married in Canada on 20 May 1995.

6. The Appellant therefore reached state pension age on 21 April 2016 at the age of 65 (Pensions Act 1995, Schedule 4, paragraph 1(1)). LK herself will not attain state pension age until 11 January 2021, on her 66th birthday (Pensions Act 1995, Schedule 4, paragraph 1(6), as amended by the Pensions Acts 2011 and 2014).

7. The Pensions Act 2014, which radically overhauled (and in broad terms simplified) the scheme for the provision of state retirement pensions, came into force (at least for all present purposes) on 6 April 2016, about a fortnight before the Appellant reached the age of 65.

The Pensions Act 2014: some key features

8. According to the Summary in the *Explanatory Notes* to the Pensions Act 2014 (at paragraph 18):

> "18. The legislation creates a new state pension for people reaching pensionable age on or after implementation on 6 April 2016. A person entitled to the full state pension will be paid a single weekly rate to be set out in regulations. This replaces the existing state pension, which has two components: a basic pension and an additional pension. The Act contains special provisions for people who have made National Insurance contributions before implementation to ensure that all their National Insurance contributions are taken into account (subject to a minimum qualifying years requirement).

9. The commentary to section 1 of the Pensions Act 2014 in the *Explanatory Notes* continues as follows:

> "45. Although the term 'state pension' has been commonly used to refer to Category A to Category D contributory and non-contributory pensions paid since the 1970s (and now payable under the SSCBA 1992), in legislation these are referred to as 'retirement pensions'. For ease of reference this commentary therefore refers to the new benefit as the 'new state pension' and the current retirement pension as the 'old retirement pension'.
>
> 46. Those reaching pensionable age on or after the start date for the new state pension will not be eligible for the old retirement pension. This start date is to be 6 April 2016. The old retirement pension arrangements will continue for people who reach pensionable age before 6 April 2016."

10. The *Explanatory Notes* also explained that a further change included the abolition of the former Category B pension (subject to two narrowly drawn exceptions, both of which are immaterial for present purposes: see Pensions Act 2014, sections 7, 11 and 12):

> "65. Under the old retirement pension rules, a person who is, or who has been, married or in a civil partnership may be entitled to a pension based on the National Insurance record of their spouse or civil partner (usually by way of a 'Category B' pension). This will not be the case for those reaching pensionable age after the start date of the new state pension."

11. On the face of it the Appellant and his wife LK will obviously be affected by this change. The question, however, is whether they can challenge that change through

the current proceedings. For the reasons that follow (in relation to Ground 2) I decide that they cannot.

The earlier correspondence with the British national insurance authorities

12. Meanwhile, over the years that he has been living in Canada, the Appellant has been in correspondence with the British authorities from time to time with regard to both his prospective retirement pension entitlement and that of LK's. For example, on 28 July 2000 the Inland Revenue NI Contributions Office wrote to the Appellant, in response to his enquiry, explaining that "when you make your claim to Retirement Pension, your wife (if over age 60) would be entitled to a pension based on your National Insurance record. If she is under 60 you may be entitled to an increase in your Retirement Pension for a dependant wife, providing her earnings are not over a certain amount". Similarly, on 11 December 2010 the Appellant e-mailed the International Pension Centre, asking if LK would qualify for a Category B retirement pension based on his NI record when she reached the appropriate retirement age. The official's response was "provided you are in receipt of United Kingdom State Pension … when your wife reaches her entitlement date, she will be able to make a claim for UK state pension based on your contributions" (14 December 2010).

The Department's decision on the Appellant's state pension claim

13. On 8 January 2016 the Appellant made an advance claim for a state pension. On 8 February 2016 the decision-maker concluded the Appellant was entitled to a state pension of £155.65 a week payable from 21 April 2016. On 4 March 2016 the Appellant wrote challenging the decision on two grounds. The first, a ground which has not since been pursued, related to the absence of any graduated retirement benefit in the pension calculation. The second, which has become Ground 2 in these proceedings, was that there was no mention in the decision of any retirement pension for LK. The Department reviewed its decision but did not make any change. The mandatory reconsideration notice of 28 April 2016 explained how the Appellant's new state pension had been calculated and added:

> "Also under Schedule 12 part 2 para. 57 to 60 of the Pensions Act 2014 a married woman will only be entitle to Cat B Retirement Pension if the married woman and her spouse reached minimum pension age before 6 April 2016.
>
> In any event LK does not reach minimum pension age until age 66; currently she is 61. Therefore this issue cannot be decided upon by HM Courts and Tribunal Service. LK will need to reach minimum pension age, submit a claim to Cat B Retirement Pension and receive a formal decision before she can submit an appeal."

14. I simply make the observation that HM Courts and Tribunals Service (HMCTS) does not decide issues of entitlement to social security benefits on appeal from decisions of the Department. HMCTS is simply the operational or administrative arm of the Ministry of Justice that supports the First-tier Tribunal. So it is the Tribunal, an independent judicial body, and not HMCTS that decides such issues.

The Appellant's appeal to the First-tier Tribunal

15. The Appellant appealed to the First-tier Tribunal. His main ground of appeal was framed as follows:

> "*It is suggested that the complete elimination of a Category B pension payable to the spouse of a NI contributor where that pension was based on my national insurance contributions, without the introduction of any transitional rules to protect my wife, myself and my family situation is unlawful.*"

16. The Appellant further developed his arguments on this ground of appeal as follows:

> "The national insurance contributions that I paid over many years contained two elements, namely:
>
> - a Category A pension for myself
> - a Category B pension for my spouse
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> However, legislation in the Pensions Act 2014, virtually overnight, has completely eliminated the Category B pension. I am not contending that the UK Government does not have a right to eliminate a pension if it decides to do so. However, the elimination of a pension must be done in a lawful manner. It is my contention that the manner in which the UK Government eliminated the Category B pension in situations that involved myself and my family and as it pertained to my own family is unlawful. Category B pensions concern family situations and fall to be considered within the ambit of Article 8 – Right to family life of the ECHR and HRA 1998. Please refer to the case of *AY v Secretary of State for Work and Pensions (RP)* [2011] UKUT 324 (AAC).
>
> I was provided with written assurance from the DWP that we would receive a Category B Pension, after I had fully paid my national insurance up to 100%. I also changed my position financially in life by accepting a lower amount of superannuation based on the expectation of my family receiving a Category B pension. My family and I are now affected detrimentally as a result of the elimination of the Category B pension without putting in place transitional rules to make provision for those families and individuals who were relatively close to receiving a Category B pension. I believe the actions of the UK Government were disproportional and as such resulted in a breach of:
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> - Article 1 of Protocol 1 ECHR and HRA 1998
> - Article 1 of Protocol No.1 ECHR in conjunction with Article 14 ECHR and HRA 1998
> - Article 8 ECHR and HRA 1998
> - Article 8 ECHR in conjunction with Art 14 ECHR and HRA 1998."

17. At this stage I make the observation that, actuarially speaking, there is no direct connection between national insurance contributions made and national insurance benefits received. The National Insurance Fund operates on a 'pay as you go' basis such that the benefits payable at any given time are financed by current, and not by historic or individualised, contributions. As the Appellant acknowledges, the terms of entitlement to benefit are defined by legislation.

The First-tier Tribunal's decision

18. On 28 February 2017 the Tribunal, following an oral hearing, dismissed the Appellant's appeal and confirmed the Secretary of State's decision dated 8 February 2016. In its corrected Decision Notice, the Tribunal explained its reasoning in summary in these terms:

> "The appellant is entitled to retirement pension of £155.65 per week from 21 April 2016. This is because the appellant attained pensionable age on that date and his entitlement is governed by the new rules set out in the Pensions Act 2014.
>
> The said entitlement is a higher amount than that to which he would have been entitled under the former statutory regime even if with the addition of acquired graduated benefits. The 2014 regime does not permit the addition of any acquired graduated retirement benefits.
>
> The appellant however had abandoned this aspect of his appeal in any event.
>
> The appellant also wished his wife to be added as a party to this appeal on the basis that she would not be entitled to a category B pension to which the appellant had contributed. This was the only ground of appeal before the tribunal at today's hearing. However the decision under appeal makes no reference to the entitlement or otherwise, potential or real, to any entitlement of the appellant's wife to a category B pension. In any event the 2014 statutory regime does not encompass any entitlement to a category B pension under any circumstances. However the appellant's wife is not of pensionable age but if she were to make a claim upon reaching pensionable age it is difficult to see how such claim could succeed in light of the provisions of the 2014 statutory regime.
>
> A Tribunal on 27.10.16 had directed, in any event, that the appellant's application to have his wife joined as a party to these proceedings was refused, together with the appellant's application to have the question of a category B pension referred to the European Court of Justice.
>
> The decision under appeal solely concerned the appellant's entitlement to retirement pension and the appellant's appeal against the entitlement referred to in that decision was abandoned by the appellant."

19. The Tribunal then issued a full statement of reasons; however, the essence of the Tribunal's decision and its reasoning is more than adequately captured by the summary on the Decision Notice.

The proceedings before the Upper Tribunal

20. I subsequently gave the Appellant permission to appeal to the Upper Tribunal. The first ground on which permission was given was the procedural ground relating to rule 27(1) of the SEC Procedure Rules. In summary, it was argued that the Tribunal had acted unfairly and/or failed to give adequate reasons for proceeding with an oral hearing in breach of the equality of arms principle. The second ground related to the abolition of the Category B retirement pension by the Pensions Act 2014 and its impact on the Appellant (and on LK) in this case.

21. Mr Kevin McClure, who now acts for the Secretary of State in these proceedings before the Upper Tribunal, supports this appeal on the first of those grounds, albeit only to a narrow extent. I deal with each of the two grounds of appeal in turn. To start with, the procedural ground of appeal relating to rule 27(1) can only properly be understood against the sequence of events that led up to the Tribunal's oral hearing on 28 February 2017.

Ground 1 – rule 27(1) of the SEC Procedure Rules and Article 6(1) ECHR

Ground 1: the sequence of events

22. On 26 May 2016 the Appellant filed his notice of appeal against the Department's decision on his claim to retirement pension. In answer to the question "*About your choice of hearing*" he ticked the box for "*I want my appeal decided on the papers*". He repeated that request in his covering letter.

23. On 6 July 2016 the Department filed its written response to the appeal. On the accompanying AT38 proforma ('Notification of response') the Appeals Officer ticked the '*Yes*' box in response to the question "*Does the Appeals officer request an Oral hearing even if the appellant chooses a paper?*".

24. On 12 July 2016 HMCTS wrote to the Appellant advising him that "your appeal will proceed as a **Oral** hearing" (spelling and emphasis as in the original).

25. On 13 August 2016 the Appellant made an application that his appeal be conducted "on the papers". He pointed out that the underlying facts of the case were not in dispute and the issues raised were purely ones of law. He claimed that as he could not attend a hearing he would be unable to respond to any arguments advanced by the Respondent at such a hearing. He further argued that in any event there should not be an automatic right to an oral hearing for the party requesting such a hearing. In particular, he contended that rule 27(1) conferred such a right on the Respondent, irrespective of his own representations. This outcome, he argued, deprived him of procedural fairness and equality of arms within the meaning of Article 6(1) of the ECHR. He cited a number of authorities from the Strasbourg court in support of his detailed submissions.

26. On 1 September 2016 a Tribunal clerk telephoned the Department, recording on the file that "they are happy for it to be heard as a paper case if the appellant is not attending".

27. On 15 September 2016 the District Tribunal Judge (DTJ) noted his understanding, which was that (a) the Appellant objected to an oral hearing and (b) the Department only wanted a hearing if it could be arranged via video-link. He instructed the clerk to see if the Department did still want a hearing and if so to arrange a video-link hearing with the Appellant to attend by telephone. If the Department no longer wanted a hearing, he directed the case was to be listed before a DTJ as a paper case.

28. On 23 September 2016 the Department's Appeals Officer replied to the effect that "If a hearing is still to go ahead then a video link would be preferred".

29. On 16 October 2016 the Appellant repeated his application for the case to be dealt with on the papers. He stated that that a telephone hearing was "not a consideration for me" as the combination of his working full-time and the time difference between the United Kingdom and the west coast of Canada (8 hours) meant a telephone hearing was "simply not practical".

30. On 21 October 2016 a clerk referred the matter back to a Judge, reporting that "I have rung the DWP again to make sure they still want an oral hearing, they said they do." She added that it was not logistically practicable to have a video-link for one party combined with a telephone hearing for the other; in such situations a three-way conference call was all that could be offered.

31. On 27 October 2016 the District Tribunal Judge ruled as follows:

> *"(1) …. If a party requests a hearing the tribunal has no power to deny that request. There will, therefore, be a hearing. The Appellant has been offered the opportunity to attend via telephone but has declined that offer. His position will be respected."*

32. On 13 November 2016 the Appellant made an application by e-mail to have Direction 1 of 27 October 2016 amended, suspended or set aside.

33. On 17 November 2016 a District Tribunal Judge ruled on that application. It is unclear whether that ruling was ever sent to, or even notified to, the Appellant. The appeal file itself includes no copy of that ruling. However, the Tribunal office's back-up administrative file includes a copy in these terms:

> *(1) The tribunal gives all parties an opportunity to attend an oral hearing.*
> *(2) If one party wishes to attend an oral hearing this will be arranged.*
> *(3) The other party will be invited to attend.*
> *(4) The Department for Work and Pensions have stated they wish to have an oral hearing, therefore, an oral hearing will be arranged.*

34. I assume for present purposes this ruling was not copied to the Appellant. It has only now come to light. I considered whether I should invite his comments. I have decided not, as the ruling in effect simply repeats points already made in other interlocutory rulings. In any event I place no reliance on this particular ruling but include it simply for completeness in terms of the narrative.

35. On 28 February 2017 the Tribunal held an oral hearing of the appeal. The District Tribunal Judge's record of proceedings noted by way of introduction that the "PO appeared by video link. A [Appellant] has declined the opportunity of a telephone hearing. Appeal proceeded".

36. So, in short, the Appellant was consistent throughout. He was adamant that he wanted his appeal to be decided on the papers. He objected to the view that the Department had, in effect, an automatic right to an oral hearing. The Department, meanwhile, appeared to be sending mixed messages. At times it stated it wanted an oral hearing (see paragraphs 23 and 30). At other times its response was more ambiguous (see paragraphs 26 and 28). However, its last known position was that it wanted an oral hearing (see paragraph 30 above).

Ground 1: the First-tier Tribunal's decision

37. In its statement of reasons (expanding slightly on the explanation given on the Decision Notice) the Tribunal dealt with the procedural point as follows:

> "The Appellant, who lives in Canada, did not attend the hearing in person and declined the offer to participate in the hearing by way of a telephone link. The appeal was listed as an oral hearing (rather than an appeal to be determined on the papers) as an oral hearing had been requested by the Respondent. A Presenting Officer for the Respondent appeared via video link and made oral submissions. The Appellant had sought a direction from the Tribunal that his appeal be determined on the papers. However, in an interlocutory decision made on 27.20.2016, this application was refused since a party to the appeal, the Respondent, had requested an oral hearing. The requirements of a fair hearing, as envisaged in the European Convention on Human Rights ('ECHR'), as transmuted into domestic UK law by the Human Rights Act 1998, was not offended by this decision."

Ground 1: the legislative framework

38. The starting point is of course the ECHR. Article 6(1), dealing with the right to a fair trial, provides as follows:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

39. Rule 1(3) of the SEC Procedure Rules provides that "'hearing' means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication". Rule 2(1) enshrines the overriding objective of the SEC Procedure Rules as being "to enable the Tribunal to deal with cases fairly and justly". In that context rule 2(2) further provides that:

> "(2) Dealing with a case fairly and justly includes—
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

40. Rule 2(4) stipulates that the parties must "help the Tribunal to further the overriding objective" and "co-operate with the Tribunal generally".

41. Rule 27(1) along with rules 28 and 31 are also all in point:

> **Decision with or without a hearing**
> **27.**—(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
> (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
> (b) the Tribunal considers that it is able to decide the matter without a hearing.
>
> **Entitlement to attend a hearing**
> **28.** Subject to rule 30(5) (exclusion of a person from a hearing), each party to proceedings is entitled to attend a hearing.
>
> **Hearings in a party's absence**
> **31.** If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
> (b) considers that it is in the interests of justice to proceed with the hearing.

Ground 1: the Secretary of State's submissions
42. Mr McClure has made a written submission on behalf of the Secretary of State. He argues that the tribunal system itself, with its inquisitorial ethos and methods, means that the application of the equality of arms principle under Article 6(1) of the ECHR is likely to be necessary at best only in marginal cases. Mr McClure adds that he has been unable to identify any Strasbourg court case law that has permitted the restriction of a party's legitimate right of access to a hearing so as to match a parallel restriction chosen by the other party. He submits that in this case the Tribunal was correct to direct an oral hearing. However, he also contends that the Tribunal should have adjourned until further efforts had been made to arrange a convenient time for both parties to participate in a telephone hearing. On that basis, and on that basis only, Mr McClure supports the Appellant's appeal.

Ground 1: the Upper Tribunal's analysis
43. The Appellant's own submissions on this appeal are far more detailed and extensive than those of Mr McClure. They were first set out in his application of 13 August 2016 and have been elaborated upon since in further applications and also in written submissions both to the Tribunal below and to the Upper Tribunal. I deal with each of the Appellant's principal arguments in turn.

44. The Appellant's main submission is that rule 27(1), the effect of which is to permit the Respondent the automatic right to an oral hearing, without further consideration and/or the exercise of any discretion by the Tribunal, is contrary to Article 6(1) of the ECHR. The contravention, in the Appellant's submission, is because rule 27(1) deprives him of procedural fairness and equality of arms. The right to a fair trial must mean that "a litigant is not denied the opportunity to present his or her case effectively before the court" (*Steel and Morris v United Kingdom*, Application No.68416/01 (2005) 41 EHRR 403 at paragraph 59). Moreover, the test for equality of arms "requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place the litigant at a substantial disadvantage *vis-à-vis* the opponent" (*Švenčionienė v Lithuania*, Application No.37259/04, at paragraph 23).

45. The Appellant's position is that there is an inherent unfairness in the Tribunal proceedings in that, whether the hearing took place in person, by video link or by telephone, he is a lay person up against the armoury of the State with all its experience, expertise and ready access to legal resources. Thus, the Appellant, who in any event was unable to attend a hearing and so unable to respond to arguments made at the hearing by the Department's representative, was placed at an immediate disadvantage by rule 27(1) when compared to the Respondent. The solution, the Appellant submits, is to read rule 27(1) as if it stood without sub-paragraph (a) ("each party has consented to, or has not objected to, the matter being decided without a hearing"). So, in a case in which one party asked for an oral hearing and the other has not, then the SEC Procedure Rules would only be ECHR-compliant if the Tribunal was vested with a discretion as to whether either to hold an oral hearing or alternatively to determine the case 'on the papers'.

46. There are a number of difficulties with this submission. Most obviously, the fundamental point, as the ECtHR held in *Göç v Turkey*, Application no.36590/97, (2002) 35 EHRR 134 (at paragraph 47), is as follows:

> "According to the Court's established case-law, in proceedings before a court of first and only instance the right to a 'public hearing' in the sense of Article 6 § 1 entails an entitlement to an 'oral hearing' unless there are exceptional circumstances that justify dispensing with such a hearing …"

47. The ECHR general or default rule, accordingly, is for a public oral hearing in first instance proceedings. The rule of law itself is reflected in the principle of open justice – indeed, the maintenance of public confidence in the administration of justice necessitates a fundamental guarantee of a citizen's right to such a public oral hearing. Granting a first instance tribunal an unbridled discretion, having considered both parties' representations, to determine whether or not to hold an oral hearing would be wholly inconsistent with the Strasbourg jurisprudence's emphasis on the need for "exceptional circumstances" to justify a departure from that norm of public oral hearings. I have no doubt but that the Appellant genuinely believes that his interests were best served by having a paper hearing. However, there will be very many claimants who would be rightly alarmed at the prospect that they had no guaranteed right to an oral hearing, but rather that their 'day in court' was purely at the discretion of a Tribunal Judge.

48. The Appellant cites several examples of Strasbourg case law in support of his submissions. However, on closer examination none of them goes so far as he suggests or stands as authority for the proposition that rule 27(1) involves a contravention of Article 6(1) ECHR. In particular, the authorities demonstrate that the assessment of whether there is true equality of arms, and whether or not an applicant is put "at a substantial disadvantage *vis-à-vis* the opponent", is necessarily fact-sensitive.

49. For example, the circumstances of *Steel and Morris v UK* were, on any reckoning, quite exceptional - the applicants, in the absence of legal aid provision for defendants in defamation proceedings, had to represent themselves in a 313-day High Court trial with 40,000 pages of documentary evidence, whilst McDonalds was represented by a large and highly experienced and expert legal team. The ECtHR concluded in that case that the inequality of arms which had arisen was not remedied by the combination of the applicants' articulacy and the limited pro bono assistance they received along with the extensive judicial assistance provided during the course of the hearing (at paragraphs 68 and 69). *Steel and Morris v UK* is thus far removed from the typical Tribunal appeal about entitlement to a social security benefit. Such hearings last typically no more than an hour, are often shorter still, and are before an inquisitorial tribunal which actively seeks to test both sides' cases. In particular, tribunals in the Social Entitlement Chamber have a long tradition of exploring points that an unrepresented claimant might not appreciate to be relevant but which might assist their case.

50. The Appellant also relies on *Švenčionienė v Lithuania*; however, this was a case in which notice of the hearing had been sent by the court administration to the wrong address for the applicant. The Strasbourg court's finding that there had been an infringement of the applicant's right to equality of arms has to be seen in that particular context. As the ECtHR held (at paragraph 25):

> "the right to equality of arms would be devoid of substance if a party to the case were not apprised of the hearing in such a way as to have an opportunity to attend it, should he or she decide to exercise the rights established by domestic law, while the other party had effectively exercised such rights."

51. Again, that scenario is a long way removed from the circumstances of the present case. Furthermore *Fretté v France*, Application no.36515/97, (2002) 38 EHRR 438; (2003) 2 FLR 9, also relied on by the Appellant, is another case in which the court administration failed to notify the applicant of the hearing. With respect, the finding of a breach of the right to a fair trial under Article 6(1) was inevitable in those circumstances. The Appellant further cites *Dombo Beheer BV v The Netherlands*,

Application no.14448/88, (1993) 18 EHRR 213. This is undoubtedly authority for the proposition that “each party shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent” (at paragraph 35). However, it remains the case that what is a “reasonable opportunity” and what is a “substantial disadvantage” requires a context-specific evaluation of the proceedings in question.

52. I am not persuaded that the imbalance of power in the Tribunal setting is such that there is necessarily an inequality of arms for the purposes of Article 6(1) ECHR. I do not doubt that in general terms the State may start with an institutional advantage in many types of tribunal proceedings. Using Galanter’s typology, the Department’s presenting officer is typically a ‘repeat player’, whereas the individual appellant is usually a ‘one shotter’ (M. Galanter, ‘Why the “Haves” Come Out Ahead; Speculations on the Limits to Legal Change’ (1974) 9 *Law and Society Review* 95). Empirical research has also shown the very real difficulties that many unrepresented appellants face in tribunal proceedings (see notably H. Genn et al, *Tribunals for Diverse Users*, DCA Research Series 1/06, January 2006).

53. However, the working out of the principle of equality of arms means that one must consider both the general and the particular context. At the general level, the Tribunal’s inquisitorial ethos and enabling role, already noted, has been specifically developed to act as a counterweight to the State’s institutional advantage. At the level of the particular, there is simply no evidence in this case that the Appellant was put at any material disadvantage whatsoever. The Tribunal’s record of proceedings shows that the hearing lasted for approximately 15 minutes. There is no suggestion that the Department’s representative made any new points at the oral hearing. Rather, the record of proceedings simply notes the presenting officer’s submission as being as follows:

> *PO: Only matter still before Tribunal was, it seemed, the Appellant’s request to have his wife joined as a party and the question of the Cat B pension, he having abandoned the [appeal against the] decision of the Dept concerning the Appellant’s own ent. [entitlement] to SRP from 21.04.16 omitting any addition for graduated pension. The Appellant, by reason of the decision was entitled to greater pension than that to which he would have been entitled – even if graduated pension had been added. The decision under appeal did not include any decision concerning the Appellant’s wife: she was not of pensionable age. If, however, she were to make acclaim when she reached pensionable age, the law no longer provided for ent. to a Cat B pension.*

54. This submission was no more than a resumé of the Department’s much more extensive written response on the Appellant’s appeal. The reality was that this was a case which, although it led to an oral hearing, was effectively decided on the basis of the parties’ detailed written submissions – as in fact the Appellant had wanted.

55. In his further arguments in his reply to the Secretary of State’s response, the Appellant seeks to place weight on the decision of the United States Supreme Court in *Mathews v Eldridge* 424 US 319 (1976). He argues that applying the three factors identified by the Supreme Court in that case – the nature of the private interest affected, the risk of error and the State’s interest in minimizing costs – leads to the conclusion that a hearing on the papers is preferable to an oral hearing. This argument is unpersuasive. *Mathews v Eldridge* was decided against a very different constitutional backdrop – the issue there was one of due process, as that term is understood in US administrative law. The particular issue in that case was whether a social security claimant was entitled to a *pre-termination* hearing before the agency

cancelled his entitlement to benefits and when he had not exhausted his administrative remedies. The US Supreme Court held that in those circumstances a pre-termination hearing was not required under due process principles. The situation here is very different – the Appellant has a decision from the Department he wishes to appeal and the presumption – in both ECHR jurisprudence and in domestic law – is that such an appeal is heard by way of an oral hearing.

56. Finally, the Appellant points to the contrast between rule 27(1) of the SEC Procedure Rules and rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). Rule 34(1) (entitled "Decision with or without a hearing") expressly stipulates that (subject to certain exceptions, which are immaterial for present purposes) "the Upper Tribunal may make any decision without a hearing". Subject again to those immaterial exceptions, the only constraint is that the Upper Tribunal "must have regard to any view expressed by a party when deciding whether to hold a hearing". The Appellant argues that rule 34 is ECHR-compliant and that rule 27 of the SEC Procedure Rules should likewise vest the Tribunal with a discretion as to the format of the hearing. The Appellant's submission is misconceived. The reason why rule 34(1) is ECHR-compliant is that the Convention does not require an appellate body such as the Upper Tribunal to hold an oral hearing where there has been an opportunity to have an oral hearing before the First-tier Tribunal (see *Hoppe v Germany*, Application No.28422/95, (2002) 38 EHRR 285; [2003] 1 FLR 384 at paragraphs 61-65).

57. For all the above reasons I reject the Appellant's primary submission that rule 27(1) of the SEC Procedure Rules involves a breach of Article 6(1) ECHR on the basis that it fails to ensure equality of arms.

58. Turning to the specifics of the case, the fact remains that Mr McClure supports the Appellant's appeal on a different procedural point relating to the fair hearing requirement. On a proper analysis two questions need to be addressed in this context. First, was the Tribunal right to direct an oral hearing? Secondly, and assuming it was, was it right to proceed on the day? Mr McClure's (brief) submission is that the answer to the first question was in the affirmative but the answer to the second question was negative.

59. As to the first question, I agree that the Tribunal was entitled to direct an oral hearing. The Appellant had made his position absolutely clear. As noted above, the Department's position had vacillated but its last known position was that it was requesting an oral hearing. On that basis, given rule 27(1)(a), the Tribunal was not only entitled but bound to direct an oral hearing.

60. As to the second question, the Tribunal was required to apply rule 31 (see paragraph 41 above). There has been no suggestion that the Appellant was not notified of the hearing. The question then was whether the Tribunal considered that it was "in the interests of justice to proceed with the hearing" within rule 31(b). It is true that the Tribunal did not in express terms refer to rule 31. However, it is clear from its reasons, as stated in both the Decision Notice and the statement of reasons, that it took into account all relevant considerations, notably that the Appellant had declined the offer of a telephone hearing and that the Tribunal had detailed written submissions from both parties, canvassing all relevant issues.

61. I acknowledge, however, that Mr McClure supports the appeal. He argues that the Tribunal "should have adjourned the hearing itself until efforts had been made to arrange a convenient time for all parties to take part in a telephone hearing" (Secretary of State's response dated 22 September 2017 at §12). In my view, with

respect, this represents an unrealistic counsel of perfection. There had plainly been a series of communications between the Appellant and the Tribunal administration, both in writing and by telephone, over some months. The Appellant had made it plain that he did not wish to have an oral hearing at any time and in whatever medium. I regret to say his arguments about the impracticality of a telephone hearing are not persuasive. As I noted when giving permission to appeal, in other cases I have held a telephone hearing with an unrepresented appellant in Brisbane and another long hearing, relying on a mobile phone connection, with a veteran living in Mexico. As Mr McClure rightly observes, appellants living in the United Kingdom may well need to take time off work to attend a hearing so as to prosecute their appeals. The Appellant showed no sign of being accommodating in this regard. Another Tribunal might have adjourned for another attempt to set up a telephone hearing. However, that does not mean the present Tribunal erred in law. In my assessment the Tribunal was entitled to proceed with the oral hearing under rule 31.

Ground 1: conclusion
62. It follows my conclusion is that the procedural ground of appeal, however it is put, does not succeed.

Ground 2
Ground 2: the legislative framework
63. It will be recalled that the Appellant made his own claim for state pension in January 2016, in advance of his 65th birthday on 21 April 2016, which date fell after the Pensions Act 2014 came into force. Under the previous regime the two main types of retirement pension were a Category A pension, based on the claimant's own contributions record, and a Category B pension, based on the record of a spouse or civil partner, whether alive or deceased. Whichever category of pension was claimed, attaining pension age was a condition of entitlement. Thus, as at the date of claim, section 48A(1) and (2) of the Social Security Contributions and Benefits Act 1992 (as amended by the Pensions Act 2007) provided as follows:

> **"48A.— Category B retirement pension for married person**
> (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
> (b) satisfies the relevant conditions or condition."

64. I call this "the pre-April 2016 section 48A". The expression "the relevant conditions or condition" was defined by section 48A(2ZA), but need not detain us here. However, as from 6 April 2016, the new section 48A(1) and (2) (or "the post-April 2016 section 48A"), as inserted by section 23 of, and paragraph 60 of Part 2 of Schedule 12 to, the Pensions Act 2014, provided as follows:

> **"48A.— Category B retirement pension for married person or civil partner**
> (1) A married person is entitled to a Category B retirement pension by virtue of the contributions of his or her spouse if—
> (a) the person attained pensionable age before 6 April 2016, and
> (b) the spouse—
> (i) has attained pensionable age, and

(ii) satisfies the relevant contribution condition.

(2) But subsection (1) does not confer a right to a Category B retirement pension on—

(a) a man whose spouse was born before 6 April 1950, or

(b) a woman whose wife was born before 6 April 1950."

65. The problem for the Appellant's wife LK is stark. On the face of the legislation she did not qualify for a Category B retirement pension at the date of the Appellant's claim as she had not attained pensionable age, as required by subsection (1)(a) of the pre-April 2016 section 48A. Furthermore, at the time the Appellant attained pensionable age, some three months later, she could not qualify for a Category B retirement pension either but this time because she had not attained pensionable age before 6 April 2016, as required by subsection (1)(a) of the post-April 2016 section 48A. Truly, this would seem to be a statutory Catch-22.

Ground 2: the Appellant's submissions

66. The gist of the Appellant's submissions on Ground 2 is set out above at paragraphs 15 and 16. That summary can only give a flavour of the detailed and carefully researched arguments that he mounts, based on both ECHR and EU case law. However, for reasons that will become evident I conclude that I do not need to address those more detailed submissions (for example as regards the alleged discrimination involved).

Ground 2: the Secretary of State's submissions

67. Mr McClure's submissions are short and to the point. His primary argument is that there was no decision under appeal to the Tribunal in respect of LK's entitlement to a Category B pension based on the Appellant's national insurance contributions. There was, therefore, no basis for any appeal. Mr McClure further observes that while the Appellant seeks to rely on principles drawn from ECHR and EU jurisprudence to support his argument that LK should benefit from transitional protection, he does not explain for what period, or on what conditions, such transitional rules should apply. According to Mr McClure, "the Appellant does not make any case for the addition of 'transitional protection' to the relevant provisions of the Act, but rather for those provisions to be frozen until his wife has been awarded Category B Pension on the basis of legislation that, in fact, no longer exists" (Secretary of State's response dated 22 September 2017 at §18).

Ground 2: the Upper Tribunal's analysis

Introduction

68. A logically prior question to the Appellant's sustained challenge to the abolition of the Category B pension for individuals in the position of LK is whether there is in fact an entitlement decision in respect of that benefit. It is for the Tribunal to determine whether it has jurisdiction to hear a case (see the Tribunal of Social Security Commissioners' decision *R(I) 7/94* at paragraph 27). The Appellant seeks to argue that both he and LK each have the right of appeal.

69. In the first instance it is for the Secretary of State "to decide any claim for a relevant benefit", which includes any claim for a retirement pension (Social Security Act 1998, section 8(1)(a) and 8(3)(a)). Section 12(1)(a) then provides for a right of appeal to the Tribunal against any decision made by the Secretary of State under section 8 "on a claim for, or on an award of, a relevant benefit". That right of appeal vests in "the claimant and such other person as may be prescribed" (Social Security Act 1998, section 12(2)". For these purposes a "claimant" is "a person who has claimed benefit" and includes "in relation to an award or decision a beneficiary under

the award or affected by the decision" (Social Security Administration Act 1992, section 191, applied by Social Security Act 1998, section 39(2)).

The Appellant's position

70. The Appellant was obviously a claimant under the definitions cited above. He therefore had the right of appeal to the Tribunal. But what had he claimed and what did the Secretary of State decide? Rather unsatisfactorily, the original claim form was not included in the appeal papers before the Tribunal. The only record was a screen print showing that a "MAIN (RP)" claim had been made on 8 January 2016. A claim for a state pension can be made up to four months in advance (Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), regulation 15(1)). Given the date of the Appellant's 65th birthday and the impending abolition of the Category A pension, his claim had to be a claim for a new state pension under the Pensions Act 2014. I accept the Appellant's argument that he also included details of his wife on (or with) that claim form. However, the Department's decision letter (dated 8 February 2016) referred to "your claim to a UK State Pension", reported that it was payable "at the full amount" (£155.65 a week) and was a "new State pension … for people who reached State Pension age on or after 6 April 2016".

71. So the Appellant had plainly made a claim for, and received a decision about, his entitlement to the new-style state pension under the Pensions Act 2014. But had he made a claim for, and received a decision about, LK's entitlement to a Category B pension? In the Appellant's request for a mandatory reconsideration (dated 4 March 2016) he wrote:

> "… in the decision letter there is no mention of a UK retirement pension in respect of my wife, LK. In my application for a retirement pension I included details about my wife. LK is presently 61 years old and included in this decision I would like to know her particular situation in respect of her entitlement to a UK retirement pension at the relevant age. The UK National Insurance contributions were paid towards a UK retirement pension for both myself and my wife."

72. The Appellant's contention is that the determination he received from the Department included two further decisions appealable under section 12 of the Social Security Act 1998, namely the decisions (i) to 'eliminate' his national insurance contributions for the purpose of subsequent potential spousal or family benefits and (ii) to refuse LK a Category B retirement pension. This argument cannot stand with the facts. The original claim was fundamentally his claim for a state pension. Whatever the precise terms of the claim as made, the decision notified on 8 February 2016 was undoubtedly confined to his entitlement to a new Pensions Act 2014 state pension. The Appellant places great reliance on the references in the mandatory reconsideration notice to the provisions implementing the post-April 2016 section 48A as evidence that an appealable decision on Category B entitlement was made. However, the appeals officer was not making any decision on a Category B claim there – rather she was responding to the query raised by the Appellant in his mandatory reconsideration request. In any event, any argument about LK's entitlement to a Category B retirement pension was entirely contingent and indeed hypothetical at that stage as the Appellant's wife had yet to attain pension age (and will not do so until 2021).

73. It follows that I do not accept that there is any decision relating to Category B entitlement (or indeed as to the treatment of the Appellant's national insurance contributions) that the Appellant can challenge before the Tribunal in the present proceedings.

74. Is LK in any better position? The formal position is that she is not and never has been a party to these proceedings. The Appellant has made a number of applications with a view to having LK joined in the proceedings. The Tribunal rejected such an application on 27 October 2016 on the basis that joinder was not “necessary”. The Tribunal’s reasoning is undoubtedly sparse, but there is no statutory requirement to provide reasons for interlocutory rulings and such reasons as are given may well be concise (see rule 34 of the SEC procedural rules and *KP v Hertfordshire County Council (SEN)* [2010] UKUT 233 (AAC) at paragraph 28). The Tribunal’s decision to refuse joinder was clearly right given (a) there had been no decision on Category B entitlement; and (b) LK was not a “claimant” or “such other person as may be prescribed” within the meaning of section 12(2) of the Social Security Act 1998. The Appellant also argues that LK has standing as she “is, or would be, a victim of that [unlawful] act” within the meaning of section 7(3) of the Human Rights Act 1998. However, that only applies in the context of proceedings for judicial review.

75. It follows that LK is in no better position than the Appellant as she is not a party to these proceedings and in any event is also not a claimant who has an appealable decision for the purposes of section 12 of the Social Security Act 1998.

76. I recognise the Appellant has set out detailed and carefully researched objections to the Government’s decision, subsequently endorsed by Parliament, to abolish the Category B retirement pension. However, his own claim for a state pension is not an appropriate juristic vehicle by which to pursue those objections. Of course, in principle LK can make her own claim for a Category B pension in 2021 when she attains pension age. However, barring any radical change in the law, any such claim would appear to be doomed to fail on the basis of the post-April 2016 section 48A statutory criteria. Meantime the only avenue theoretically (if unrealistically) open to LK is to seek to bring proceedings for judicial review (and, of course, the Upper Tribunal lacks the power to make a declaration of incompatibility under the Human Rights Act 1998).

77. I also recognise that the Appellant has over the years received information from Departmental officials about LK’s *prospective* pension entitlement based on his contributions. I just make two observations in that regard. The first is that those officials’ replies were accurate at the time they were made. The second is that while the Appellant may well have taken those replies as assurances, the case law shows that there are “numerous authorities holding similarly that estoppel cannot prevent a statutory duty from being carried out: see R(CS)2/97, R(P)1/80, R(SB)1/83, R(SB) 4/91 and R(JSA)4/04” (*PS v Secretary of State for Work and Pensions and LM (CSM)* [2016] UKUT 437 (AAC) at paragraph 58).

Ground 2: conclusion

78. Accordingly I find that Ground 2 is not made out.

Overall conclusion

79. The decision of the First-tier Tribunal does not involve any material error of law. I therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original	**Nicholas Wikeley**
on 25 April 2018	**Judge of the Upper Tribunal**