Bellch 176
CJ Hart J

Commissioner's case no: CP/4504/2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the Secretary of State's appeal, brought with the leave of a legally qualified panel member, against the decision of the Leicester Appeal Tribunal made on 3 August 2001. I set aside the Tribunal's decision and make the decision which the Tribunal ought on its findings to have made, namely to dismiss the Claimant's appeal against the decision of the Secretary of State made on 11 September 2000.

2. The Secretary of State's decision was that the Claimant's entitlement to state retirement pension, as from 14 August 2000 (being the first appropriate pay day following her husband's death) was £132.95 per week. The Claimant's contention, in effect upheld by the Tribunal, was that it was £35.09 per week greater than that – i.e. £168.04.

3. I held an oral hearing of this appeal, at which the Secretary of State was represented by Mr. Jeremy Heath of the Office of the Solicitor to the Department of Work and Pensions and the Claimant was represented by Miss Harris of counsel.

4. There is no dispute as to the facts. The issue is one of construction and relates to the correct way of making what is sometimes referred to as the "contracted-out deduction" provided for by s.46 of the Pension Schemes Act 1993 ("the 1993 Act"), in a case where a claimant's category A retirement pension is increased under s.52 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") by reference to the contributions and earnings of her deceased spouse.

5. The structure of the relevant statutory provisions, so far as relevant to the facts of this case, is as follows:

   (1) With effect from 16 November 1998 (the first appropriate pay day following her 60th birthday) the Claimant became entitled to a category A retirement pension, by reference to her own national insurance contributions and earnings factors. This pension was composed of two elements: (i) a "basic pension" and (ii) an "additional" (earnings-related) pension: s.44(3) of the 1992 Act. Her entitlement to basic pension was at 59% of the full rate, because she had paid contributions sufficient to give her 23 qualifying years in a "working life" of 44 years.

   (2) The Claimant also had a guaranteed minimum pension (GMP) under an occupational pension scheme which had contracted out of SERPS, and under s.46 of the 1993 Act the amount of this GMP was required to be deducted from the amount of Category A retirement pension which would otherwise have been payable.

(3) The Claimant's husband died on 11 August 2000, having also been entitled at the date of his death to a category A retirement pension composed of both a basic pension (in his case at the full rate) and an additional earnings-related pension.

(4) S.48B(1) of the 1992 Act provides for entitlement to a category B retirement pension in the case of a person (like the Claimant) whose spouse died whilst they were married and after attaining pensionable age. Broadly, s.48B(2) provides for the basic and additional elements of that category B pension to be calculated in the same manner as a category A pension, but by reference to the deceased spouse's contributions and earnings factors. As with the category A pension, however, s.46 of the 1993 Act provides for the amount of GMP to be deducted.

(5) Subject to the effect of the provisions considered in (6) and (8) below, therefore, the Claimant's position after the death of her husband was that she was entitled to a category A retirement pension by reference solely to her own contributions and earnings factors, and to a category B retirement pension by reference solely to the contributions and earnings factors of her husband. In each case the amount of GMP fell to be deducted under s.46 of the 1993 Act.

(6) The first qualification to the position in (5) above is that s.52 of the 1992 Act contains what is described in the heading to it as a "special provision for surviving spouses." It applies in the case of a surviving spouse, such as the Claimant, who (but for s.43 of the 1992 Act, referred to in (8) below) would be entitled to both a category A and a category B retirement pension. The provision can operate to increase both the basic and additional elements of the surviving spouse's category A retirement pension. If the basic element of that category A pension is less than the full amount, it is increased by whichever is the lesser of (a) the shortfall and (b) the basic element of the category B pension. As to the additional element, that is increased by the amount of the additional element in the category B pension, but so that the total cannot exceed the "prescribed maximum." It is agreed that in this case the prescribed maximum is £125.30 per week. S.52 does not itself provide for the extinguishment or reduction of the category B pension, and I have not been able to find any other provision which does so.

(7) The effect, after applying s.52, is therefore that (but for s.43) the Claimant would have been entitled as from her husband's death (a) to a category A retirement pension, which itself was increased under s. 52 by reference to her category B retirement pension and (b) to a separate (and in this case necessarily lower) category B retirement pension. Each of those pensions would be subject to the provison in s.46 of the 1993 Act for deduction of the amount of the GMP.

(8) The final piece of the jigsaw is that s. 43 of the 1992 Act has the effect that a person cannot be entitled to both a category A and a category B retirement pension, but can elect between them, and in default of election

is entitled to whichever is the more favourable. In this case the category B pension therefore becomes at the end of the day irrelevant, since it is necessarily less than the category A pension. However, it is necessary to be aware of the existence of the underlying category B entitlement in order to understand the structure as a whole.

6. I now turn to contentions of the parties as to the manner in which the Claimant's category A retirement pension, following her husband's death, should be calculated. These contentions are best explained by reference to the actual figures.

(1) The Secretary of State's contention

	(a) Basic element (increased under s.52 to the full amount because of husband's contributions);			67.50
Plus	(b) Additional element:			
	(i) Own earnings;		73.36	
plus	(ii) husband's earnings		87.03	
			160.39	
	but subject to maximum total:			125.30
				192.80
Less	(c) GMP			62.70
				130.10
Plus	(d) graduated retirement pension			2.85
				132.95

(2) The Claimant's contention

	(a) Basic element (increased under s.52 to the full amount because of husband's contributions);			67.50
Plus	(b) Additional element:			
	(i) Own earnings;		73.36	
less	(ii) GMP		62.70	
			10.66	
plus	(iii) husband's earnings		87.03	
				97.69
Plus	(c) graduated retirement pension			2.85
				168.04

7. The difference between the two contentions relates to the stage at which the GMP is deducted under s.46 of the 1993 Act. The Secretary of State's contention is that it is deducted only after the total amount of pension has been worked out by applying all the relevant provisions in the 1992 Act, and in particular all the relevant provisions of s.52. The Claimant's contention is that it is deducted at an earlier stage – i.e. in calculating the amount of the additional element of the pension attributable to the Claimant's own earnings. The effect, in this case, of making the deduction at that earlier stage, and then adding the amount of the additional element attributable to the husband's earnings, is that the cap (in this case of £125.30) on the total amount of additional pension is not reached and so does not bite. It is that which leads to the difference in the end result.

8. I must now set out the centrally relevant statutory provisions.

s.52 of the 1992 Act

"(1) This section has effect where, apart from s.43(1) above, a person would be entitled both –

(a) to a Category A retirement pension; and
(b) to a category B retirement pension by virtue of the contributions of a spouse who has died.

(2) If by reason of a deficiency of contributions the basic pension in the Category A retirement pension falls short of the full amount, that basic pension shall be increased by the lesser of –

(a) the amount of the shortfall, or
(b) the amount of the basic pension in the rate of the Category B retirement pension,

"full amount" meaning for this purpose the sum specified in section 44(4) above as the weekly rate of the basic pension in a Category A retirement pension.

(3) If the additional pension in the Category A retirement pension falls short of the prescribed maximum, that additional pension shall be increased by the lesser of –

(a) the amount of the shortfall, or
(b) the amount of the additional pension in the Category B retirement pension.

(4) ....."

s.46(1) of the 1993 Act

"Where for any period a person is entitled both –

(a) to a Category A or Category B retirement pension ..... ; and
(b) to one or more guaranteed minimum pensions

the weekly rate of the benefit mentioned in paragraph (a) shall for that period be reduced by an amount equal –

(i) to that part of its additional pension which is attributable to earnings factors for any tax years ending before the principal appointed day, or

(ii) to the weekly rate of the pension mentioned in paragraph (b) (or, if there is more than one such pension, their aggregate weekly rates),

whichever is the less."

8. In my judgment the Secretary of State's contention is correct, for the following reasons:

(1) S.46 states simply that the Category A or (as the case may be) Category B pension shall be reduced by (in this case) the amount of the GMP. The very strong impression created by that language is that the deduction is to be made after the amount of the appropriate pension has been worked out, and not at some intermediate stage in working it out.

(2) On a closer analysis of s.52 and 46, I do not think that the Claimant's contention can really be made to fit with the structure of those provisions, for two main reasons.

(a) S.52(3) provides that "if the additional pension in the Category A retirement pension falls short of the prescribed maximum, that additional pension shall be increased ...". The Claimant's contention in my view involves reading those references to "the additional pension" as meaning the additional pension after the s.46 deduction has been taken into account. However, that in turn assumes that the s.46 deduction should be treated as made only from the part of the Category A pension which consists of the additional pension. But, as Commissioner Williams has pointed out (see para. 16 of *CP 4479 2000*) that is not what s.46 provides. It provides simply for the total pension to be reduced by the GMP, without purporting to apportion that reduction to any particular element of the pension. It is true, as Miss Harris submitted, that it is natural to attribute the deduction to the additional pension, because a GMP is a substitute for the earnings-related element, and indeed the Secretary of State's own workings did so attribute it (albeit at the end of the process). But there is nothing in s.46 which in fact justifies any such attribution.

(b) If, in accordance with the Claimant's contention, one reads the references in s.52(3) to "the additional pension in the Category A retirement pension" as being references to the amount of that additional pension after deduction of the GMP, then one must, consistently, read the reference in s.52(3)(b) to "the amount of the additional pension in the

Category B retirement pension" as being subject to that same deduction: see para. 5(4) above. This would result in the GMP being deducted twice. Miss Harris correctly submitted that that cannot have been intended, but it would be the result to which her submissions would logically lead.

(3) In my judgment the Claimant's contention would lead to an anomaly which cannot have been intended. This is that, in a situation where the cap (i.e. the "prescribed maximum" referred to in s.52(3)) would come into effect, the Claimant's contention would result in the total benefit by way of category A retirement pension and GMP for a person in a contracted-out occupational pension scheme being substantially more favourable than for a person in the same position but whose occupational scheme was not contracted out. That can be illustrated by reference to the figures in this case. On the Claimant's contention, the total by way of category A retirement pension and GMP to which she is entitled is £168.04 (category A pension) plus £62.70 (GMP) = £230.74. If her occupational scheme had not been contracted out, she would (on her contention) have been entitled to £195.65 category A pension. The difference arises because the Claimant's contention results in the cap having a reduced (and in this case no) impact in the situation where there is a GMP. The Secretary of State's contention, on the other hand, would result in her total entitlement to additional pension and GMP being £195.65 on either basis, because the cap has the same impact in the two situations. The GMP payable from a contracted-out scheme is supposed to be a substitute for the additional element of state retirement pension, and it cannot have been intended that the impact of the cap should be entirely different in the two situations.

(4) Miss Harris sought, by reference to examples, to contend that the Secretary of State's contention was unfair and led to anomalies. The Tribunal's reasoning was essentially that the Claimant's contention led to a fairer result. However, I am satisfied that the apparent anomalies contended for are not in reality anomalies at all, but rather either (a) simply consequences of the inescapable existence of the cap in s.52(3) or (b) a consequence of overlooking the Claimant's GMP entitlement. I should refer in particular to the way in which the Claimant herself saw the matter in her initial letter of complaint dated 25 October 2000:

"Adding both my husband's and my own additional pensions together:

husbands	£87.03
mine	£73.36
	£160.39

takes it above the maximum additional pension, therefore, I lose £35.09 of pension paid in.

Then £62.70 (my COD) is taken from this reduced amount of £125.03 leaving me with £62.60.

I, therefore, lose all my own Additional Pension and end up with only 74.5% of my late husband's inherited additional pension.

I cannot believe that I should actually be penalised for paying full stamps for 19 years. In fact, I would have been better off if I had not paid any NI contributions at all."

However, that overlooks that reduced contributions were payable to SERPS because the occupational scheme was contracted out, and that the Claimant is entitled in addition to the £62.70 GMP, so that the total payable to her by way of additional pension and GMP is £125.03. If the Claimant had not contributed either to SERPS or to a contracted-out scheme, her only additional pension would have been the significantly lower amount of additional pension inherited from her husband.

(Signed)	Charles Turnbull **(Commissioner)**
(Date)	18 September 2002