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Commissioner's File: CS/008/1990

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 27 September 1989 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that the decision of the adjudication officer dated 5 August 1987 refusing an increase of invalidity benefit in respect of the claimant's first wife should not be reviewed.

2. This is an appeal by the claimant, brought with the leave or the tribunal chairman, against the decision of the social security appeal tribunal of 27 September 1989.

3. On 25 February 1987 the claimant sought a review of his award of invalidity benefit to allow an increase in respect of his first wife, and of his six children who were living in Pakistan. On 5 August 1987 the adjudication officer decided that an increase of benefit was not payable for the claimant's wife. Presumably also there was a decision in respect of the children, but I am not concerned with this. On 20 October 1988 the adjudication officer refused to review his earlier decision of 5 August 1987. In due course the matter went to the social security appeal tribunal, who in the event upheld the adjudication officer.

4. However, in reaching their conclusion they specifically stated:-

"We did not consider the question of domicile at all."

But as the question of domicile was essential for determination of the case, the tribunal necessarily erred in point of law.

5. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute my own decision. In social security legislation "marriage" and related terms, eg "wife" were intended to incorporate the notion familiar to English law of "the voluntary union for life of one man and one woman to the exclusion of all others" (see R(G) 18/52, paragraph 19 citing Lord Penzance in Hyde v Hyde and Woodmansee L.R.1 P.D. 130 at page 133). However, in certain circumstances a polygamous marriage will be treated as a monogamous marriage, and the woman who is party to it will have the status of "wife" in social security legislation.

6. The crucial regulation is regulation 2(1) of the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 [S.I. 1975 No. 561], which provides that a polygamous marriage shall be treated as having the same consequences as a monogamous marriage for any day, but only for any day, throughout which the polygamous marriage is in fact monogamous. Regulation 2(2) of the regulation defines when a polygamous marriage shall be treated as monogamous. That particular provision reads as follows:-

" 2. (2) In this ... regulation:-

(a) a polygamous marriage is referred to as being in fact monogamous when neither party to it has any spouse additional to the other; and

(b) the day on which a polygamous marriage is contracted or on which it terminates for any reason, shall be treated as a day throughout which the marriage was in fact monogamous if at all times on that day after it was contracted or as the case may be, before it terminated, it was in fact monogamous."

7. The claimant's case is that he only had one wife under English law. The facts are as follows. The claimant married his first wife in Pakistan in 1948, and that marriage was contracted according to Islamic law. He came to England from Pakistan on 22 June 1957. In 1964 he returned to Pakistan for a short period, and married his second wife there in 1965. He returned to this country in 1966 with his first wife, and in 1968 his second wife came to the United Kingdom. It is also apparent that he visited Pakistan for nine months between 13 November 1974 and 30 August 1975. It is not in dispute that both marriages were performed in accordance with the necessary requirements of the law of the place where the ceremony of marriage was celebrated, i.e. Pakistan, but for them both to be recognised as marriages, albeit polygamous, under English law, the parties thereto had to have the capacity, under the laws of their respective domiciles, to contract marriage. Accordingly, if at the time of each marriage the claimant was still domiciled in Pakistan, then both

marriages were valid under English, law. It follows that the crucial issue is whether the claimants domicile was in Pakistan at the time of each marriage.

8. It is not in dispute that, at the date he contracted the first marriage, he was domiciled in Pakistan; but was he still domiciled there when in 1965 he married his second wife? He had in the intervening period come to England, and, according to him, had changed his domicile to that of England. If that was right, then he had no capacity to enter into the second marriage and the first marriage, although polygamous in nature, had under regulation 2(2) to be treated as monogamous. Accordingly the crucial issue was one of domicile, something which the tribunal declined to consider, thereby rendering their decision erroneous in point of law.

9. In common law the concept of domicile is regarded as the equivalent of a person's permanent home. There is a presumption in favour of the continuance of an existing domicile, and the burden of proving a change will lie on the party alleging it. It would seem that when the displacement of a domicile of origin by a domicile of choice is alleged, the standard of proof goes beyond mere balance of probability (see Scarman J In the Estate of Fuld (No. 3) [1968] P.675, 685-686). English law presumes that a person does not lightly abandon his domicile of origin, although this can be rebutted by strong evidence to the contrary. English law also presumes that a person does not acquire a domicile of origin in a country whose religion, manners and customs differ widely from those of his own country. This presumption is again rebuttable by evidence.

10. In the present case, had the claimant at the time of his second marriage decided to make his permanent home in the United Kingdom? The evidence is that he had not. He returned to Pakistan in 1964 and married his second wife there in 1965. Moreover, he went back again in 1974. Further, although his six children, three from each wife, were born in this country, they were sent back to Pakistan, and as far as I am aware, are still there. The claimant has really done nothing to show that he has abandoned his domicile of origin in favour of a domicile of choice in this country. The burden of establishing such a change is quite a heavy one, and he has failed to discharge it. Moreover, at the time of his second marriage he had only been in England for a few years, and at that stage it was even less likely that he had changed his domicile of origin than it might be today. Accordingly, I am satisfied that, at the date of the second marriage, the claimant was still domiciled in Pakistan, and that in consequence he entered into a marriage recognised in this country.

11. It follows from what has been said above that the claimant is polygomously married to two wives, and that such marriage cannot be regarded as monogamous. Accordingly, for the purposes of social security legislation, he has no "wife", and as a result he is not entitled to an increase of invalidity benefit in respect of a wife for any period. The adjudication officer was

right to refuse to review his decision of 5 August 1987, which in turn refused an increase of benefit.

12. Accordingly my decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) 2 March 1992