

Forfeiture Rule - Modification

WMW/HJD

Commissioner's File: CSP/2/92
*104/92

SOCIAL SECURITY ADMINISTRATION ACT 1992
FORFEITURE ACT 1982

REFERENCE BY THE ADJUDICATION OFFICER

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Frances FOGG (Mrs)

[ORAL HEARING]

1. I determine that the forfeiture rule precludes this claimant from receiving retirement pension based upon her husband's contributions. Section 4(1) of the Forfeiture Act 1982 applies. However I also decide, in exercise of the power contained in section 4(1A) and (1C)(b), that the forfeiture rule should be modified so that with effect from the date of this decision it will no longer apply to her claim for retirement pension. Finally, and in exercise of the power contained in section 4(1E), I direct that this decision shall apply to any future claim for a benefit or advantage under a relevant enactment, on which a question about preclusion by virtue of the forfeiture rule arises. The case is remitted to the adjudication officer for consequential action.

2. This is a reference by the adjudication officer to the Commissioner under section 4 of the Forfeiture Act 1982 arising out of a claim for retirement benefit made by the claimant on 5 March 1992. The basis of claim was that the claimant was over 60 and her husband was deceased. There is no question but that he satisfied the contribution conditions. The husband ("the deceased") died on either 31 March 1990 or 1 April 1990 - the date matters not for the purpose of this decision. What does matter is that he died because of a wound caused by a knife held by the claimant. On 4 September 1990 at the High Court of Justiciary sitting in Inverness the claimant, charged with murder, pled guilty to culpable homicide. That plea was accepted by the Crown and she was sentenced to four years imprisonment to run from 2 April 1990. Her claim to pension was made just after her release and submissions in the usual way were lodged both by the adjudication officer and on behalf of the claimant. She sought an oral hearing of the reference. That was granted by a Commissioner and ordered to proceed in private.

3. At the private oral hearing the adjudication officer was represented by Miss Amanda Grant, Solicitor, of the Office of the Solicitor in Scotland to the Department of Social Security. The claimant was represented by Mr Derek O'Carroll, Solicitor, of the Legal Services Agency, Glasgow. I am indebted to both for the full and careful analysis of the facts and the expositions of the law which they placed before me.

4. I have described the fatal incident in a neutral way because the first question to arise was whether the forfeiture rule applied at all. The onus in that regard rested upon the adjudication officer - paragraph 23 of R(G) 2/90. The forfeiture rule operates in cases where there has been an unlawful killing. And the standard of proof required to establish an unlawful killing approaches that in criminal cases - paragraph 22 of R(G) 2/90.

5. The material put before me for the adjudication officer started with the extract of sentence and a statement from the Crown Office. The last narrated that the couple had been married in 1961, the husband being some 8 years younger than the claimant. They had lived in Birmingham for about 20 years before coming North. Their relationship was described as -

".. such that when they were affected by drink, as frequently occurred, they were argumentative and violent towards each other. When not influenced by alcohol they appeared to be relatively harmonious. At the time of his death the blood alcohol level of the deceased was 341 milligrammes in 100 millilitres of blood, and that of [the claimant] 69 milligrammes in 100 millilitres of blood."

The background to the incident was described as that -

".. neighbours had heard raised voices from the house for a period of nearly 2 hours prior to the assault, and at about 11.45 pm [the claimant] sought assistance saying that her husband had been stabbed. She did not wish medical assistance to be summoned and was abusive and angry. She had initially claimed that her husband had been wounded and had had a knife when he returned to the house, but thereafter admitted that she had been responsible and had hidden the knife."

It was also recorded that the claimant suffered from epilepsy but that it was under control. It does not feature otherwise in the case.

6. At the outset of the hearing the claimant gave evidence. She elaborated the matrimonial history. It can, I think, fairly be summarised as follows: she had only known her husband for some three months prior to the marriage which took place in Northampton. They then lived for a short period in Lossiemouth, thereafter in Birmingham until about 1983 when they returned to Lossiemouth. From the outset the husband was violent to the claimant when he had had drink which was when he was able to afford it. She accepted that she was argumentative so that when the husband came in under the influence she would be abrasive. But he always started the violence. That violence was physical and included, amongst the grosser incidents, one when he had kicked her so damaging her that she had a left leg $2\frac{1}{2}$ inches shorter than the right; another when he broke all her teeth; another when he hit her in the left eye with the result that she can now hardly use it; another when in the course of a struggle with him holding a knife he nearly chopped her right hand off so that it now has 3 fingers virtually useless; and on other occasions she had broken ribs. On some occasions she also had been drinking. She was in fear of her husband whenever he had been drinking. A relative had tried in vain to get him to go for treatment. He kept the claimant short of money and on occasions went with other women. Nonetheless she described him as essentially good to her and it appeared clear that she had in her way been very fond of him and much regretted his death.

7. Coming to the day in question the claimant explained that for some four or five months previously the husband had been off drink, but on that day he got some money and resumed drinking. There came a stage when he left the house to go again to the pub. He returned with a drink for her. Sometime thereafter he said that he was going upstairs. She then went to make their evening sandwiches. She had a knife in her hand to cut the sandwich fillings. She heard someone trying the door and thought that it was a neighbour. When she opened the door her husband appeared, swore at her, and then kicked her.

As she fell she caught him on the shoulder with the knife. At the same time she said that she had used the knife to protect herself because of her damaged hip. The husband then subsided into a chair. The claimant saw that he was injured and went for a neighbour who was a nurse. She disputed that she had not wanted medical assistance. She did not think that she had been abusive and angry. Her husband had not had a knife and she had never so said. She had not intended to kill her husband - "If I had known he was dead I would have done myself in".

8. There was lodged on behalf of the claimant the social enquiry report prepared for the High Court. Apart from repeating the history of the marriage and its troubles, no doubt derived from the claimant, it contains a passage that -

".. when defending herself from her husband's attacks she inflicted injury on him and, on one occasion at least this also involved the use of a knife."

It also recorded that despite all the troubles -

".. she states that she cared very much for husband. She did think about leaving him on many occasions but it would seem that, whilst she had an extremely difficult life with him, she viewed the prospect of life without him as being just as difficult."

The conclusion was -

"[The claimant] presented as an open, friendly individual who was co-operative throughout both interviews. If her version of her life with [the deceased] is to be believed then, over a long number of years [she] was involved in an extremely destructive relationship with her husband, a relationship that had very few positives and a significant number of negatives."

9. It rather appeared to me that, if the claimant's account was taken at its highest as accurate, there was probably no assault involved and so no unlawful killing. The incident thus appeared to be an accident, or little more than that, in the course of a long history of a troubled relationship. But I had to remember that the onus was on the adjudication officer and he had demonstrated - indeed it could not be and was not disputed - that the claimant had confessed to culpable homicide and had been sentenced therefor. Moreover on her own evidence her plea had been made with the advice of senior counsel and in response to the original charge of murder.

10. What the whole papers in the case disclosed at the time of the claimant's appearance in Court is not before me. I am aware that problems and questions arise in such a situation. - I note that in R(G) 3/90 there was also a plea of guilty to culpable homicide. But even then the weight of the consequential conviction did not require to be determined nor, so far as I have been able to find, has the question otherwise arisen. I say at once that, so far as I can judge and it is notoriously difficult, there is no reason for me not to accept as substantially accurate the claimant's evidence in the sense that she was recalling the events of the evening in question as best she now could. Inevitably there is the risk of overlay or obliteration as a natural process following a tragic situation. It is impossible to assess or allow for that. No witness involved in the trial, or even in the events in question was called

called apart from the claimant. I appreciate that she alone had been present at the critical stage. But clearly in such a case the evidence of others must have been available to provide some perspective within which could have been judged the nature of the husband's death by knife wound. Such must have been the source of the Crown Office information to the effect that the claimant had hidden the knife. Even that act might not have counted against her. Then there was also what the neighbours were said to have heard. Even that would not necessarily have counted against the claimant since she accepted that there had been trouble earlier on the evening in question. On the other hand there is something of a conflict within her evidence as between being kicked and then just catching the deceased's shoulder with the knife as against some more deliberate act to protect her damaged hip.

11. In my judgment the correct starting point must be the extract conviction put forward by the adjudication officer. It *prima facie* discharges his onus of establishing that what happened between the couple was not only a killing but an unlawful one. The claimant's evidence tends to negative that. It indicates that the act involved had rather the colour of accident if also a tincture of self-defence. Paragraph 22 of R(P) 1/88 makes it clear that it is the act itself that has to be focused upon. That in turn was based upon the well known passage in Gray v Barr [1971] 2 QB 544, from Salmon LJ at page 581 - "... in each case it is not the label which the law applies to the crime which has been committed but the nature of the crime itself which in the end will dictate whether public policy demands the Court to drive the applicant from the seat of justice."

12. In regard to the act I have to bear in mind that the presiding Lord Commissioner sentenced the claimant to four years imprisonment. That will have been largely upon the basis of *ex parte* statements by the advocate depute and the counsel appearing for the claimant. There must have been therein facts accepted and agreed, or at least appearing so to his Lordship, to warrant such a sentence. In short the sentence speaks of some more deliberation or intent to assault as having been involved than the claimant ever admitted to me. I am therefore faced by an account at some odds with that most probably given, or accepted, expressly or impliedly, on her behalf when she was arraigned before the High Court. That raises sharply the question of the evidential value of the conviction.

13. The normal rule is that a conviction before a criminal court is not admissible in civil proceedings unless on a plea of guilty when it counts as an extrajudicial admission - Devlin v Earl 1895 3 SLT 166, MacKay v Bolton 1897 4 SLT 321 and para 389 of Dickson on the Law of Evidence in Scotland (3rd Edition). There are exceptions but they are of no relevance to these proceedings. There is a further speciality, namely that the verdict of a criminal court may be *res judicata* in a civil action if the parties and the interests are the same - Young v Mitchell 1874 1 R 1011 (a rather unusual situation where the Master and Servant Act 1867 could apparently ground both criminal and civil proceedings in a case of unfair dismissal). It is, I think, rather stretching matters to suppose that the Crown and its Department of Social Security are the same and that the interests in this case are the same. There is also, I conceive, some difference in the position of a Commissioner as against that of a civil court. The rules of evidence are more relaxed and there is an investigatory jurisdiction in the case of the former. As an example, it is far from unknown for convictions against plea to be founded upon by an adjudication officer in cases such as this, and of course the reference is in order that the question "shall be determined" - section

4(1) of the 1982 Act. I cannot return a *non probandum* answer. What I have just set out seems to square with R(G) 2/90 where a Tribunal of Commissioners said that it was the action in bringing about the death and not any subsequent conviction to which the forfeiture rule relates and, further, that the verdict of the Court is not the only, nor even a binding, factor to be taken into account by the Commissioner.

14. I have now to apply that legal framework to the material in this case in order to tease out the nature of the action that caused the death. Although persuasive the claimant's evidence on its own does not seem to me to be either of sufficient clarity or power to outweigh the plea tendered and what must have been accepted as the relevant facts to produce a four year sentence. I should add that I have paid no regard to material in a newspaper cutting produced for the claimant - if I had it would not have helped her case - for I regard such a source as of little evidential value. It follows that I am unable to accept that she has successfully challenged the adjudication officer's evidence showing that the killing of her husband was unlawful

15. But that is not quite the end of this part of the reference. It may be that a killing is unlawful yet the forfeiture rule does not apply. In Burns v Secretary of State for Social Services 1985 SLT 351 the Lord President (Lord Emslie) dealing with another knife injury case in a well known passage at page 353 said that -

"The general rule is, however, based upon public policy and one is accordingly concerned in the first case to identify, to use the words of the Lord Chief Justice in ex p. Connor, the nature of the crime itself, and to ask whether it is one which falls to be regarded as a matter of serious public concern. In my opinion it is clear, when the opinions in ex p. Connor and Gray v Barr [[1971] 2 QB at 568 to 69] are properly understood, that if the nature of a particular crime of culpable homicide is that it was committed by an assault with an offensive weapon, which is undoubtedly a matter of grave public concern, the general rule will and should be applied, save only, perhaps in highly exceptional circumstances which I find it difficult to envisage."

I cannot but agree that it is difficult to envisage such highly exceptional circumstances. It may be that R(G) 3/84 was such a case; the Commissioner so held although, with respect, I rather doubt his conclusion. There the deceased had been shot by the discharge of a gun held by his wife. But because of her then mental condition as accepted by the trial judge the Commissioner held the forfeiture rule not to apply. This case is quite different from that case. I have therefore held the forfeiture rule to apply here.

16. Turning to the question that follows, namely the question of modification, Mr O'Carroll properly put before me the case of Cross Petitioner, 1987 SLT 384 which concluded that modification so far as the Court's powers were concerned did not extend to 100% relief. That view was endorsed in CSG/4/89, by a Tribunal of Commissioners - now reported as R(G) 3/90. I have no hesitation in accepting and following those decisions. Equally I have no hesitation in following the views of Lord Cameron in Patterson, Petitioner, 1986 SLT 121 where he observed that -

".. it is necessary and proper to have regard to the nature and state of the relationship of the parties, both antecedent and operative at the time of the offence, as well as the circumstances and quality of the offence itself, including the degree, if any, of premeditation on the part of the offender which the evidence may have established. In addition I think it is always necessary to bear in mind the interest of the public and the suppression of crime, and to avoid such degrees of relaxation as might be open to misguided interpretation as encouragement to persons endangered by violence or threats of violence to take the law into their own hands."

I do not regard the additional point made in that quotation as being of direct concern to a Commissioner. His jurisdiction is limited by statute and I venture to doubt whether such an aspect of wider public policy is open to me. On the other hand I think it is open to me to take into account the interests of the contributors to the social security scheme which underwrites the contributory pension now sought. That interest is in avoiding a person getting an unfair advantage by early access to the scheme through an unlawful act.

17. Applying the foregoing considerations to the unhappy history of this marriage and to the circumstances of the killing I find no premeditation involved and that, even upon the basis upon which I have held the forfeiture rule to apply, there may have been involved something of the nature of self-defence, but excessive in the circumstances. Weighing the whole matter as best I can I have reached the view that the claimant should be relieved from the effect of the forfeiture rule with effect from the date of this decision.

18. The adjudication officer in his written submission asked me to determine whether or not this ruling was to apply to any future claim on which the same forfeiture rule arises - section 4(1E) and (1F) of the 1982 Act. I have acceded to that request.

19. Finally the adjudication officer has informed me that the claimant has consented to my also deciding her claim if appropriate and after I had determined the forfeiture rule questions that arose. He provided information thereanent as at the date of his written submission. Since my finding on relief only relates to a date some time thereafter I am hesitant to make a positive award and think it better simply to remit the case to the adjudication officer. If any dispute arises on that remit then leave is reserved to restore the case before me.

(signed) W M Walker
Commissioner
Date: 30 November 1992