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MHJ/1/LM

Commissioner's File: CG/004/91

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR WIDOWS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that -
 - (a) the unanimous decision of the Central London social security appeal tribunal given on 2 May 1990 is erroneous in point of law and is accordingly set aside;
 - (b) the claimant is not entitled to widow's benefit from and including 29 July 1985.
2. The claimant, to whom I shall refer as Mrs JD, appeals with leave of the chairman against the decision of the tribunal disallowing her appeal against the decision of the adjudication officer, issued on 18 April 1988, that she was not entitled to widow's benefit from 29 July 1985 because her marriage to her late husband, Mr PD, was celebrated under a law which permits polygamy, was not in fact monogamous at the relevant time and, therefore, for social security purposes she could not be accepted as the valid wife - and consequently widow - of the late Mr PD.
3. I held an oral hearing of this appeal on 29 July 1992. Mrs JD attended and was represented by Mr R Sarkar, who described himself as a family friend and who also interpreted for Mrs JD, who apparently does not speak English, and who gave evidence himself. The adjudication officer was represented by Mr N. Butt of the Office of the Solicitor to the Departments of Health and Social Security.
4. The background to this matter, which is not in dispute, is that Mr PD was born on 1 June 1935 in what was then India, but which later became East Pakistan and, following secession in March 1971, Bangladesh. Mr PD married Mrs JD according to Hindu law and custom on 4 July 1955. They have three children, born between 1957 and 1962 and in 1963 Mr PD came, by himself, to the United Kingdom. He returned to Pakistan and, latterly,

Bangladesh, for visits lasting about 7 months in 1966/67, 2 months in 1970 and 11 months in 1975/76. In about 1970 Mr JD was granted British citizenship. In 1968 Mrs JD had joined her husband here, leaving the children with their paternal grandparents by whom they were then brought up - there was apparently an unsuccessful application to bring them to the United Kingdom. Mr and Mrs D lived in rented accommodation, he worked for some time in the catering trade and, Mr Sarkar told me, he and Mr PD were in partnership running an Indian restaurant in Ealing between 1978 and 1980.

5. The restaurant business failed and on 3 March 1980 Mr PD went to Bangladesh, where he stayed for some 2 years and 9 months, until his return to the United Kingdom on 13 December 1982. During that period it is alleged that, on 19 May 1981, Mr PD went through a Hindu ceremony of marriage with a woman named Anima, to whom I shall refer as Mrs AD. It is, of course, that marriage which gives rise to the present appeal. Mr PD made one more visit to Bangladesh between May and November 1984; when his purpose, according to Mrs JD's statement dated 16 May 1991, was to -

"see mother and family/problems with second wife/to help out following flooding."

6. On 29 July 1985 Mr JD died as a result, it appears, of injuries he received during a robbery and, on 10 February 1986, Mrs JD claimed widow's benefit. On 5 October 1987 a claim for widow's benefit was made by Mrs AD, supported by an affidavit, sworn in Bangladesh on 9 September 1985, in which she gave particulars of her marriage on 19 May 1981. On 7 April 1988 Mrs AD's claim was disallowed as, on 18 April 1988, was Mrs JD's claim, on the ground that neither marriage was monogamous at the relevant time, the date of Mr PD's death.

7. At paragraph 7 of R(G) 1/70 it was held (following R(G) 18/52) that -

"... the word 'marriage' ... and related words such as 'husband' and 'widow', denote a matrimonial relationship of a monogamous character and do not include polygamous relationships ..."

It is, therefore, well settled and trite law that for social security purposes a widow is only entitled to widow's benefit if, at the date of her husband's death, in addition to his having the necessary contribution record, their marriage was in fact monogamous. That means that, at that date, there must be no other valid and subsisting marriage. Where a husband had entered into another marriage, or purported marriage, in order for his marriage to his first wife to be monogamous at the date of his death, it will have to be shown - among a number of possibilities which it is not necessary for me to go into - that the second wife was dead, the second marriage had been validly dissolved or, the issue in the instant case, was invalid at the date it was celebrated.

8. In the present case it is common ground that Mr PD satisfied the contribution conditions. It is clear that at the date of his death Mrs AD was alive and there has never been any suggestion that their marriage was terminated by divorce or otherwise. The issue in this case is whether or not the ceremony of marriage between Mr PD and Mrs AD was valid. It is not disputed that the ceremony took place (although I accept that Mrs JD was unaware of it until after her husband's death). There is evidence of the marriage in the papers before me, as well as Mr Sarkar's evidence to me that, after his return to the United Kingdom in 1982, Mr PD told him that he had married again as, he said, he needed someone in Bangladesh to look after his property in that country and there is also evidence that Mr PD's family in Bangladesh prevented Mrs AD from having anything to do with Mr PD's affairs.

9. In her appeal against the decision disallowing benefit, Mrs JD stated that -

"(1) I am the only lawfully married wife of my late husband."

However, no serious suggestion was made by either Mr Sarkar or Mr Butt, that the ceremony on 18 May 1981 was defective according to the Bangladeshi laws pertaining to Hindu marriage. In the absence of such evidence I must accept that the marriage was lawful and valid in Bangladesh. That is not an end of the matter and, indeed, brings me to what it was agreed is the only live issue in this appeal; namely the question of Mr PD's domicile on 18 May 1981.

10. In my view the question of domicile is crucial to this case, and it is the tribunal's failure to consider that matter at all which, in my judgment renders their decision erroneous in point of law. I need say no more about that, save that I set the decision aside and, pursuant to section 23(7)(a)(ii) of the Social Security Administration Act 1992, it is expedient that I should substitute my own decision.

11. It is necessary for me to examine the question of domicile in general terms, and I would note my indebtedness to the characteristically clear and succinct rules set out in Dicey and Morris's Conflict of Laws from which I draw the following principles. Under English law every person receives a domicile of origin at birth and, throughout his life, cannot ever be without a domicile and, further, at any one time, can only have one domicile. However, a person can acquire a domicile of choice by residing in a country, other than that of his domicile of origin, with the intention of staying there either permanently or indefinitely. All surrounding circumstances must be taken into account when determining whether a person has acquired a domicile of choice, including his motive for taking up residence initially and whether or not that residence was precarious. A person may abandon a domicile of choice only if he both ceases to reside and ceases to intend to reside there; it is not, for example, necessary to show a positive intention not to return, it suffices to prove an absence of intention to continue to

reside. When a person abandons a domicile of choice he either acquires a new domicile of choice or his domicile of origin revives.

12. In Henderson v Henderson [1967] P.77, Sir Jocelyn Simon P described domicile at page 79D/E as -

" ... that legal relationship between a person ... and a territory subject to distinctive legal system ... "

and continued at page 79E/F -

"The relationship arises ... from [the person] being or having been resident in such territorial area with the intention of making it his permanent home ... "

At the end of page 79 the learned President said -

"Though the principles which govern a change of domicile are well established, they are often difficult of application ... "

and, having considered the particular problems of England and Scotland which, of course, have no relevance to the present case, he went on at page 80c -

"In order to help resolve such difficulties the law has evolved further rules. First, clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities. Where residence however long is neutral or colourless or indeterminate in character, it will not give rise to an inference that the domicile of origin has been abandoned. Secondly, on the other hand, a mere 'floating intention' ... to return to the country of origin at some future period is not sufficient for the retention of the domicile of origin if the [person] has settled in some other territory subject to a distinctive system of law with the intention of remaining there for an indefinite time.

.....

So an intention of the [person] to return to his country of origin on such an indefinite event as when he has made his fortune ... will not suffice to prevent the acquisition of a domicile of choice."

13. Applying the principles which emerge from the above what then is the position in the instant case? As Mr Sarkar forcefully pointed out to me, during his 50 years of life Mr PD spent the major part as an adult in England - during the 12 years from 1963 (when he was 28) until November 1975 he was continuously in this country, apart from two visits, totalling about 9 months, to Bangladesh in 1966 and 1970. Initially he was

on his own but after about 5 years, in 1968, Mrs JD joined him and while, as Simon P put it, he might well then have had "an intention ... to return to his country of origin ... when he had made his fortune", every indication is that he and his wife were, despite being separated from their children and retaining property in Bangladesh, settled in England. I tried, with little success, to obtain from Mrs JD through Mr Sarkar some information about her and her husband's mode of life during those years and what, if any, plans he had made for the future. However, it seems that if Mr JD had any hopes and wishes he did not tell his wife about them; indeed she said that he never discussed his intentions with her, and he certainly never mentioned Mrs AD.

14. If Mr PD never acquired an English domicile of choice then of course he retained his domicile of origin. However, on the balance of probabilities I am prepared to accept that at some time after 1963 and before he obtained British citizenship in 1970 he acquired a domicile of choice in England. Mr PD's and Mr Sarkar's restaurant venture is some further indication of Mr PD's intention to stay in England permanently or indefinitely.

15. Did that domicile of choice continue after the failure of the restaurant and Mr PD's return to Bangladesh in 1980? In the absence of any evidence that when he left this country he intended to abandon any intention of residing here, I accept that his English domicile of choice continued, at any rate for the time being. However, it is necessary to look at what happened then. According to Mr Sarkar, who I have no reason to doubt was doing his best to help me, Mr PD embarked upon certain unsuccessful business ventures in Bangladesh during the 2 years and 9 months he was there. On 19 May 1981, he went through a ceremony of marriage with Mrs AD. Mr Sarkar sought to persuade me that, after Mr PD's return to England at the end of 1982, his, apparently somewhat half-hearted, efforts to bring Mrs AD to this country as a visitor - and not as his wife - , were indicative of his fear (and I cannot say whether or not it was well-founded) that she would not be permitted entry as another wife, and that, in some way which I did not follow, was evidence that he had retained his English domicile throughout. I cannot accept that it is evidence of anything of the sort. Certainly it is true that Mr PD returned to the United Kingdom, but there was nothing to prevent his doing so as he had a British passport and citizenship. Doing the best I can on the information before me, I am forced to the conclusion that Mr PD went to Bangladesh in 1980 with the hope and intention of establishing, or re-establishing, himself there. In those circumstances I find that, at some time between his arrival in Bangladesh and his marriage to Mrs AD, he abandoned his domicile of choice and his domicile of origin revived.

16. It follows that as at the date of his marriage on 19 May 1981 Mr PD considered himself and in fact was subject to the "distinctive legal system" of Bangladesh and that his marriage to Mrs AD must therefore be considered a valid and subsisting one in English law. That, I am only too well aware, is extremely unfortunate for Mrs JD. Had I been able to find

that Mr PD had retained his English domicile of choice at the time of his marriage to Mrs AD, then that marriage would be invalid in English law and Mrs JD would be the only lawful wife - and widow - for the purposes of the social security legislation. I regret that I am not able to so find, but upon careful consideration the conclusion I have reached seems to me the only possible and reasonable one on the facts before me.

17. I should add that once, as I have found, Mr PD contracted a valid polygamous marriage in Bangladesh in 1981, the situation is in no way altered by his subsequent return to England in December 1982. Even if - and it is not necessary for me to make any specific finding - Mr PD again acquired an English domicile of choice, that does nothing to invalidate his marriage to Mrs AD.

18. I have dealt with this case at some length in the hope that Mrs JD may understand that she is the victim of circumstances. Obviously no blame, or even responsibility, attaches to her. I regret the result for her sake and that this matter should have taken so long to resolve. In that connection I would, in conclusion, express my appreciation of the assistance I have received from the submissions dated 19 February 1991, 23 May 1991 and 12 March 1992, by the adjudication officer now concerned with the case.

19. Although Mrs JD's appeal technically succeeds it does not in fact help her as I substitute my own decision to the same effect as that given by the tribunal.

(Signed) M H Johnson
Commissioner

Date: 27 August 1992