CPAG

Commissioner's File No: CG/11/1991

CORRECTION TO COMMISSIONER'S DECISION

In the exercise of my powers under regulation 24 of the Social Security Commissioners Procedure Regulations 1987 and of the inherent jurisdiction of the Commissioners I make the following corrections to the decision signed on 30 March 1994.

(a) In paragraph 2, after the words "9 August 1988" insert the words "and to a widow's payment under section 24 of that Act".

(b) In paragraph 19, in line one, for the word "claimants", substitute the word "husband's".

(c) In paragraph 19, in line 14, for the word "not", substitute the word "also".

(d) In paragraph 19, in lines 15 to 17, for the words following "Social Security Act 1975 because" to the end of the sentence, substitute the words "she was under pensionable age at the date of the husband's death, which was after 11 April 1988, and the husband satisfied the contribution condition for widow's payment."

J Mesher
Commissioner

20 JUN 1994

Widows benefit - Polygamous Marriage - Domicile of Choice - CPAG.

41/94

JMe/1/LM Commissioner's File: CG/11/91

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR WIDOWS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The claimant's appeal is allowed. The decision of the Newcastle social security appeal tribunal dated 16 October 1990 is erroneous in point of law, for the reasons given below, and I set it aside. I consider it expedient to make the necessary further findings of fact and to give the decision on the claim (Social Security Administration Act 1992, section 23(7)(a)(ii)). That decision is set out in paragraph 2 below.

2. My decision is that the claimant is entitled to widow's pension under section 26 of the Social Security Act 1975 from and including 9 August 1988.

The background

3. The claimant was born on 10 March 1936. On 11 November 1955 she married her husband (whom I shall call "the husband") in Pakistan. It is accepted that the domicile of origin of both the husband and the claimant was Pakistan, whose law permitted polygamy and that at the date of their marriage neither had abandoned their domicile of origin. In June 1962, when he was 25, the husband came to England, leaving the claimant and their three children in Pakistan. He found regular employment in England. On 21 April 1967 he was registered as a citizen of the United Kingdom and Colonies. On 24 October 1969 the husband returned to Pakistan. On 8 January 1970 he went through a ceremony of marriage in Pakistan with a lady who was resident and domiciled in Pakistan (whom I shall call, purely for purposes of identification, "the second wife"). On 13 January 1970 he and the second wife arrived in England, where they lived together until the husband's death on 6 June 1988, having had four children. On 6 June 1970 a fourth child of the husband was born to the claimant.

4. In a letter dated 3 August 1988, and accepted by the

Secretary of State on 1 June 1989 as a claim in proper form, the claimant made a claim for widow's benefit. It was accepted that the husband's contribution record was sufficient to qualify the claimant for widow's benefit, but the adjudication officer on 15 August 1989 decided that the claimant was not entitled to benefit on the ground that she was not the husband's widow. The view was that where words like "marriage", "husband" and "widow" are used in the social security legislation they denote matrimonial relationships of a monogamous character. The claimant's marriage to the husband, under which the husband was capable of taking other wives, was not of a monogamous character and did not fall within regulation 2 of the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975. That regulation provides:

> "(1) Subject to the following provisions of these regulations, a polygamous marriage shall, for the purposes of the Social Security Act and the Family Allowances Act and any enactment construed as one with those Acts, 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.
>
> (2) In this and the next following 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 that 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."

The adjudication officer decided that the claimant's marriage to the husband was not in fact monogamous on the date of his death because of the husband's subsisting marriage to the second wife.

5. The claimant appealed against the adjudication officer's decision. She attacked the formal validity of the husband's marriage to the second wife under the domestic law of Pakistan. The appeal tribunal heard the appeal on 16 October 1990, in the absence of the claimant, who had said that she could not attend, being in Pakistan.

The appeal tribunal's decision

6. The appeal tribunal decided that the claimant was not entitled to widow's benefit from and including 9 August 1988. The appeal tribunal went into the question of the formal validity of the ceremony of 8 January 1970 with great care and thoroughness and rejected the points which the claimant had made on that question. That was a conclusion which the appeal

tribunal was clearly entitled to reach on the evidence before it. In the circumstances as they have subsequently developed I need give no more details of the decision. The appeal tribunal gave no consideration to the question of the husband's capacity to contract the marriage to the second wife.

Subsequent proceedings

7. The claimant applied for leave to appeal to the Commissioner, which was refused by the appeal tribunal chairman. She renewed the application to the Commissioner, who on 21 March 1991 directed the adjudication officer to make a submission with particular reference to the question of the husband's domicile at the date of his second marriage. In the submission dated 21 May 1991, the adjudication officer noted the report of an interview with the second wife on 2 May 1991 and submitted that it was for consideration by the Commissioner whether by 8 January 1970 the husband had acquired a domicile of choice in the United Kingdom. In reply, the claimant submitted that in the circumstances the husband had done so, and was not legally capable of marrying a second wife. The Commissioner granted leave to appeal on 22 August 1991 and later directed that there should be an oral hearing of the appeal. There followed a period of some confusion because, by mistake, a second file was opened relating to the claimant's appeal, but eventually the mistake was discovered and an oral hearing was fixed for 7 February 1994.

8. The claimant was unable to attend the oral hearing and was not able to appoint any representative to attend the hearing on her behalf. In her letter dated 1 January 1994 and received in the Commissioners' office on 13 January 1994 she said that she was sending more evidence in a fortnight. None had arrived by the date of the oral hearing, but I have been able to decide the appeal in the claimant's favour on the evidence currently available. At the oral hearing the adjudication officer was represented by Mr L. Scoon of the Office of the solicitor to the Department of Social Security. I am grateful to him for his assistance.

Was the appeal tribunal's decision erroneous in point of law?

9. Mr Scoon submitted that it was, on the ground that the appeal tribunal should, in the exercise of its inquisitorial jurisdiction, have investigated the question of the husband's capacity to enter a valid marriage with the second wife. I accept that submission. Although that question was not raised by the claimant or the adjudication officer before the appeal tribunal, the length and quality of the claimant's residence in England clearly raised the possibility that he may have acquired a domicile of choice in England and Wales. The decision dated 16 October 1990 must therefore be set aside. I have considered whether I should send the appeal back to a new appeal tribunal for rehearing, which would give the opportunity for the claimant and the adjudication officer to try to obtain further evidence related to the husband's domicile as at 8 January 1970. However,

in view of the long lapse of time since then, I incline to the view expressed by Mr Scoon at the oral hearing, that it is highly improbable that any worthwhile new evidence would come to light. I have concluded that I should make what findings of fact are possible on the evidence now available and give the decision on the claim.

The Commissioner's decision on the claim

10. Before dealing with the facts, I must examine briefly the law on domicile and the capacity to contract polygamous marriages. Mr Scoon assumed in his submissions to me that if the husband was domiciled in England and Wales at the time of his marriage to the second wife, that marriage would be void because by English law he could not marry a second wife while his marriage to the claimant subsisted. The same assumption is made in the decision on Commissioner's file number CG/29/1990, to be reported as R(G) 4/93. Section 11(d) of the Matrimonial Causes Act 1973 (re-enacting section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972) provides that if a person domiciled in England and Wales enters into a polygamous marriage outside this country the marriage is void. But that provision only applies to marriages entered into after 31 July 1972. In relation to marriages, like the one in issue in the present case, entered into before 1 August 1972, one must look to the common law for an answer. It is axiomatic that the concept of marriage in English law is of "the voluntary union for life of one man and one woman to the exclusion of all others" (Lord Penzance in Hyde v Hyde and Woodmansee (1866) LR 1 P & D 130, 133). Thus if the English common law governs the question of the husband's capacity to marry the second wife, the marriage of 8 January 1970 must be void. The predominant rule of English law for choosing which legal system governs the question of capacity to marry is that each party must have capacity by the law of his or her pre-nuptial domicile (the "dual domicile" rule). I need in the circumstances only refer to the statements of the law in Dicey and Morris on the Conflict of Laws (11th ed, 1987, pp.622-6) and Bromley's Family Law (7th ed, 1987, pp 23-7). That is because the only rule that is put forward in competition with the dual domicile rule is that the law of the intended matrimonial home should govern the question of capacity. In the present case, the matrimonial home of the husband and the second wife was clearly intended to be in England and Wales, so that the use of the intended matrimonial home test will produce the same result as the dual domicile test if the husband had acquired a domicile of choice in England and Wales by 8 January 1970. If the husband was domiciled in Pakistan at that date, more difficult questions might need to be resolved as to whether English law, as the law of the intended matrimonial home, could govern the question of his and the second wife's capacity to marry.

11. On the general question of domicile I adopt the succinct summary by Mr Commissioner Johnson in paragraph 11 of decision R(G) 1/93, itself drawing on the treatment in Dicey and Morris. It is in the following terms:

"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 an 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."

Mr Scoon referred me to decision on Commissioner's file number CS/8/1990 as an unreported decision. It is in fact reported as R(S) 2/92. In R(S) 2/92, and in CG/29/1990, Mr Commissioner Rice says that the concept of domicile is equivalent to a person's permanent home and asks whether the claimant in that case, whose domicile of origin was Pakistan, had decided to make his permanent home in England and Wales, so as to acquire a domicile of choice here. There is high authority that the notion of the permanent home lies at the root of the concept of domicile (see Lord Cranworth's remark in Whicker v Hume (1858) 7 HLC 124, 160, that by "domicile we mean home, the permanent home; and if you do not understand your permanent home I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it"). However, I consider that to put the intention required to acquire a domicile of choice in terms of an intention to make a permanent home in a country is liable to mislead. The person concerned does not have to have ruled out any possibility of return to the country of his domicile of origin. The intention required is of residence for an indefinite period. As it was put by Scarman J in In the Estate of Fuld (No. 3) [1968] P 674, 684:

"a domicile of choice is acquired only if it be affirmatively shown that the propositus [the person concerned] is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g. the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn: the ultimate decision in each case is one of fact - of the weight to be

attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities."

12. The passage just cited leads to another important issue - the standard of proof of the acquisition of a domicile of choice in the place of a domicile of origin. In Henderson v Henderson [1967] P77, 80, Simon P says:

> "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 choice has been abandoned."

It is to be noted that Simon P did not seek to define any specific standard beyond the balance of probabilities. In In the Estate of Fuld (No. 3), at [1968] P 686, Scarman J rejects the proposition that the standard required is of proof beyond reasonable doubt. He warns against reading statements in earlier cases as establishing presumptions as to the continuance of the domicile of origin. The powerful phrases used in those cases:

> "emphasise as much the nature and qualify of the intention that has to be proved as the standard of proof required. What has to be proved is no mere inclination arising from a passing fancy or thrust upon a man by external pressure, but an intention freely formed to reside in a certain territory indefinitely. ... Two things are clear - first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists; and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words."

I apply the approach put forward in those two decisions, which seem to me to be entirely consistent, in the present case.

13. I mention one other matter of law, because it is referred to in R(S) 2/92 and CG/29/1990. There it is said that "English law presumes that a person does not acquire a domicile of choice in a country whose religion, manners and customs differ widely from those of his own country". Dicey and Morris (11th ed, p.137) refers to such a presumption with apparent acceptance of its authority, but in Qureshi v Qureshi [1972] Fam 172, 193 Simon P describes it as "not so much a proposition of law as an expression of common experience: people are generally unlikely to make a permanent home in a country which is ethnically and culturally alien - particularly where one which is culturally and ethnically congenial is available as an alternative." The question in any particular case is of course not what is generally likely or unlikely, but what is the actual

intention of the particular person concerned. In my view, such a presumption does not exist as a matter of law. As suggested by Simon P, the factors he mentions are simply matters which may be borne in mind in assessing the evidence relating to the particular person concerned in the light of the general approach adopted in the preceding paragraph.

14. I now turn to the evidence relating to the husband in the present case. The bare bones of the history, which I think are not in dispute, are set out in paragraph 3 above. I have taken those matters in particular from the claimant's letter dated 31 October 1988 (pages T6 and T7), her affidavit dated 31 October 1988 (page T8) and the husband's national insurance record sheet (pages 72 and 73). I have preferred the date of the marriage between the claimant and the husband given by her to the date of 14 November 1955 which appears in the adjudication officer's decision on the claim, although the exact date is not crucial. I have also considered the husband's nationality certificate (pages T1 and T2). There is little other evidence of the husband's intentions up to 8 January 1970. The main item is the record of the interview with the second wife on 2 May 1991, referred to in the adjudication officer's submission dated 21 May 1991. Since that record was not copied into the documents specifically prepared for this appeal, but is in a back-file, I set it out in full:

> "My name is [...] and I live at 32 L... Road. I cannot remember what work [the husband] was employed in after 1962 to the date of his death.
>
> I returned from Pakistan after my marriage to rented accommodation in Woking, but I cannot remember the full address. It may have been 46 M... Road, Woking. I do not know anything about [the husband] applying for British Citizenship. He did not own any property or land in Pakistan. We both went back to Pakistan at least twice after 1970 but I can't remember any dates. [The husband's] intention was to make England his home after he came here to live in 1962.
>
> We returned to Pakistan for visits only to relatives. He wanted to be buried in England but as he was a Muslim his family (parents) wanted him buried in Pakistan. He did not leave a will."

The record was signed by the second wife and by the interviewing officer. That is rather indirect evidence, being a third-hand account of the husband's expressed intentions, but I give considerable weight to it. That is first, because from the point of view of the second wife her statement was not self-serving, and second, because her statement reports the husband's intentions at a time when so far as one can tell the legal question of where he was domiciled was not in his mind. The other factor which I should mention is that the claimant's letter dated 3 August 1988 states that the husband visited Pakistan in connection with the marriage of his children by the

claimant and with a view to arranging to take their fourth child, who was disabled, to England for treatment.

15. Mr Scoon submitted to me that the evidence was not sufficiently clear or positive to show that the husband had abandoned his domicile of origin in Pakistan by 8 January 1970. He pointed out that by that date the husband had only been in England for about eight years. He retained family ties in Pakistan and he must have thought that he had the capacity to enter into a valid marriage with the second wife. Naturalisation was a factor to be taken into account, but was not decisive. The evidence of the second wife of his intention to make England his home was consistent with an intention to make it his temporary home or to return to Pakistan on retirement or some other event. It was necessary to be circumspect in looking at what had happened after the crucial date for the identification of the husband's domicile. Overall, there was insufficient evidence to rebut the presumption of continuance of the domicile of origin in Pakistan.

16. I think that Mr Scoon's submission gave insufficient attention to the quality of the intention required to establish a domicile of choice. As explained in In the Estate of Fuld (No. 3), an intention to reside indefinitely in a territory, with only vague or floating possibilities of return to the territory of the domicile of origin, will suffice. The intention which the husband expressed, according to the second wife, to make England his home, seems to me to be of that quality. The fact that he may not, so far as one can now ascertain, have excluded the possibility of returning to Pakistan as his home does not prevent a domicile of choice arising in England and Wales. I agree with Mr Scoon that one must be circumspect in taking events after the crucial date as evidence of the husband's intentions at that time. However, I consider that it is proper for me, in considering the weight to give to the husband's expression of intention, to look at the consistency of his subsequent conduct with that expression of intention. As Lord Buckmaster said in Ross v Ellison (or Ross) [1930] AC 1, 6-7:

> "Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purpose for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression."

I consider that the return of the husband and the second wife to England almost immediately after the ceremony of 8 January 1970 to set up a matrimonial home here is strong confirmation of his intentions before that date, which are further confirmed by his continued residence here until his death. There are contrary indications in the husband's continued family ties with Pakistan, in that he had a wife and children there with whom there was a continued contact. Indeed, the fourth child of the claimant and the husband must have been conceived on his visit to Pakistan

from 24 October 1969. The length of the husband's residence in England and the fact that the religion, manners and customs of England are different from those of Pakistan are of little weight if there is sufficiently clear other evidence of the requisite intention. I take the husband's registration as a citizen of the United Kingdom and Colonies as entirely neutral. First, domicile expresses a connection with a territory subject to a distinctive legal system. In this case that territory is England and Wales, not the United Kingdom. Second, a person in the husband's position may have sought registration so as to secure the right of abode in the United Kingdom without any intention of residing indefinitely in England and Wales.

17. As explained above, I have preferred to approach this case without reliance on presumptions of law, but what has caused me anxious consideration is whether the evidence of an acquisition of a domicile of choice in England and Wales is sufficiently clear and firmly based to satisfy the judicial conscience. The amount of evidence available is very small, and I recognise that the absence of evidence inevitably works against those who seek to establish an abandonment of the domicile of origin. However, I consider that I am entitled to take into account the nature of the jurisdiction which I am exercising, the resources of the parties and the difficulties of obtaining reliable evidence about a person's state of mind many years in the past. In those circumstances, I am satisfied that the evidence of an acquisition by the husband of a domicile of choice in England and Wales at some date prior to 8 January 1970 outweighs the evidence to the contrary and to such a degree as to satisfy my judicial conscience. In particular, I find the evidence of the husband's expressed intention, confirmed by his subsequent actions, to be persuasive. I am also quite satisfied that the husband did not abandon his domicile of choice before 8 January 1970. His residence in England and Wales was not abandoned by his visit to Pakistan from 24 October 1969 or subsequent visits, nor was his intention to reside here indefinitely.

18. The result is that since the husband was domiciled in England and Wales on 8 January 1970, and the intended matrimonial home of the husband and the second wife was England and Wales, he was not capable of entering a valid marriage with the second wife. That marriage is void under English law. The husband's marriage to the claimant has therefore throughout been monogamous in fact and if the claimant needed the assistance of regulation 2 of the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 on the date of the husband's death it would be available. However, their marriage, although polygamous (in the sense of potentially polygamous) at the outset, became monogamous as a matter of law when the husband acquired a domicile of choice in England and Wales (Ali v Ali [1968] P 564, 575, and R v Sagoo [1975] QB 885, 890). That domicile of choice endured until his death and therefore immediately before his death the claimant was monogamously married to him. The claimant was no doubt domiciled in Pakistan at that time, but the law of Pakistan did not permit her to take another husband during the subsistence of her

marriage to the husband.

19. Therefore the claimant was the claimant's widow for the purposes of sections 24 to 26 of the Social Security Act 1975, as in force at the date of the husband's death. No other obstacle to her entitlement to widow's pension from that date, apart from her not being his widow, has been put forward. She was aged between 45 and 65 at that date and so satisfies subsection (1)(a). Her claim for the period beginning on 9 August 1988 was made well within the limit of 12 months under regulation 19(6)(b) of the Social Security (Claims and Payments) Regulations 1987. I note that the form AT2 gives the date of claim as 3 August 1989, but that is inconsistent with the dating of the letter by the claimant and the dating of the acceptance of the form of claim on behalf of the Secretary of State. The claimant is not entitled to a widow's payment under section 24 of the Social Security Act 1975 because she was not living with the husband as husband and wife at the date of his death (see subsection (2)). She is not entitled to a widowed mother's allowance under section 25 of the Social Security Act 1975 because in her circumstances she could not, by virtue of section 13(3) of the Child Benefit Act 1975, be entitled to child benefit in respect of any of her children by the husband while she was outside Great Britain (see section 25(1)(a) of the Social Security Act 1975). The claimant would prima facie be disqualified for receiving widow's pension by virtue of section 82(5)(a) of the Social Security Act 1975 while she was absent from Great Britain, but that disqualification is lifted by regulation 4(1) of the Social Security Benefit (Persons Abroad) Regulations 1975. There thus seems to be no obstacle to the claimant's entitlement to widow's pension from and including 9 August 1988. I leave it to the adjudication officer to calculate the amount of pension payable to the claimant. If there is any dispute as to the proper amount payable, the matter is to be returned to the Commissioner for further decision.

Conclusion

20. The claimant's appeal is allowed and my decision on her claim is as set out in paragraph 2 above.

(Signed) J Mesher
Commissioner

Date: 30 March 1994