Polygamous marriage & widow's benefit CPAG

DGR/16/SH

★ 109/92

Commissioner's File: CG/029/1990

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR WIDOW'S BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 17 November 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 award of widowed mother's allowance from and including 15 March 1983 should be reviewed and revised, so that no such allowance is payable from that date, but that the overpayment of such allowance amounting to £463.75 in respect of the inclusive period from 15 March 1983 to 5 April 1988 is not recoverable from the claimant.

2. This is an appeal b y the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 17 November 1989.

3. The question for determination by the tribunal was whether an award of widowed mother's allowance from and including 15 March 1983 should be reviewed and revised, so that no such allowance was payable from that date and, if it should be so reviewed and revised, whether the overpayment of benefit for the inclusive period from 15 March 1983 to 5 April 1988 in the sum of £463.75 was recoverable from the claimant pursuant to section 53 of the Social Security Act 1986 (now section 71 of the Social Security Administration Act 1992). In the event, the tribunal, upholding the decision of the adjudication officer on the question of entitlement, confirmed that the award should be reviewed and revised as from 15 March 1983, but allowed the appeal as regards recovery of the sum overpaid, so that the claimant was not required to repay.

4. In social security legislation "marriage" and related terms, eg. "wife" "widow" are 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 a party to it will have the status of "wife", or as the case may be "widow", in social security legislation.

5. The crucial regulation is regulation 2(1) of the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975, 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. 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."

6. The claimant's case is that the only lawful marriage entered into by her late husband ("the deceased") was to herself on 23 June 1949. She accepts that he also went through a form of marriage in Bangladesh on 14 August 1960 to one Gul Bahar Bibi but contends that this was invalid. Although she did not make the point to the tribunal, she now argues that such marriage was contracted without her consent and was therefore invalid. But irrespective of this issue, it was incumbent upon the tribunal to satisfy themselves that at the date of the "second marriage" the deceased had capacity to contract it. This in turn depended upon whether he was domiciled in Bangladesh (formerly East Pakistan). For if he had acquired a domicile of choice in England, then he had no capacity to enter into a second marriage whilst the former one still subsisted. However, if he continued to be domiciled in Bangladesh, he retained the necessary capacity. Moreover, if he retained the requisite capacity, as it is not in dispute that the form of that marriage was in conformity with the rights of Islamic law, the second marriage was valid, and as both wives were living at the date of his death, then the marriage to the claimant could not be treated as monogamous. And if the marriage to the claimant was not

treated as in fact monogamous, then neither the claimant, nor for that matter the second wife, was entitled to widow's benefit.

7. Unfortunately, the tribunal do not appear to have considered the question of domicile, or if they did, they have not referred to it in their decision, and as a result I must set aside their decision as being erroneous in point of law. However it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute my own decision.

8. As regards the question of domicile, at the time of the second marriage what was said in paragraph 9 of decision CS/008/1990 should be borne in mind.

> " 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 (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 choice in a country whose religion, manners and customs differ widely from those of his own country. This presumption is again rebutted by evidence."

9. The information held on the DSS Overseas Branch File indicates that the deceased" was employed as a merchant seaman. He was resident in England for the following periods:-

> " 14th December 1954 to 27th February 1960
>
> 24th November 1963 to 4th January 1967
>
> 22nd August 1967 to a date unknown."

Both of the deceased's marriages took place in Bangladesh, and all his children were born there. There is no evidence that his family were ever resident with him in this country. It is not known if the deceased owned property in England, but there is a suggestion that he owned land in Bangladesh, which was sold by his "wives" after his death. The deceased died in Bangladesh. It is not known whether he was registered by the Home Office as a citizen of the United Kingdom by the Home Office.

10. In the light of the above evidence, I do not consider that it has been established that the claimant had acquired a domicile of choice in England at the time of his second marriage, namely 13 August 1960. It follows that he had capacity to contract that marriage, and it is not in dispute that the form of that marriage was in conformity with the requirements of the law of Bangladesh.

11. However, the claimant now contends - something, which she did not allege before the tribunal - that that marriage was invalid because the deceased took his second wife without the claimant's knowledge and consent contrary to Islamic law. As I am now determining the matter myself, I can properly take into account that particular contention.

12. In determining whether there is any substance in the claimant's argument, it is necessary to consider Islamic Law. I have obtained an opinion, on the point taken by the claimant, from Mr Ian Edge, an expert on Islamic Law which appears in the Schedule attached to this decision. Manifestly, for the reasons there given there is nothing in the claimant's contention.

13. My decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) **1 December 1992**

SCHEDULE

1. I am a lecturer in Law in the Law Department of the School of Oriental and African Studies in the University of London where I have for the past twelve years taught and completed research on Islamic Law. I am the founding Director of the Centre of Islamic and Middle East Law established in 1989

   I am also a barrister practising at Grays Inn Chambers, Grays Inn and have given many opinions on Islamic Law, including the Islamic Law applicable in Bangladesh.

2. I understand the main and pertinent facts to be as follows. The claimant Arosh Bibi was the first wife of Samir Uddin whom she married in East Pakistan (as it was then) on 23 June 1949. At all times she has been resident and domiciled in Bangladesh (as it is now). The said Samir Uddin died on 25 October 1970 and in 1984 the Claimant made a claim in the UK for widowed mother's allowance which was awarded from 15 March 1983 and paid for five years until it was stopped on 5 April 1988. The payment of the allowance was reviewed in 1988 and stopped on the grounds that the claimant's marriage had been in fact actually polygamous it having been disclosed that the said Samir Uddin married a second wife, Gulbakar Bibi, in East Pakistan on 13 August 1960. It is against that decision to stop payment that the claimant appeals.

3. I am therefore asked to explain the circumstances of Bangladeshi Law as to the validity of these two marriages to determine whether or not the [claimant] was a spouse of an actually polygamous marriage.

4. The state now known as Bangladesh has suffered two changes of international status in the last fifty years and hence the exact dates of the occurrence of the underlying facts is of great importance.

   Before 1947 Bangladesh was part of undivided India ruled formally by the British. Islamic Law applied in undivided India to muslims and was the traditional law of the mainstream school of Islamic Law that is the Hanafi school. Some few reforms of the traditional law had been made; mainly the Child Marriage Restraint Act 1929 (providing for higher minimum ages of marriage than classical Islamic Law) and the Dissolution of Muslim Marriages Act 1939 (which gave women access to the courts for certain types of judicial divorce).

   In 1947, on the departure of the British, the Indian subcontinent was split into two states: present day India and Muslim Pakistan. Pakistan at that time comprised both West Pakistan and East Pakistan. Early legislation of the united Pakistan adopted the laws of undivided India as far as they applied so that there was legal continuation. The main

provisions are found in the Pakistan (Adoption of Existing Pakistan Laws) Order 1947.

From the time of partition from India in 1947 until 1971 (when East Pakistan gained its Independence) the laws of united Pakistan applied equally in both West and East Pakistan. In 1961 an important Ordinance was passed (during a period of martial law) which amended in some important ways the Islamic Law applicable in united Pakistan. This was the Muslim Family Laws Ordinance 1961. It had provisions for registration of divorces, for the limitation of polygamous unions and for changes in inheritance law and was quite controversial. It applied equally however to West and East Pakistan.

In 1971 East Pakistan broke away from West Pakistan and established itself as the newly Independent muslim state of Bangladesh. By the Bangladesh (Adoptation of Existing Bangladesh Laws) Order 1972 then all the laws enforceable in the courts of Bangladesh before 1971 are to be considered applicable after Independence. Hence, again there was legal continuity.

Some modifications to Islamic law have occurred since 1971 - particularly amendments to the Muslim Family Law Ordinance, but these do not concern us on the facts of this case.

5. From the above it is clear that all the legal events of this case occurred during the period of the existence of united Pakistan in a part of that state named East Pakistan. The second marriage vitally occurred on 13 August 1960 and hence before the coming into force of the Muslim Family Laws Ordinance 1961.

Thus, the Islamic Law applicable to the question of the validity of these two marriages is that of united Pakistan after partition but before the Muslim Family Laws Ordinance. It is quite clear that the Islamic Law at that time permitted polygamy to muslim men and did not attempt legally to dissuade or put obstacles in the path of a man who wanted to marry a second wife. Under that classical Islamic Law the husband would be under no duty to inform his first wife of his taking a second polygamous spouse, let alone seek her consent.

Therefore as long as the minimal formalities were carried out and the second marriage in 1960 can be adequately proved then it was a perfectly valid polygamous marriage at the time it was entered into and nothing in Bangladeshi Law since that date has caused that status to be altered.

6. As my opinion is that the Muslim Family Laws Ordinance 1961 is not relevant or applicable to this claim I have not considered it necessary to discuss the points raised by the interpretation of section 6(5) of that Ordinance. Were it necessary, my view on that section would have been that it had no effect on the validity of the marriage and hence would not have helped the claimant.