Presumption of Marriage After Invalid Ceremony & Cohabitation 41/98

MJG/CM/9

Commissioner's File: CG/11331/1995

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal from the decision of the social security appeal tribunal dated 3 May 1995 as that decision is erroneous in law and I set it aside. My decision is that, for the purpose of the claim made on 7 February 1994 for widow's benefit, it has been established that the claimant is "a woman who has been widowed" within the meaning of section 38(1) of the Social Security Contributions and Benefits Act 1992. Accordingly, provided the other requirements (eg contribution conditions) of that section are satisfied, the claimant is entitled to widow's pension in respect of the death of her husband on 23 January 1994 and the adjudication officer should forthwith make the appropriate award: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a woman born on 4 August 1939, from the unanimous decision of a social security appeal tribunal dated 3 May 1995 which dismissed her appeal from a decision of an adjudication officer issued on 12 August 1994, the relevant terms of which were, "It has not been established and cannot be presumed that there is a valid marriage between [the claimant] and [ZSB]. This is because there is no evidence of a valid ceremony in accordance with the Marriage Act 1949. Therefore it is not valid for social security purposes."

3. This case has, because of its complexity, been the subject of three oral hearings before me. At the conclusion of the first two hearings, on 28 August 1997 and 28 October 1997 respectively, I issued Directions requiring further written submissions and information. The last

hearing, on 30 April 1998, was a joint hearing of this and another case (on Commissioners file CG/6957/95) involving the same point, on which however a decision was deferred because in that case (unlike this one) there was a question whether or not there had been a marriage in India as well as any marriage in England. At the hearing on 30 April 1998, the claimant was present with her son but was not otherwise represented. On a previous occasion she had been represented by her daughter, who is a Solicitor. Detailed written representations have been made by her children on her behalf. I am grateful for them. At the hearing on 30 April 1998 Mr Gurdial Singh, of Counsel, appeared for the claimant in the other case. He addressed me on the general issues which are common to both cases. I am much indebted to him for his researches and for his submissions. At all three hearings the adjudication officer was represented by Mr Sriskandarajah, of the Office of the Solicitor to the Departments of Health and Social Security. I am also much indebted to him for his researches and submissions.

4. The claimant's husband died on 23 January 1994. A copy of his death certificate has been made part of the appeal papers in this case (No T23). Shortly thereafter, on 7 February 1994, the claimant made a claim for widow's benefit, stating that she had married her husband on 27 June 1956. The ceremony on which she relies as being a marriage ceremony in England (there being no marriage in any other country) took place on 27 June 1956 at a Sikh Temple in West London. A letter from the General Register Office for England and Wales dated 25 June 1997 indicates that that Temple was not registered for marriages until 28 September 1983.

5. Registration of buildings for marriages in England is provided for by the Marriage Act 1949 (which is still the principal Act), sections 41-52. It is clear from those sections that registration of a building for marriage purposes can operate only as from the date of registration and is not retrospective.

6. The position is therefore that when the claimant went through a formal ceremony of marriage according to Sikh religious rites (with witnesses, members of the family, etc, present) in the Temple in question on 27 June 1956, that Temple was not a building registered for marriages. A letter dated 19 September 1997 to Mr Sriskandarajah from the Vice-President and Authorised Person of the Temple in question states,

> "It is a common knowledge that religious marriages are being performed in the Sikh Gurdwaras [i.e. Temples] all over the world. Although such marriages called 'Anand Karj' are recognised in India but [sic] in U.K. these are treated as only blessings in the place of worship and I

believe that the people undergoing such marriages are told about this."

7. In response to that, a written submission on the claimant's behalf states,

> "I would also like to bring to the Commissioner's attention that the last paragraph of the letter from the Central Gurdwara, .. cannot be construed to reach [a conclusion adverse to the claimant]. A Sikh marriage, performed according to religious customs and rites, for any Sikh, is a marriage in itself and not merely blessings."

8. Whatever is the correct position, no doubt it would be possible after such a ceremony in an unregistered Sikh Temple for the parties to have gone thereafter to eg a Registrar's Office for a civil wedding ceremony. That however did not occur in the present case. It should also be noted that there is no certificate of marriage in this case. It has also been confirmed that there appears to be no Act of Parliament, Public or Private, relating to marriages in Sikh Temples.

9. After the ceremony in the Sikh Temple on 27 June 1956 the claimant and her 'husband' lived together in what was clearly a 'monogamous' relationship for some 37 years, bringing up the children of the 'marriage'. The husband's income tax and social security contributions were assessed on the basis that he was a married man.

10. The adjudication officer's written submission to the tribunal appears to have been on the basis that the ceremony at the Sikh Temple on 27 June 1956 was not a valid marriage (a) because the building was not registered for marriages and (b) because in any event the ceremony was not apt to create a marriage. Point (b) has not been pursued at the stage of appeal to the Commissioner in either of these two cases. I consider that to be a correct course of action. The real issue is whether or not what was undoubtedly according to Sikh religious rites a marriage ceremony was invalidated by its taking place in a building, the Temple, which was not registered for marriages at the time, though it became registered subsequently. I have dealt with the case on that basis. In any event, in so far as there is any question mark over the actual nature of the ceremony, that is in my view answered by the presumption from cohabitation to which I refer below.

11. The tribunal of 3 May 1995, while saying that they had "enormous sympathy with the appellant's predicament", gave as their reasons for dismissing the appeal, "Unfortunately, at the time of her marriage ceremony the Sikh Temple was not registered for performing marriages, nor had the marriage been registered in a Registry Office. As a result there has not

been a valid ceremony in accordance with the Marriage Act 1949, and this meant that the appellant is not entitled to widow's pension." It is only fair to the tribunal to say that the issues that have subsequently been gone into at the stage of the appeal of the Commissioner were not all before the tribunal. I have held their decision to be erroneous in law, not because of any deficiency in findings of fact and reasons for decision, but because I have come to the conclusion that the fact that the Sikh Temple was not at the relevant date in 1956 a registered building is not fatal to the claim by the claimant to be the widow of Mr ZSB because there operates in her favour the presumption of marriage from long cohabitation, to which I refer below.

12. Before I deal with that presumption, I ought perhaps to note that reference has been made by the parties to the provisions of section 49 of the Marriage Act 1949 ("Void marriages") paragraphs (a), (b) and (e) of which provide that if a person "knowingly and wilfully" intermarries either without notice being given to the Registrar or without the notified Registrar issuing a certificate or in a building other than that specified in the notice to the Registrar, the marriage shall be "void". However, I do not consider that (contrary to Mr Singh's submissions) the undoubted fact that the claimant here had no "mens rea" , i.e. did not "knowingly and wilfully" violate marriage law, means that the marriage is automatically valid. Section 49 is not an enabling but a penalising section. The scheme of the 1949 Act is to classify marriages into certain categories, of which the present one is Part III of the Act, i.e. "Marriage under Superintendent Registrar's Certificate." There was no such marriage in 1956 in the ceremony in the Sikh Temple because the Registrar was never notified. Section 49 is directed to infringements of the detailed rules concerned with marriages under Part III of the Act not with marriages altogether outside the preview of Part III of the Act. Nevertheless, the fact that "mens rea" is needed for a marriage to be void in those circumstances is an indication of a theme which undoubtedly runs throughout the legislation and the case law. That there is that it is not only in the interests of the parties but is also in the public interest that wherever possible bona fide ceremonies of marriage should be upheld. That is particularly so in my view in a case of this kind where the claimant was one of the first Sikh immigrants to this country. She bona fide married according to the customs and rites of her own religion. That deserves the greatest possible recognition in this country.

13. During the course of these proceedings, I requested submissions from the parties as to whether there was, ".. any room for the operation in this case of the presumption of marriage from cohabitation after ceremony (see Halsbury's Laws of England, Fourth Edition, Vol.22, para.993)?" The presumption of marriage can in fact arise, not only under the case law summarised in paragraph 993 of Halsbury's Laws, but

also paragraph 992. I now set out both those paragraphs (though not the footnotes referring to the case-law on which they are based). They read,

> "Presumption of marriage
>
> 992. Presumption from cohabitation without ceremony
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> Where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, even if there is no positive evidence of any marriage ceremony having taken place, and the presumption can be rebutted only by strong and weighty evidence to the contrary.
>
> 993. Presumption from cohabitation after ceremony.
>
> Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence, or the death of a former spouse."

Prior to the hearing before me on 30 April 1993, submissions had been solely on paragraph 993, "Presumption from cohabitation after ceremony". However, at the hearing on 30 April 1998 the matter was widened because rightly in my view Mr Gurdial Singh submitted that paragraph 992 (presumption where no ceremony) was also relevant. I consider both of those paragraphs now.

14. Paragraphs 992 and 993 are both concerned with a single common law presumption from cohabitation of a relevant length of time and other circumstances. (There is no doubt here that the relevant factual circumstances are present - 37 years of 'monogamy' with children of the union). After an examination of the case law which is cited by Halsbury to substantiate these two paragraphs, it appears to me that the presumption has some elements of a presumption of law rather than just a presumption of fact. In some ways it is akin to the position in Scotland where a valid marriage may be proved by "cohabitation with habit and repute" (see R(G) 1/71; R(G) 4/84; and R(G) 5/83). The adjudication officer, however, submits that there is no room for the presumption in the circumstances of paragraph 993, i.e. "Presumption from cohabitation after ceremony", because the presumption is rebutted by the undoubted fact that the 'marriage' in 1956 in the Sikh Temple took place in an unregistered building. However, that fact does not stop the presumption from otherwise arising. It could possibly for example be presumed

that there had been some kind of civil ceremony afterwards although there is no evidence of this.

15. The extensive case-law cited by Halsbury to support paragraph 993 assists and in particular the High Court's decision in Re Shephard, George v. Thyer [1904] 1Ch.456. In that case it was held that the presumption of marriage from long cohabitation applied even where it was known and admitted that the only marriage ceremony was a purported marriage in France which was invalid according to the laws of France. That decision seems to me to be completely in point and, although technically not binding on me, has of course high persuasive force. Nevertheless, I note that in paragraph 11 of R(G) 2/70, a decision of Sir Rawden Temple a former Chief Commissioner and an expert on matrimonial law, it is said,

> "11. It would not, however, be right to part with this aspect of the case without referring to Re Shephard, George v. Thyer [1904] 1Ch.456. There the parties gave evidence that the only ceremony of marriage through which they went took place in France. The case was argued and decided on the basis, accepted by the learned judge, that expert evidence showed that the ceremony could not have been valid, and it was submitted that if the parties were not married by that ceremony they were not married at all. Nevertheless in the parties' long cohabitation after the ceremony, a marriage was presumed. I regret that I do not find any great assistance in the case. It is clearly unsupported by Sastry Velaider Aronegary v. Sembecutty Vaigalie (1881) 6 App.Cas.364 which it purports to follow, and where the decision depended upon a ceremony of marriage, prima facie valid. If the only marriage ceremony which the parties claimed to have gone through is invalid, the whole force of any presumption in favour of their marriage is destroyed and it is impossible to treat an invalid marriage as presumptive evidence of a valid marriage. An explanation of Re Shephard to be found in the books, is that the learned judge must have rejected the evidence of the parties as to what occurred in France. But the claimant's evidence in this case is quite clear, and was accepted, and I feel unable (with respect to the learned judge) to follow Re Shephard, which was undoubtedly decided as a hard case. And hard cases are, I think, to be cautiously regarded. Where there is evidence that the marriage asserted can only derive from the particular ceremony having validly taken place, it seems to me that the formal validity of that ceremony is unaffected by the fact of cohabitation thereafter. If such cohabitation is relevant, it may have reference to the possibility that the parties thought they were married, and validly married. But it has no bearing on the validity."

16. I naturally pay the greatest of respect to those statements by the learned Commissioner and I bear in mind the system of precedent of Commissioners' decisions, enjoined by a Tribunal of Commissioners in R(I) 12/75, paragraphs 21 et seq. Nevertheless, in the present case, I consider R(G) 2/70 distinguishable. In that case the claimant was relying on an alleged ceremony of marriage in an English registry office and not, as here, on a marriage according to different religious rites in a Temple of that religion. Moreover Re Shephard is, so far as I am concerned, a High Court decision, in pari materia, which I should follow unless there is any good reason why I should not. I have carefully read the entirety of the Law Report of Re Shephard. It seems to me that it carries the proposition for which it is cited and that I should follow it. There does not have been drawn to the attention of the learned Commissioner who decided R(G) 2/70 the possibility that, where a ceremony that the parties have relied on is shown to have been invalid, one ought then also to consider the authorities summarised in paragraph 992 of Halsbury's Laws i.e. "Presumption from cohabitation without ceremony" (my underlining).

17. I now therefore turn to the point (strongly made by Mr Singh) as to the application of paragraph 992, "Presumption from cohabitation without ceremony". It should be remarked that, if a person is able to have a marriage presumed where there has been no ceremony at all (paragraph 992), it would hardly be equitable that a person who has gone through a bona fide ceremony thought to be a marriage (and entered into long cohabitation on the strength of it) should be in a worse position. The legal position must in my view be this. First one asks whether or not a particular ceremony can be presumed to be have been a valid marriage. If it is decided that it cannot be so presumed, then one treats the case thereafter as if there has been no ceremony at all and looks at the remainder of the facts to see whether there can be presumption from cohabitation without ceremony. If there has been a long 'monogamous' cohabitation with nothing to cast any doubt on the facts of the situation (i.e. the strong and weighty evidence to the contrary to which Halsbury refers), then the fact that there may have been an invalid ceremony in the first place does not in my view prevent there being a presumption of marriage from the facts themselves. I note for example that Halsbury cites in the notes to paragraph 992 the case of Re Green, Noyes v. Pitkin (1909) 25 T.L.R.222 for the proposition that the presumption from cohabitation without ceremony was applied in a case where there had apparently been a foreign 'marriage'. It would be erroneous in my view to treat the two situations referred to in paragraphs 992 and 993 of Halsbury as if they were mutually exclusive. They are but classifications of one overall common law presumption, which in my view should undoubtedly on the facts of this case be applied. For that reason I have held the claimant's claim to be the widow of the deceased to be justified.

18. Lastly I should comment that all of the arguments in this case have been based on the undoubted position that, when asking whether or not a person is a "widow" under social security legislation, it has to be shown that there had been a valid marriage according to English law if the marriage took place in England i.e. the lex loci celebrationis must be observed. That "lex" includes of course the common law presumption of marriage from long cohabitation. That there must be a valid English marriage, according to the lex loci, is a proposition which was recently affirmed by the Court of Appeal in Fuljan Bibi v. Chief Adjudication Officer, 25 June 1997 in the context of polygamous marriages. There was quoted at paragraphs D and E of page 6 of the transcript of that decision the well known definition of marriage given by Lord Penzance in Hyde v. Hyde and Woodmansee [1886] L.R.1 P and D 130 at 133, defining marriage as follows,

> "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

19. In the present case there is nothing to suggest that the Sikh marriage ceremony and the consequences thereof in the eyes of the Sikh religious authorities was other than such a voluntary union for life of one man and one woman to the exclusion of all others. In my view that 'marriage' is validated by the common law presumption from long cohabitation, in pursuance of the policy of the law that, in the absence of the clearest possible reason why there should not be such a presumption, a ceremony of 'marriage' bona fide entered by parties who thereafter who live monogamously and bring up children of the union should be respected and accorded the proper legal status of marriage.

(Signed) **M J Goodman**
Commissioner

(Date) 7 May 1998