

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CFP/2301/2018

ON A REFERENCE UNDER SECTION 4(1) OF THE FORFEITURE ACT 1982

Before: Mr E Mitchell, Judge of the Upper Tribunal.

Determination under section 4(1) of the Forfeiture Act 1982:

The forfeiture rule does not preclude Mr W from receiving the whole or part of the additional pension referable to his late wife.

REASONS FOR DETERMINATION

The Secretary of State's reference

1. The Secretary of State for Work & Pensions refers to the Upper Tribunal the question whether Mr W, by virtue of the forfeiture rule, would be precluded from receiving the whole or part of the state pension referable to his late wife. In other words, that part of Mr W's state retirement pension comprised of an additional pension. The Secretary of State's reference state that, if the forfeiture rule did not apply, the weekly amount of Mr W's additional pension would be £4.51 to 12 April 2017, £4.84 to 12 April 2018 and £4.84 to 12 April 2019.
2. On 13 February 2007, the Crown Court found that Mr W was "under a disability such as to render him unfit to be tried, and was found to have done the act of: Murder". The victim was Mr W's wife.
3. The Crown Court imposed a restriction order on Mr W (without limit of time). The Judge's brief sentencing remarks noted that, at the relevant date, Mr W was suffering from mental illness described in psychiatric evidence as "a major depressive disorder". The Secretary of State also supplied a news report about the tragic circumstances surrounding Mr W's wife's death in February 2006, which it is unnecessary for me to describe.
4. The Secretary of State's reference asserted that Mr W had been convicted of murder so that it was not open to the Upper Tribunal to modify the forfeiture rule in his case.

Proceedings before the Upper Tribunal

5. I had doubts as to whether the Secretary of State was correct to assert that Mr W had been convicted of murder. I gave case management directions which explained those doubts and required the Secretary of State to supply a written submission that:

(a) if the Secretary of State continued to maintain that Mr W was convicted of murder, explained why; and

(b) if she no longer maintained that Mr W was convicted of murder, set out a modified question for determination by the Upper Tribunal.

6. The Secretary of State's submission in response stated that she no longer asserted that Mr W had been convicted of murder since he had been found unfit to plead to the charge of murder. Her reformulated question for determination by the Upper Tribunal was "if the forfeiture rule is found to apply, the Modification Rule should be considered".

7. I then gave further case management directions, as follows:

"In this case, I am minded to determine that the forfeiture rule does not apply...If the Secretary of State wishes to make written submissions in response to the above provisional view, her written submissions must be received by the Upper Tribunal within **one month** of the date on which these directions are issued."

8. In response, the Secretary of State's representative informed the Upper Tribunal that she was "in full agreement with the course of action being suggested".

Legal framework - forfeiture

9. In the Forfeiture Act 1982 ("1982 Act"), the "forfeiture rule" means "the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing" (section 1(1)).

10. Section 4(1) of the 1982 Act provides for the Upper Tribunal to determine a question whether, if a person were otherwise entitled to any benefit under a "relevant enactment", he would be precluded by the forfeiture rule from receiving the whole or part of the benefit. The Social Security Contributions and Benefits Act 1992, under which the additional pension

portion of Mr W's state retirement pension would be payable, is a relevant enactment (section 4(5)).

11. If the Upper Tribunal determines that the forfeiture rule precludes a person who has unlawfully killed another from receiving the whole or part of a benefit, it may also decide to modify the effect of the rule (section 4(1A) of the 1982 Act). However, no decision made under section 4(1A) shall affect the application of the forfeiture rule "in the case of a person who stands convicted of murder" (section 5)). Additionally, a section 4(1A) modification decision is not permitted unless the Upper Tribunal is satisfied that the justice of the case requires the effect of the rule to be so modified. In considering the 'justice of the case', the Upper Tribunal must have regard to the conduct of the offender and the deceased and such other circumstances as appear to it to be material (section 4(1B)).

12. Rule 26(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 requires a forfeiture reference made by the Secretary of State to include a "statement of the question for determination".

Legal framework – persons unfit to be tried

13. The Crown Court could not have imposed a restriction order on Mr W under section 41 of the Mental Health Act 1983, which is the most commonly-encountered type of such order. Section 41 restriction orders are made in conjunction with a hospital order and hospital orders may only be made upon a person's conviction for a criminal offence (section 37(1)). Since Mr W was found unfit to plead, he cannot have been convicted of murdering his wife. Moreover, a hospital order may not be made upon a person's conviction for murder. Such orders are not available where a person is convicted of an offence, such as murder, the sentence for which is fixed by law.

14. The Secretary of State agrees that Mr W must have been dealt with by the Crown Court under the Criminal Procedure (Insanity) Act 1964 ("1964 Act").

15. Section 4(4) of the 1964 Act requires that "the question of fitness to be tried shall be determined as soon as it arises" and, by section 4(5), the court is to determine the question without a jury. If the court determines that a person is not fit to be tried then:

(a) the trial shall not proceed; and

(b) the jury shall determine whether the accused "did the act...charged against him as the offence" (section 4A(2)).

16. Where the offence charged is murder, the court must make a restriction order. While section 5(4) of the 1964 Act provides that this is the same type of order as a restriction order

made under the Mental Health Act 1983, for present purposes the relevant point is that a restriction order under the 1964 Act is not preceded by a finding that a person was guilty of having committed a criminal offence.

17. The legal test for unfitness to plead is described, in my view correctly, in the Law Commission's *Unfitness to Plead – Volume 1: Report* (2016, Law Com No 364):

“3.4 The legal test for unfitness to plead is not set out in statute, but is derived from the common law, that is decisions made by the courts. It remains that set down by Alderson B in the 1836 case of *Pritchard* [(1836) 7 C & P 303]:

There are three points to be enquired into: - First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence - to know that he might challenge any of you [jurors] to whom he may object - and to comprehend the details of the evidence.

3.5 The later case of *Davies* [(1853) 3 Car & Kir 328, 175 ER 575] added the requirement that the defendant be able to instruct his or her legal adviser. Thus the *Pritchard* criteria were then understood to require the defendant to be able to: plead to the indictment, understand the course of proceedings, instruct a lawyer, challenge a juror and understand the evidence. If an accused was found to lack any one of these abilities that would be sufficient for him or her to be found unfit to plead.

3.6 More recently, the *Pritchard* test has been interpreted by the courts to make it more consistent with the modern trial process. Probably the most widely favoured formulation comes from the trial judge's directions to the jury in the case of *John M* [[2003] EWCA Crim 3452, [2003] All ER (D) 199], which were approved by the Court of Appeal and in which express reference is made to the need to be able to give evidence.”

18. In finding that Mr W ‘did the act charged’ the Crown Court jury would not have been required to consider whether he had the necessary *mens rea*, only whether he committed the *actus reus* of the offence.

Determination of reference

19. Mr W was not convicted of murder. The Secretary of State incorrectly asserted otherwise in her initial reference. It follows that Mr W's case is not one in which the forfeiture rule, if it

applies, is excluded from modification under section 4 of the 1982 Act. However, I decide that no question of modification arises because, in Mr W's case, the forfeiture rule does not apply.

20. In *Re Houghton, Houghton v Houghton* [1915] 2 Ch. 173 a coroner's inquisition found that Mr Houghton killed his intestate father. Mr Houghton also killed his brother and, in respect of that death, was dealt with under section 2 of the Trial of Lunatics Act 1883. The jury returned a special verdict under section 2(1) of the 1883 Act, which provided for "a special verdict to the effect that the accused was guilty of the act...charged against him, but was insane as aforesaid at the time when he did the act". In the light of the special verdict given in respect of Mr Houghton's brother, proceedings in respect of his father's death were discontinued.

21. The issue for Joyce J in *Re Houghton* was whether Mr Houghton was precluded from taking a distributive share under his father's intestacy. While not referred to in terms, the judge must have been concerned with the application of the forfeiture rule. Joyce J held:

"In the present case the unfortunate victim, the father, died intestate. But one thing is, I think, quite certain, namely, that, if the indictment against the defendant, John Frederick Houghton, for the murder of his father had been proceeded with, and it had been proved that he did in fact slay his father, he would have had to be dealt with under s. 2 of the Trial of Lunatics Act, 1883. So that, whatever be precisely the proper form of the verdict to be taken in such circumstances, if he had been found guilty of the act, he would not have been found guilty of any offence. In other words, having regard to the decision in *Felstead v. Rex* (1), the defendant, John Frederick Houghton, if actually tried, would have been acquitted of any criminal offence, even if found guilty of the act of killing his father.

Consequently I can see no reason why he should not have taken any benefit under the will of his father if the deceased had left a will. There is still less reason, if possible, why he should not take his proper share under the intestacy of his father..."

22. In other words, the forfeiture rule did not apply so as to exclude Mr Houghton from a share under his father's intestacy. For forfeiture rule purposes, the 'special verdict' has been equated with a finding of not guilty by reason of insanity. In *Re Giles (deceased); Giles v Giles* - [1971] 3 All ER 1141 Pennycuik V-C said:

It is well established by authority that the principle laid down in these cases has no application where the killer was insane. In such a case, a special verdict of "guilty, but

insane" or the more modern "not guilty by reason of insanity" both amount to an acquittal.

23. Mr W was acquitted of the charge of murder. In those circumstances, and given the absence of any conviction for manslaughter on the grounds of diminished responsibility, the forfeiture rule does not apply to him. Mr W is not precluded by the forfeiture rule from receiving the additional pension referable to his late wife.

E Mitchell
Judge of the Upper Tribunal
9 May 2020
(Authorised for issue)