DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Secretary of State for Work and Pensions, who is the Appellant in the Upper Tribunal proceedings.

The decision of the East London First-tier Tribunal dated 22 December 2016 under file reference SC124/16/02448 involves an error of law. The decision of the First-tier Tribunal is set aside.

The Upper Tribunal is not able to re-make the decision under appeal. It follows that the claimant's appeal against the Secretary of State's decision dated 8 July 2016 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge who was previously involved in considering this appeal on 22 December 2016.

(3) The claimant should now provide any further evidence for the new Tribunal, to be sent to the regional tribunal office in Sutton within one month of the date this Upper Tribunal decision is issued, e.g. dealing with the matters specified in paragraph 30 of the reasons below.

(4) The Secretary of State's representative should produce any other further written evidence to put before the tribunal along with a supplementary submission to be sent to the regional tribunal office in Sutton, within two months of the date of issue of this decision, dealing with the matters specified in paragraph 31 of the reasons below.

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. I am allowing the Secretary of State's appeal to the Upper Tribunal against the decision of the First-tier Tribunal. I appreciate this will be a disappointment to the claimant, but I hope these reasons explain why I have had to come to that conclusion. I am not making the decision that the First-tier Tribunal should have made as further facts need to be established. The case accordingly needs to go back to a new First-tier Tribunal to be re-heard. Only then will the claimant (the appellant in the First-tier Tribunal) know whether or not she is entitled to bereavement benefit.

The question of a possible oral hearing of the appeal to the Upper Tribunal

2. Neither the Secretary of State's representative nor the claimant has asked for an oral hearing of this appeal before the Upper Tribunal. I have considered the matter under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). In my view, an oral hearing before the Upper Tribunal is not required. The facts, so far as they are known, are not in dispute, and the question for me now is one of pure law and the issues are clearly enough set out in the papers. There is nothing extra to be gained by having an Upper Tribunal oral hearing; better that the case is re-heard by a new First-tier Tribunal sooner rather than later, applying the correct law.

The case before the First-tier Tribunal

3. The case before the First-tier Tribunal (the FTT) concerned the claimant's appeal against the Secretary of State's decision on her claim for bereavement benefit. The Secretary of State's decision-maker had concluded that the Appellant was not entitled to bereavement benefit. The decision maker took the view that the claimant's marriage to her late husband (Mr S) was not a valid marriage under UK law. In this decision I refer to the claimant herself as Mrs N, to preserve her anonymity.

The First-tier Tribunal's decision

4. The FTT, following a hearing on 22 December 2016 that took just 11 minutes, allowed the claimant's appeal. In its decision notice, issued on the day of the hearing, the FTT gave its summary reasons. These were that "At the time of [Mr S's] death he was only married to one wife as his other wife had died many years previously. He and [Mrs N] were therefore, at the time of his death, not in a polygamous marriage – Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 regulation 2(1) and (2)". The FTT Judge later issued a statement of reasons, expanding on those summary reasons. That document concluded as follows:

> "14. The decision maker has focussed on the period throughout the marriage and stated the second marriage was not valid as Mr S could not enter into a polygamous marriage as he was domiciled here. The focus however in my view should have been the circumstances at the time of death. At the time of his death there was only one wife.
>
> 15. Further in my view it cannot be the case that Mrs N is accepted as Mr S's wife for immigration purposes and yet not for Social Security purposes.
>
> 16. For the reasons set out in the Decision Notice this appeal is allowed."

The Secretary of State's appeal to the Upper Tribunal

5. The Secretary of State's representative argued, in short, that the FTT had failed to apply correctly the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975.

6. The District Tribunal Judge gave the Secretary of State permission to appeal to the Upper Tribunal. I then made directions on the appeal, observing as follows:

> *"Introduction*
> 1. The First-tier Tribunal (FTT) in East London decided to allow Mrs N's appeal against the Secretary of State's decision refusing entitlement to bereavement benefit (p.65, statement of reasons at pp.67-69). The FTT decided that at the time of his death Mr S was only married to Mrs N and that the marriage was not polygamous.
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> 2. District Tribunal Judge May has already given the Secretary of State permission to appeal to the Upper Tribunal against the FTT's decision (p.80). The Secretary of State's grounds of appeal are summarised at p.84 and build on the advice at pp.52-53.
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> 3. I see that Mrs N's son is representing her. He may wish to seek expert advice from e.g. a law centre, welfare rights agency or Citizens Advice as the appeal raises some complex issues of law.
>
> 4. I make some preliminary comments on the Secretary of State's appeal below. They do not amount to a concluded view.
>
> *Did the tribunal actually ask itself the right legal question?*
> 5. Did the First-tier Tribunal actually address the correct legal issue on the appeal? The fundamental issue in this case was the validity (as a matter of the law of England & Wales) of the late Mr S's marriage to Mrs N in Bangladesh in 1983. In particular, the question would seem to be whether *at that date in 1983* he had either (i) retained or reacquired his original domicile of birth (Bangladesh) or (ii) had acquired a new domicile of choice (in the United Kingdom).
>
> 6. If the position was as in (i), there would be no need to doubt the validity of the marriage (under English law).
>
> 7. If, however, the position was as in (ii) – which would seem likely as he arrived in the UK in 1963 and set up home here – then the problem lies in section 11(d) of the Matrimonial Causes Act 1973. This states that a person who is domiciled in England and Wales cannot contract a valid marriage abroad if that marriage is polygamous.
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> 8. If that is indeed the right approach, then the question of whether the marriage was monogamous at the time of Mr S's death was irrelevant – for the simple reason that under the law of England and Wales there had never been a valid marriage in the first place. My earlier decision in *SB v Secretary of State for Work and Pensions (BB)* [2010] UKUT 219 (AAC) shows that domicile at the time of marriage is the crucial question.
>
> 9. I recognise that Mrs N was allowed to join Mr S in the UK in 2003 and had settled status here. However, immigration rules are not necessarily the same as social security rules."

7. The claimant, understandably, resists the appeal. In her original notice of appeal to the FTT she put her case clearly:

> "I came to the United Kingdom to join my spouse on 8/3/03. I lived with him. I have settled status on the grounds that I am his legally married spouse. His first wife has passed away. The Home Office verified and accepted our marriage. On these grounds I wish the Tribunal will reconsider my claim for Bereavement Benefit."

8. She makes the same points in relation to the Secretary of State's appeal to the Upper Tribunal:

> "I was legally married to my husband. I entered the UK as a spouse. I was his spouse when he passed away. As his widow I should get a pension."

9. The claimant's arguments have an attractive simplicity. Unfortunately the law is more complex and means that the Secretary of State's appeal to the Upper Tribunal must succeed. Whether there is entitlement to bereavement benefit ultimately turns on Mr S's domicile as at the date of his second marriage in 1983.

The Upper Tribunal's analysis

The time line

10. The relevant chronology is not in dispute:

10 December 1938	Mr S's date of birth (in what is now Bangladesh)
31 December 1959	Mr S marries Mrs B in Bangladesh
12 September 1963	Mr S arrives in the United Kingdom
10 January 1964	Mrs N's date of birth
11 March 1983	Mr S marries Mrs N in Bangladesh
22 November 1997	Mrs B's date of death
8 March 2003	Mrs N arrives in the United Kingdom
5 April 2016	Mr S's date of death

11. There are two other factual matters which appear not to be in dispute.

12. First, Mr S's marriage to Mrs B in 1959 in Bangladesh was a valid marriage by local law and there was no subsequent divorce. Rather, that marriage was ended by Mrs B's death in 1997. Mr S was accordingly validly married to Mrs B at the time that he purportedly married Mrs N, also in Bangladesh, in 2003.

13. Second, Mr S arrived in the United Kingdom in 1963. Mrs B joined him here; it is unclear when she arrived but it seems they had three children, all of whom were born in the United Kingdom. All the children also went to school here. Mr S owned property here and his main bank account was also in the United Kingdom. There is, however, no evidence on file that he ever acquired British citizenship. The most recent travel document copied in the appeal papers is Mr S's Bangladeshi passport that originally expired in 1978 but which was extended to expire in 1983.

The relevant law

14. In a case such as this there are two important legislative provisions which must be kept in mind at all times.

15. The first is section 11(d) of the Matrimonial Causes Act 1973) (omitting immaterial or repealed words):

> "**11 Grounds on which a marriage is void**
> A marriage celebrated after 31st July 1971 … shall be void on the following grounds only, that is to say—
> (a) …
> (b) …
> (c) …
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other."

16. It is accepted that Mr S's second marriage in 1983 was valid under Islamic law and the law of Bangladesh, which permits polygamy. However, by virtue of section 11(d) of the 1973 Act, it follows that if at the time of his second marriage Mr S was domiciled in the United Kingdom, then under the law of England and Wales he had no capacity to marry Mrs N. So while valid by local law, the marriage would be void under English (and Welsh) law as "at its inception" Mr S did have "any spouse additional to the other" (i.e. Mrs B, who was still alive and had not been divorced).

17. The second statutory provision is regulation 2 of the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 (SI 1975/561):

> **"General rule as to the consequences of a polygamous marriage for the purpose of the Social Security Act and the Family Allowances Act**
> **2.**—(1) Subject to the following provisions of these regulations, a polygamous marriage shall, for the purpose 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 regulations–
> (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."

18. It should be noted that regulation 1(2) includes the following definition, namely a "'polygamous marriage' means a marriage celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy".

19. Thus regulation 2(1) 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". However, this does not have the effect of converting a void marriage into a valid one simply by virtue of the parties being in practice monogamously married immediately

prior to one party's death. Instead, it means that a *valid* polygamous marriage can be treated as "a monogamous marriage for any day … throughout which the polygamous marriage is in fact monogamous". As Mr Commissioner Howell put it in unreported decision CG/2611/2003 at paragraph 6:

> "A person seeking to claim widow's benefit under the **Social Security Contributions and Benefits Act 1992** has to be *either* the surviving member of a monogamous marriage recognised as valid under United Kingdom law *or* the surviving member of a valid marriage under a law which permits polygamy but in fact the only spouse of the deceased at the date of his death: section 121(1)(b), and regulation 2 of the **Social Security and Family Allowances (Polygamous Marriages) Regulations** 1975 SI No 561."

20. The key expression in this passage for present purposes is "*a valid marriage*". If Mr S had been domiciled in Bangladesh in 1983 he would have had capacity to enter into a valid polygamous marriage. If the sequence of events had then continued as before, Mrs N would be able to claim bereavement benefit on his death as she would be, in the words of Mr Commissioner Howell, "the surviving member of a valid marriage under a law which permits polygamy but in fact the only spouse of the deceased at the date of his death". If, however, Mr S had been domiciled in the United Kingdom in 1983, then he would not have had capacity to enter into a polygamous marriage abroad in the first place and, by the law of England and Wales the second marriage in Bangladesh was void from the outset and could not be rescued by regulation 2. In effect it never existed as a valid marriage for the purposes of social security law (see R(G) 3/59).

The error made by the First-tier Tribunal

21. Put shortly, the FTT asked itself entirely the wrong question and so misdirected itself in law. The judge overlooked section 11 of the 1973 Act and misunderstood the import of the 1975 Regulations. She erroneously focussed on the nature of the relationship between Mr S and Mrs N at the time of Mr S's death in 2016, whereas she should have directed her mind to the true legal status of the second marriage in 1983. That inquiry required a consideration of Mr S's domicile in 1983. The FTT wholly failed to address that question or find any relevant facts. The FTT relied on two other factors for the conclusion it reached in its statement of reasons.

22. The first was a passage in the Department for Work and Pensions' (DWP) *Decision Maker's Guide* that paraphrased regulation 2. This did not assist – the *Guide* is by definition guidance, and not a source of law. It also presumed that the polygamous marriage had been validly entered into – and so assumed there was no void marriage by virtue of section 11 of the 1973 Act.

23. The second was a passage from *Hansard* from 2011 in which Mr Chris Grayling, the then Minister of State at the DWP, also sought to paraphrase the statutory provision (12 October 2011 Vol. 607, col. 434W). The Minister's response was as follows: "Where a man dies leaving two widows, neither gets bereavement benefit. If at the time of his death he leaves a single widow, she could qualify for bereavement benefit." Again, this statement does not assist and for the same reasons. First, it is not a source of law. Second, the Minister correctly referred to the deceased leaving a "widow" – but by virtue of section 11 of the 1973 Act, if there was no validly contracted marriage as recognised by the law of England and Wales, it followed there could be no (again, legally recognised under the law of England and Wales) widow.

24. Mrs N relies on a further point, also referred to by the FTT in its statement of reasons at paragraph [15], namely the Home Office's acceptance of Mrs N's settled immigration status. This cannot be decisive. The Home Office made its decision to admit Mrs N under immigration law, which may operate by different principles and rules – for example, there is scope for discretion to be exercised under immigration law. Whether or not that was the case here, a Home Office decision maker's decision under immigration law cannot bind the DWP decision maker when making a decision according to social security law. The result may appear inconsistent, but "that is a result of the different legislation that is applied by those Departments and the different policy that the legislation embodies" (as Upper Tribunal Judge Jacobs explained in *ST v SSWP (IS)* [2009] UKUT 269 (AAC); [2010] AACR 23 at paragraph 26).

25. All in all the FTT comprehensively misapplied what is undoubtedly some quite complex law, which draws on social security law, family law and private international law. As such the Secretary of State's appeal must be allowed and the FTT's decision set aside as involving an error of law.

26. Given the absence of fact-finding by the FTT on the issue of domicile, the appeal will need to be re-heard by a fresh FTT.

Guidance to the new First-tier Tribunal

27. The starting point for the FTT is to establish Mr S's domicile as at the date of his second marriage in Bangladesh in 1983. It is safe to assume that Mr S had a domicile of origin in Bangladesh. The question for the FTT is whether that had been supplanted by a domicile of choice in the United Kingdom by 1983.

28. The Secretary of State relies on the facts that, as the DWP's Relationship Validation Unit summarised them to be:

- Mr S considered the UK to be main residence
- He owned property in the United Kingdom
- He arrived in the United Kingdom in 1963
- All children were schooled in the UK
- Mr S's first wife was resident in the UK and three children were born in the UK maternity benefit was claimed on three occasions
- His main bank account was in the UK.

29. These factual statements may well be correct. However, the basis for these findings is not immediately obvious from the evidence on the appeal file. For that reason I am not able to re-make the decision under appeal myself. For example, it is unclear why the Relationship Validation Unit concluded that "Mr S considered the UK to be main residence". In his notice of appeal to the Upper Tribunal, the Secretary of State's representative states that "there appears to be no reason to suppose that Mr S was not domiciled in the UK, and living with his first wife, when the purported second marriage took place". I am by no means sure that "no reason to suppose" is good enough in the circumstances.

30. The onus is in part on Mrs N. She will need to produce evidence to show that by 1983 Mr S had retained his domicile of origin in Bangladesh. For example, did he own any property in Bangladesh? Did he rent any property in Bangladesh? Did he have family in Bangladesh, and if so who? Did he go back and remain in Bangladesh for any prolonged periods between 1963 and 1983? Did he retain his Bangladeshi

nationality or did he become a British citizen (and, if so, when did that happen)? However, as will be seen, this final factor may count for little.

31. The Secretary of State should produce a further or supplementary submission for the new FTT setting out both its evidence and its arguments for asserting that Mr S had acquired a domicile of choice in the United Kingdom by 1983. This might include, for example, his UK national insurance record for the period from 1963 to 1983.

32. Thus ascertaining a person's domicile is not necessarily straightforward. As Mr Commissioner Johnson held in R(G) 1/93:

> "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."

33. The following explanation by Upper Tribunal Judge Jacobs is also helpful (taken from unreported decision CP/3108/2004)

> "**Domicile**
> 11. This concept is used in the conflict of laws. It defines a person's connection with a particular legal jurisdiction. Everyone has a domicile. A person's domicile of origin is acquired at birth. However, it is possible to change domicile by acquiring a domicile of choice. The evidence must be particularly persuasive to show that a domicile of choice has displaced the domicile of origin. There are two elements that must be shown in order to prove that a domicile of choice has been acquired. First, the person must have taken up residence in the country concerned. Second, the person must have the necessary intention. It is not necessary that the person should form an intention about domicile. Most people live their whole lives without even knowing that such a thing exists. The intention that has to be shown relates to the permanence of the person's residence in the country concerned. There may be statements made by the person about this. But for the most part the intention has to be inferred from the person's actions and the circumstances of the case. In order to show that a person has acquired a domicile of choice, it is necessary to show that the person had settled there with the intention 'to make his home in the new country until the end of his days unless and until something happens to change his mind': see the judgment of Lord Justice Buckley in *Inland Revenue Commissioners v Bullock* [1976] 1 WLR 1178 at page 1185."

34. The question of the individual's intention was discussed by Scarman LJ in the case of *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."

35. As Mr Commissioner Mesher (as he then was) held in R(G) 1/95 (at paragraph 16):

> "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."

36. That decision is also useful for the light it sheds on the issue of a change in citizenship status: "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" (also at paragraph 16).

37. So the starting point is that Mr S retained his domicile of origin (Bangladesh) unless and until he acquired a domicile of choice (in the United Kingdom). It is difficult for a person to lose a domicile of origin, which means that an individual may live in the United Kingdom for many years without becoming UK-domiciled. Ultimately, and in a sentence, the issue is whether or not Mr S had by 1983 sufficiently severed his links with Bangladesh and formed a definite and permanent intention to regard the United Kingdom as his permanent home.

Conclusion

38. For all these reasons, I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new Tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 1 March 2018

Nicholas Wikeley
Judge of the Upper Tribunal