CAF/1819/2016

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and Hearing

1. **This appeal by the appellant succeeds**. Permission to appeal having been given (in respect of various grounds) by a judge of the First-tier Tribunal on 3rd June 2016 and (on other grounds) by me on 17th May 2017 and in this decision, and in accordance with the provisions of section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal (WPAFC Chamber) sitting at Fox Court (London) on 24th November 2015 made under reference SD/00133/2015. I substitute my own decision. This is to the effect that appellant did not have to make a claim for (restored) widows pension following the death of her second husband. I refer the matter to the Secretary of State to proceed with the consideration of the matter on this basis.

2. I held an oral hearing of this appeal at Field House (London) on 10th July 2017. Neither the appellant nor her appointee daughter attended in person but they were represented by Glyn Tucker of the Royal British Legion. The Secretary of State was represented by Saul Margo of counsel. I am grateful to them for their assistance in both written and oral argument.

The Legal Framework

3. The legal position is governed by articles of The Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 ("the SPO" or "the Order"), which, so far as is relevant, provides as follows (references are to article numbers):

> **23**(1) The surviving spouse or surviving civil partner of a member of the armed forces whose death is due to service may be awarded a pension [at the appropriate rate as specified in Schedule 2] …
>
> **33**(1) Subject to the following provisions of this article, any pension or allowance awarded under this Part of this Order or under Part II of a 1919 to 1921 instrument to a person other than a parent shall cease if that person marries or lives with another person as the spouse of that person or forms a civil partnership or lives with another person as the civil partner of that person.
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> (2) Where-
>
> > (a) in accordance with paragraph (1) an award ceased because the person had another person living with her or, as the case may be, him as a spouse or formed a civil partnership or had another person living with her, or as the case may be, him as a civil partner; and

(b) the person claims an award under this part in respect of a period which begins after the end of that relationship

The claim shall be determined as though the relationship had never ended.

(3) …

(4) In determining whether a pension is payable to a person as a surviving spouse in respect of any period beginning on or after 19th July 1995, no account may be taken of the fact that the widow has married another if, before the beginning of that period, the marriage has been terminated or the parties have been judicially separated.

…

(7) For the purposes of paragraph (4)-

(a) The reference to the termination of a marriage is to the termination of the marriage by death, dissolution or annulment …

34(1) Subject to paragraph (4) and article 35, it shall be a condition precedent to the making of any award of any pension, allowance or supplement mentioned in paragraph (2) (including any such award which follows an earlier award or which follows a period which, had there been an award for that period, would have ended in accordance with article 33(1)) that the person making the claim shall have-

(a) completed and signed a form approved by the Secretary of State for the purpose of claiming that pension, allowance or supplement payable under this Order; and

(b) delivered that form either to an appropriate office of the Secretary of State or to the office of an authorised agent.

(2) The pensions, allowances and supplement to which paragraph (1) applies are-

…

(k) a surviving spouse's or surviving civil partner's pension payable under article 23;

35(1) A claim for the pensions, allowances and supplements mentioned in the following paragraphs of this article shall not be required if the conditions set out in the relevant paragraphs are satisfied.

(2) …

(3) A claim for a surviving spouse's or surviving civil partner's pension under article 23 is not required if-

(a) the member of the armed forces by reference to whose death the pension would be payable died whilst serving in the armed forces; and

(b) copies of that member's medical and service records are delivered to the Veterans Agency.

…

4. Paragraph 62 of Schedule 6 to the Order defines "Veterans Agency" as "an office designated by the Secretary of State for the purpose of receiving and determining applications for a pension, allowance or supplement".

5. Article **46** of the Order provides that Schedule 3 has effect with respect to commencement dates of awards under the Order. Paragraph 1 of Schedule 3 provides that, subject to other provisions of the Schedule, an award shall have effect from the date (not earlier that the latest of) the date of death or the date of claim.

6. So far as is relevant paragraph 5 of Schedule 3 provides as follows:

5. Where a claimant satisfies the Secretary of State that-

(a) he would have made a claim … on a date ("the earlier date") earlier than that ("the actual date") on which he actually did so but for the fact that he was incapable of doing so or instructing someone to act on his behalf by reason of illness or disability; and

(b) that illness or disability continued to be the cause of the delay up to the moment the claim or application was made

any reference in this Schedule to the date of claim … shall be treated as a reference to the later of-

(i) the earlier date; and

(ii) the date three years before the actual date.

7. Subject to exceptions which are not relevant in the present case, the relevant parts of paragraph 10 of Schedule 3 to the Order provide as follows:

10. … where a claimant satisfies the Secretary of State that-

(a) he would have made a claim … on an earlier date than he actually did but for an act or omission of the Secretary of State or any officer of his carrying out functions in connection with war pensions … which

> wrongly caused him to delay the claim or application and the act or omission was the dominant cause of the delay; and
>
> (b) that act or omission continued to be the dominant cause of the delay up to the moment the claim or application was made
>
> any reference in this Schedule to the date of claim … shall be treated as a reference to the earlier date referred to in this paragraph.

8. On an appeal the reference in paragraph 5 and the first reference in paragraph 10 to the Secretary of State are to be read as references to the tribunal.

Background and Procedure

9. The appellant is a woman who was born on 14th September 1920. On 5th September 1942 she married for the first time. Sadly, her husband was killed on active service on 6th December 1942. She was awarded a war widow's pension. She remarried on 1st December 1945 and, in accordance with the law and rules prevailing at the time, her entitlement to war widow's pension ceased. Her second husband died on 30th November 2000. She did not at the time make any relevant claim for war widow's pension or similar payment.

10. With effect from 19th July 1995 the legislation changed so that (using the language applicable to the present case) if a claimant's first husband had died before 31st March 1973 the pension could be retained on remarriage on or after 6th April 2005. Where the pension had been surrendered prior to 6th April 2005 it could be restored at the end of the second marriage.

11. The appellant and her daughter (who is her appointee) became aware of the then current position in 2014 and made enquiries of Veterans UK in November 2014. A claim was made on 15th November 2014. On 23rd February 2015 the Secretary of State awarded the appellant "Restored War Widow's Pension" from 15th November 2014 – the date of the new "claim". The amount of pension and age allowance awarded as at the date of claim was £266.29 weekly. As this appeal is about the correct commencement date, clearly there is a significant amount of money at stake.

12. On 1st May 2015 the appellant, who was by then living in Australia, appealed to the First-tier Tribunal against the decision of the Secretary of State in relation to the commencement date. The First-tier Tribunal considered the matter in London on 24th November 2015 in the absence of the appellant or any representative. The Secretary of State was represented by an official from the Veterans Agency. The tribunal confirmed the decision of the Secretary of State, although it seems that its written reasons were not issued until 28th April 2016. The appellant's daughter applied for permission to appeal to the Upper Tribunal on two grounds. The first related to the matters in paragraph 10 of Schedule 3 to the Order (act or omission of Secretary of State etc). The second related to the claimant's medical condition. On 3rd June 2016 Upper Tribunal Judge Wikeley, sitting as the Chamber President (Temporary) of the

First-tier Tribunal, gave the appellant permission to appeal to the Upper Tribunal. In relation to the first ground he commented "I am not persuaded there is an arguable error of law". In relation to the second ground he commented that "it may be questionable whether the Tribunal either made sufficient findings of fact or gave adequate reasons". His permission was given "principally on the second point, but not limited to that". On 17th May 2017 I directed that the appellant could raise any point of law on which she had hitherto relied. However, she had not received any legal advice before the First-tier Tribunal hearing and, to the extent necessary, I now give permission to appeal on any relevant point of law. I am satisfied that the Secretary of State has had due warning of, and an opportunity to consider, all the points that were raised. I also directed that there be an oral hearing of the substantive appeal, and that took place on 11th July 2017.

13. The Secretary of State opposes the appeal and supports the decision of the First-tier Tribunal. Mr Tucker put forward three grounds of appeal.

Incapacity to Claim

14. The relevant medical evidence is that relating to the appellant during the period between the death of her second husband (30th November 2000) and the date taken by the Secretary of State as the date of claim (15th November 2014). Paragraph 5 of Schedule 3 to the Order effectively allows backdating for three years prior to the date of claim if throughout the period the claimant was incapable of claiming by reason of illness or disability. There is a certain amount of medical evidence on the file but attempts to obtain full GP records were unsuccessful, partly because of the appellant's move from the United Kingdom to Australia.

15. On 10th November 2005 a General Hospital in North Shields (UK) reported that the appellant had had a right partial anterior circulation stroke in April 2005 and diagnoses included ischaemic heart disease, hypertension, previous TIAs (no dates given), hiatus hernia, diverticular disease, hysterectomy and paroxysmal atrial fibrillation. A long list of medication was supplied. Problems identified in the stroke review clinic on that day included tingling pain in the right hand, reduced sensation in the left arm, and poor eyesight due to cataracts. The staff nurse commented:

> "She is independent with all activities of daily living. She does not however feel she has made a full recovery from the stroke. She still has lack of sensation in her left arm and leg".

16. An occupational therapy home visit report, written on 29th July 2008 in respect of a visit on 25th July reported falls inside and outside and the need to use a range of mobility aids but no problems with communication and no psychological problems in respect of eg orientation, memory, mood or mental state – although the value of this report should not be overstated as it does not report the opinion of a psychologist or psychiatrist or specialist mental health worker.

17. There was a hospital admission on 17th January 2012 with persistent bleeding, and it was noted that the appellant was "usually self caring" and could make all her needs known with no problem communicating.

18. On 29th May 2014 the appellant saw a consultant physician (also in the UK) who reported that she understood why it was necessary to carry out certain investigations and provided verbal consent.

19. A letter of 27th February 2015 from what appears to be a GP practice in Australia referred to additional problems with retinal haemorrhages, chronic kidney disease and lumbar spinal stenosis as well as "significant impairment" shown on MMSE (mini mental state examination).

20. On 11th September 2015 Dr P Kearney, the medical adviser to the Secretary of State concluded that there was no evidence that the appellant had been prevented from 2000 from making a claim through illness. I observe that this was on the basis of the written evidence rather than any physical examination or discussion with those who had attended the appellant.

21. The appellant's daughter (who is her appointee) made written representations to the effect that the appellant had been suffering from long term dementia and Alzheimer's disease and would always tell the relevant professionals that she was fit and well and could look after herself even while being quite aggressive in her verbal response to family members. She would not remember going for medical assessments and "defiantly deny" that she had been out that day. It was only while seeing David Cameron on the TV in 2014 talking about war widows' pensions that she suddenly said "I used to get one of those", having not been capable of remembering that until that particular prompt.

22. The First-tier Tribunal found as follows (references are to paragraph numbers of its written decision and reasons):

> 3(e) … The tribunal did not identify any additional evidence in the available evidence to show that the appellant was mentally incapable of understanding what her entitlement might be …
>
> 5. Although the response contains details of ill-health, the nature of that ill health did not disable this appellant from telling her family that she once had a war pension during 2014 when widows war pensions were referred to [on TV] …

23. Mr Tucker made the same point as made by Judge Wikeley (when giving permission to appeal) about the inadequacy of the tribunal's reasoning on this matter. Mr Margo pointed the lack of medical evidence to support a finding that could bring the appellant within paragraph 5 of Schedule 3 to the Order. However, he overstated his case by suggesting that the First-tier Tribunal had dealt with this matter adequately and that the appointee daughter's evidence could never be sufficient to support a

contrary finding. I agree both that the First-tier Tribunal's reasoning on this point was inadequate, and that the evidence before the First-tier Tribunal could not bring the claimant within paragraph 5. It is possible that, with the resources of the Royal British Legion (which were not utilised for the First-tier Tribunal hearing) further relevant medical evidence could be obtained, and if this were the only matter in issue, I would have referred the matter back to the First-tier Tribunal for a fresh hearing and decision.

Act or Omission of Secretary of State

25. Paragraph 5 of Schedule 3 to the Order relates to the situation where, to put it crudely, the Secretary of State can be blamed for the appellant's failure to make the claim earlier than it was made. There was evidence before the tribunal that when the 1995 legislation was going through parliament the Secretary of State took steps to notify 78 organisations and publications of the changes, including very large charities and advice agencies and many relevant ex-Services organisations (pages 11 to 16 of the Upper Tribunal file). At that time it was estimated that 16,500 war widows would benefit, and that the War Pensions Agency had already received 8620 enquiries.

26. The First-tier Tribunal stated:

> 3(e) to (f) … [The appellant] did not know about her entitlement despite reasonable efforts by the Secretary of State to widely disseminate knowledge of this development in the law. On the evidence … the tribunal concluded that reasonable steps were taken by the Secretary of State to disseminate knowledge of entitlement to war widows pension. It would have solved the current problem were the appellant to have been written to directly but it is highly likely that the record of a young war widow of 1942, who ceased to have a war widows pension in 1945, would have been lost in the mist of time that had passed by the time of the change of the law in 1995.
>
> 4. Unfortunately the appellant did not know about her entitlement in 2000 on the death of her second husband. This is despite reasonable and documented efforts by the Secretary of State to disseminate this information. She did not know about her entitlement until 2014.

27. Mr Tucker argued that potential beneficiaries should have been notified directly of the possible restoration of pension. An obvious initial enquiry that could have been made, but was not, was whether there was an extant record of the cessation of the claimants' pension. The First-tier Tribunal was in error in not considering this. There was a small group of those whose pensions had been removed and the Secretary of State could have written to them all.

28. In written submissions to the Upper Tribunal, under the guise of legal argument, the Secretary of State tried to smuggle in further evidence on this point. I disregard such evidence, but note the argument that the fact that the appellant and her daughter were not aware of the publicity given to the change in the legislation "does not negate

that more than reasonable steps were taken by the Secretary of State to make widows aware of the revision to the Scheme" (written observations of 2nd September 2016).

29. I do not know whether the Secretary of State or the various government agencies responsible for these matters did maintain records of war widows whose pensions had been withdrawn, although they may well have done, but to expect them to have kept track of their whereabouts and addresses or contact details until 1995 (a period of half a century for this appellant) would be expecting too much.

30. Reference was made to the decision of Mr Justice Newman in the Administrative Court in Secretary of State for Defence v William Reid [2004] EWHC 1271 (Admin). Although that decision deals with the same provisions as this one, it does not help me to reach a decision. In that decision Mr Justice Newman observed that it was open to the Secretary of State to call evidence (before the Pensions Appeal Tribunal, which has now been replaced by the First-tier Tribunal) of the reasonable steps that had been taken to inform personnel abroad, but he had not done so. Accordingly the judge upheld the decision of the tribunal to backdate an award in that case. In the present case the Secretary of State did present such evidence (to the First-tier Tribunal) and that tribunal was entitled to accept the evidence and find that there was no relevant act or omission.

The Need for a Claim

31. The issue here is whether the circumstances come within the provisions of article 35(3) of the Order. This is set out above and applies when the death occurred while serving in the armed forces (which is not in doubt here) and copies of the deceased's medical and service records are delivered to the Veterans Agency (as defined above).

32. The Secretary of State argued that article 35(3) should not be interpreted as applying where the restoration of war widows pension is sought. This is because article 33(2)(b) uses the words "that person claims an award" in relation to such restoration, followed by the words "the claim shall be determined" (my underlining). Article 33 does not state that there are circumstances in which there is no need to make a claim, and does not refer to article 35(3). Generally the Order makes express provision that claims or applications need to be made in all circumstances other than those set out in article 35(3) and imposes strict time limits. In article 35(3) cases the Secretary of State is already in possession of all the necessary information and therefore there is no need for a claim. In paragraphs 7 and 8 of his written observations of 2nd March 2017 Mr Margo expressed it in this way:

> "7. … it would make no practical or policy sense if this exception to the need to make a claim applied to cases where a surviving spouse is seeking the restoration of a pension on the grounds that a subsequent spouse had died … The Secretary of State would need to know that the death had taken place. In the vast majority of cases there would be no way that the Secretary of State could know such a thing without being informed as the result of a claim being

> made. It follows that a purposive reading of [the Order] favours the Secretary of State's interpretation.
>
> 8. … if a person in [the claimant]'s position did not need to make a claim, the Secretary of State could be liable for making up missed pension payments going back many years in circumstances where there was no possible way for the Secretary of State to have known that an entitlement to a (restored) pension had arisen. This would be contrary to the effective administration of the War Pensions Scheme."

33. I am not sure that this last point makes a great deal of sense. The amount of pension the Secretary of State would liable to pay would be the same whether a claim were made on the day after the death of the second husband or whether a claim was made or notification given many years later, and if the records required by article 35(3)(b) have been provided there would be very little effect on administration.

34. Mr Tucker pointed to an amendment to the Order made with effect from 6th April 2015 (by SI 2015 No 208). Article 33(2)(b) now reads:

> 33(2)(b) that person applies to restore the award in respect of a period which begins after the end of the relationship that led to the cessation of the award.

He suggested that the use of the word "claim" in the previous version of 33(2)(b) meant no more than the phrase "applies to restore the award" in the new version. It is article 34(1) that requires a formal claim, and that is expressly subject to article 35. This is an explicit exception to the general approach to claims and time limits taken in the Order. This exception indicates that it was intended to place a greater onus on the war pensions scheme in such cases.

35. I agree with Mr Tucker that the use of the word "claim" (which is not defined in article 2 of or Schedule to the Order) in the unamended version of 33(2)(b) is effectively a shorthand term for applying or notifying or requesting, or supplying information. It does not carry the same import as the requirement for a formal claim under article 34.

36. I note that article 23 refers to a deceased "whose death was due to service". The death does not have to have taken place <u>whilst serving</u>. The general rule is that a claim must be made under article 34. However, there is an exception in article 35(3) to the general rule in article 34 if the deceased "died whilst serving". This must be because the Secretary of State cannot be expected to know what happens to a former member but can be expected to know what has happened to a serving member. Subject to the satisfaction of the condition in article 35(3)(b) a formal claim by the present appellant would not be required and she would be entitled to a restored pension as and when she satisfied the other conditions. Presumably this was on the death of her second husband.

37. Mr Margo argued that there is no evidence that article 35(3)(b) was satisfied in 1942 and it has not been suggested that it was satisfied at any subsequent stage. I find this suggestion strange. It is not disputed that a widows pension was awarded to the appellant in 1942 or that her first husband's death was due to and whilst in service. The Secretary of State's predecessor must have been satisfied at the time, on medical evidence, that he had died. The fact of the award at the time is in itself evidence in the present case. Accordingly it can be taken that whoever was designated to do so at the time received the relevant medical and service records, unless there is any evidence to the contrary (which, in this case, there is not).

38. On this basis I allow the appeal and make the decision and order indicated above.

H. Levenson
Judge of the Upper Tribunal

14th September 2017