DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the appellant.

The decision of the Newcastle-upon-Tyne First-tier Tribunal dated 1 September 2009 under file reference 229/09/00127 involves an error on a point of law and is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the appellant's appeal against the Secretary of State's decision dated 16 December 2008 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)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

(1) The re-hearing will be at an oral hearing.

(2) The new tribunal should not involve the tribunal judge who heard this appeal at the hearing on 1 September 2009.

(3) If the appellant has any further written evidence to put before the tribunal, this should be sent to the Tribunals Service regional office in Newcastle-upon-Tyne within one month of the issue of this decision.

(4) If the appellant wants the re-hearing to be held in London, so that her representative may attend, the appellant or the representative should write to the Tribunals Service regional office in Newcastle-upon-Tyne within one month of the issue of this decision with that request.

(5) The First-tier Tribunal that rehears this appeal must consider carefully and make findings of fact as to JU's domicile at the date of his marriage to the appellant in 1997.

(6) Copies of Commissioners' decisions R(G) 1/93 and CP/3024/1999 should be added to the tribunal bundle for the re-hearing.

(7) The new tribunal must consider all the evidence afresh and 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 are all subject to any later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary

1. The appellant's appeal to the Upper Tribunal is allowed. The decision of the Newcastle-upon-Tyne First-tier Tribunal dated 1 September 2009 under file reference 229/09/00127 involves an error on a point of law and is set aside. There must be a re-hearing before a new First-tier Tribunal.

What the Upper Tribunal has decided in practice

2. The right of appeal to the Upper Tribunal is only on points of law. The facts are for the First-tier Tribunal to decide. My decision is that the Newcastle-upon-Tyne First-tier Tribunal applied the law wrongly. It may or may not have come to the right conclusion on the merits of the case, but it misapplied the law in getting there. For that reason, and that reason alone, the appeal to the Upper Tribunal is allowed.

3. A new First-tier Tribunal must re-hear the appellant's appeal against the original decision of the Secretary of State refusing her claim for bereavement benefit. That new tribunal must apply the law correctly and form its own view of the facts. It may end up coming to the same decision in the end as the previous tribunal, or it may reach a different conclusion. So the fact that this appeal to the Upper Tribunal has succeeded on a point of law is no guarantee as to the outcome of the re-hearing before the First-tier Tribunal on the facts.

What the Upper Tribunal has **not** decided in practice

4. It follows that the Upper Tribunal has **not** decided that the appellant is entitled to bereavement benefit in relation to her late husband's death. The new First-tier Tribunal will have to decide that question, after applying the relevant law correctly and finding the facts as appropriate.

5. The appellant's representative has misunderstood the nature of some of the submissions being made to the Upper Tribunal. He refers to the decision of Mr Commissioner Jacobs which is on file. However, that decision by Mr Commissioner Jacobs was in relation to a different case. A copy of that decision was sent to the Upper Tribunal by the Secretary of State's representative as it sets out the legal issues to be decided. The fact that the claimant succeeded in that other case (under reference CP/3024/1999) does not necessarily mean that the appellant in this case will succeed at the end of the day. I return to that point later.

What this appeal to the Upper Tribunal is about

6. The appellant ("SB") applied for bereavement benefit. The Secretary of State refused her claim on the basis that in English law she was not the valid wife of her husband "JU". The appellant, who lives in Bangladesh but has a representative in London, lodged an appeal.

7. The appeal was heard by the First-tier Tribunal at Newcastle-upon-Tyne. The tribunal confirmed the Secretary of State's decision and so dismissed the appeal. In short, the tribunal concluded that the marriage between SB and JU was not valid for the purposes of entitlement to bereavement benefit.

8. The appellant now appeals to the Upper Tribunal. Her appeal to the Upper Tribunal is supported by the Secretary of State's representative in the present proceedings, Mr David Scholefield. He says, in short, that the tribunal applied the law incorrectly and did not give adequate reasons.

9. For the avoidance of doubt, I need to make Mr Scholefield's position clear. He agrees that the tribunal made a mistake in law. But he is not saying that the appellant is necessarily entitled to bereavement benefit. He says that a new First-tier Tribunal will have to decide that issue. I agree.

A brief outline of the key events in this case

10. As this case has to go back for re-hearing, I will not rehearse all the evidence. That is a matter for the new tribunal to examine. However, for the benefit of the new tribunal I will set out some of the key dates in this case, which do not appear to be in dispute:

4 October 1924	JU born in what is now Bangladesh
10 September 1957	JU registers in the UK under national insurance scheme
Date unknown pre-1963	JU marries Sundor B in Bangladesh
Date unknown pre-1963	Sundor B dies
5 February 1963	JU marries MB in Bangladesh
6 April 1964	SB born in Bangladesh
9 December 1967	JU becomes a British citizen
1 January 1997	JU marries SB in Bangladesh
16 February 2005	MB, JU's second wife, dies in London
31 July 2007	JU dies in Bangladesh

11. JU first came to Great Britain in 1957. He lived here for long periods of time. By the time that JU passed away on 31 July 2007, there seems to be no doubt that under Islamic law the appellant was his only surviving wife. His first wife had died before 1963. He had then married his second wife, MB, with whom he lived in England and with whom he had 10 children, all of whom still live in the United Kingdom. MB died in London in 2005. The appellant was therefore JU's third wife but his sole surviving wife and therefore his only widow in Islamic law.

12. However, although the appellant was his sole surviving wife under Islamic law, that does not necessarily mean that she was his widow for the purposes of a claim for bereavement benefit under the British social security system. The reason for this apparent contradiction is that different legal systems have their own special rules for recognising valid marriages. Just because a marriage is recognised under one legal system does not mean it is automatically recognised under another legal system.

The legal issue at the heart of this appeal

13. JU's first wife, Sundor B, died before 1963. JU then married MB in Bangladesh in 1963. In 1997 JU married the appellant, also in Bangladesh. So MB was still alive and married to JU when he married the appellant. Under Islamic law the marriage in 1997 was a valid polygamous marriage.

14. The position under English law is more complicated. The validity of the marriage in 1997 as matter of English law depends ultimately on JU's domicile at that date. As Mr Commissioner Jacobs (as he then was) explained in Commissioner's decision CP/3024/1999, domicile depends on residence and intention about residence. Everyone has a domicile of origin, or a domicile of birth, based on their parents' domicile. However, a person may lose their domicile of origin by later acquiring a different domicile of choice, by actually moving to another country and intending to remain there indefinitely. It is also possible, of course, subsequently to abandon a domicile of choice and acquire a different domicile, perhaps re-acquiring a domicile of origin.

15. If JU had, by the time of the 1997 marriage, acquired a domicile of choice in the United Kingdom, then as a matter of English law the 1997 marriage would have been void, notwithstanding its validity under Islamic law. The reason for that is section 11(d) of the Matrimonial Causes Act 1973. This states as follows (omitting s.11(a)-(c) which are not relevant):

> "A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say—
>
> (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. The marriage between JU and the appellant was obviously celebrated after 31st July 1971. It was also a polygamous marriage as JU was at the time married to MB. The marriage was plainly entered into outside England and Wales. There is no suggestion that at the time of the marriage the appellant's domicile was other than Bangladesh. However, section 11(d) provides that such a marriage is void (under English law) if "either party was at the time of the marriage domiciled in England and Wales". For that reason JU's domicile in 1997 was the crucial issue.

17. So, if JU's domicile in 1997 was in the United Kingdom, then as a matter of English law his marriage to the appellant would not have been valid. On that basis, when JU died, then the appellant would not be his lawful widow and so would not be entitled to bereavement benefits on the basis of his national insurance record.

18. If, on the other hand, JU's domicile in 1997 was in Bangladesh, then as a matter of English law his marriage to the appellant would have been valid. On that basis, when JU died, then the appellant would have been his lawful widow and so

would be entitled to bereavement benefits on the basis of his national insurance record. The reason for this is that the marriage would have been treated as monogamous because, at the time of his death, JU only had one surviving wife (see regulation 2 of the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 (SI 1975/561)).

Why the First-tier Tribunal's decision involves an error of law

19. The First-tier Tribunal's decision involves an error of law for two reasons. The first reason is that it is not clear that the tribunal asked itself the right legal question. The second reason is that the tribunal did not make sufficient findings of fact or give adequate reasons for its decision. I will explain each point briefly.

20. First, it is unclear whether the tribunal asked itself the right question. That question was this: what was JU's domicile at the time of his marriage in 1997 to the appellant? In at least two places the tribunal asked itself different questions, namely (i) what was what JU's domicile was at the time of his death?; and (ii) was the marriage monogamous at the time of his death? Both of those questions were irrelevant to the fundamental question that had to be asked. There are signs elsewhere in the Statement of Reasons that the tribunal did actually ask itself the right question. However, as Mr Scholefield argues, it is not acceptable for there to be such a degree of confusion as to what was the relevant date for the purpose of identifying JU's domicile (and hence the validity in English law of his marriage to the appellant).

21. Second, the tribunal made very sparse findings of fact and did not give adequate reasons. Indeed, one reading of the third paragraph of the Statement of Reasons is that JU had acquired a domicile of choice in the United Kingdom by 2007, which would not answer the question the tribunal actually had to answer. In addition, the appellant and her representative had made detailed written submissions arguing that either JU had never abandoned his domicile of origin (Bangladesh) or, if he had, he had re-acquired it before his 1997 marriage to the appellant. Those arguments needed to be addressed. If the tribunal did not accept them, then the tribunal had to explain why.

Directions for the new First-tier Tribunal

22. Directions for the re-hearing are set out at the start of this decision of the Upper Tribunal. In particular, the First-tier Tribunal that rehears this appeal must consider carefully and make findings of fact as to JU's domicile <u>at the date of his marriage to the appellant in 1997</u>.

23. The new tribunal will note that the report of the International Pension Service Officer (dated 27 July 2008, at pages 11-13) did not express a firm view on whether or not JU had acquired a domicile of choice in the United Kingdom by 1997. On the other hand, the advice of the Department's Relationship Validity Unit (RVU) was that by 1997 JU had acquired a domicile of choice in the United Kingdom and so lacked capacity to enter into a marriage with the appellant under English law (advice dated 5 November 2008, pages 72-73). That view was elaborated upon in the Secretary of State's further submission at pages 95-97 (dated 2 June 2009).

24. Against that, the new tribunal will have to consider the various arguments advanced by the appellant to support her claim. Her detailed written submissions appear at various places in the bundle, for example in her letter of appeal (8 March

2009, pages 2-5), and the detailed submissions at pages 80-82 (21 May 2009), with supporting evidence, and at pages 109-110 (9 August 2009). These arguments are also summarised in the application for permission to appeal (dated 8 December 2009, pages 117-119).

25. The appellant makes specific reference to JU's landholdings in Bangladesh and the fact that he had a bank account there. Clearly these are factors that the new tribunal must consider. However, it is unlikely that they can be conclusive, just as the fact that JU owned land in the United Kingdom and had a bank account here would not, of itself, mean that he had a United Kingdom domicile at the material time. The tribunal must take into account all the relevant evidence in reaching its decision about JU's domicile in 1997.

26. The tribunal should also take into account the following legal principles when making its findings of fact, which have been taken from *Halsbury's Laws of England* (Volume 8(3), "Conflict of Laws") as an authoritative statement of the relevant law. A person's domicile of origin is received by operation of law at birth; any domicile of choice is acquired later by the individual actually moving to another country and intending to remain there indefinitely. A person's domicile of origin is retained until the acquisition of a domicile of choice; it cannot be divested, although it remains in abeyance during the continuance of a domicile of choice. A person's domicile of choice is lost by abandonment, at which point the domicile of origin will revive unless some other domicile is acquired. Furthermore, the domicile of choice is destroyed when it is once lost, but may be acquired again by fulfilling the same conditions as are required in the first instance.

27. As indicated above, in order to have acquired a domicile of choice in a country, an individual must have actually resided there and must have formed the intention of making his sole or principal permanent home in the country of residence, and of continuing to reside there indefinitely. So residence alone, unaccompanied by this state of mind, is not enough. The intention which must be shown is as to the quality of the residence; it is not actually necessary to show that the person concerned intended to change his domicile. A person can change his domicile without changing his nationality; conversely a change of nationality does not necessarily involve a change of domicile.

28. Furthermore, an intention to reside in a country for a fixed period of time, or until some clearly foreseen and reasonably anticipated event happens, will not be sufficient to acquire domicile However, if the proper conclusion from all the circumstances is that the individual intends to make his home in a country for an indefinite time, he will acquire a domicile of choice there notwithstanding a continuing emotional attachment to some other country or an intention to change his residence upon some vague contingency.

29. A domicile of choice can, of course, be lost by abandonment. This process is the exact converse of its acquisition. It is necessary for the person concerned to cease to reside in the country of domicile, and also to cease to have the intention to return to it as his permanent home. Absence without the intention of abandonment is of no effect; nor is intention without any actual change of residence.

A note about the decision of Mr Commissioner Jacobs in CP/3024/2009

30. As indicated above, the Secretary of State's representative provided a copy of the decision of Mr Commissioner Jacobs in a different case, CP/3024/2009, because of the helpful analysis in that decision of the issue of domicile. The fact that the claim

succeeded in that case does not mean that the claim in the present case will necessarily succeed. This is because although the legal principles are constant, the facts of the two cases are different.

31. On the facts of CP/3024/1999, Mr Commissioner Jacobs explained why he was satisfied that the claimant's husband, who had arrived in the United Kingdom from Pakistan in 1957, had acquired a domicile of choice in this country by 1964 (see his application of the facts to the law at paragraphs 23 to 26 of the Commissioner's decision). However, the factual context of that case was important. The claimant in that case was the deceased's first wife, having married him in 1956. Her husband then married a second wife in Pakistan in 1964. When the claimant applied for a retirement pension on the basis of her husband's contributions, both the appellant and the second wife were alive.

32. It followed from the discussion above that although both the marriages were valid under Islamic law, the critical issue was the approach taken by English law. If the husband's second marriage was valid in English law, then the marriage was polygamous and the claimant was not entitled to a retirement pension. The validity of that second marriage depended on where the husband was domiciled in 1964. If he was domiciled in the United Kingdom, the second marriage was not valid under English law, and the first marriage was monogamous. If he was domiciled in Pakistan, the second marriage was valid and the claimant's marriage polygamous. For the reason set out in his decision, Mr Commissioner Jacobs concluded that the claimant's husband was domiciled in the United Kingdom in that case by 1964, and so her claim could succeed.

33. On the facts of CP/3024/1999 both marriages took place before 1971, and so section 11(d) of the Matrimonial Causes Act 1973 did not apply. However, as a matter of common law, capacity to contract a polygamous marriage is governed by the law of each party's domicile. Furthermore, at common law a person whose personal law, as determined by his domicile, does not permit polygamy has no capacity to contract an actually polygamous marriage (see *Re Bethell, Bethell v Hildyard* (1888) 38 ChD 220).

34. The result in that case was therefore that the claimant was entitled to benefit. Under English law the husband had only one valid wife, the first wife, as he had a United Kingdom domicile when he married his second wife in 1964. So in that case the second marriage was valid under Islamic law but not under English law. The factual circumstances of that case and the present case are therefore not necessarily the same.

The venue for the re-hearing before the First-tier Tribunal

35. The original appeal was heard by the First-tier Tribunal in Newcastle-upon-Tyne. The reason for that is that the Secretary of State has an office based in Newcastle-upon-Tyne to deal with benefit claims involving an overseas element. As such appellants are usually resident abroad, and unable to attend the tribunal hearing, it makes no difference to them where in Great Britain the hearing is held. One advantage of holding the appeals in Newcastle-upon-Tyne is that the Department is better placed to send a presenting officer to the hearing. However, presenting officers can travel or the Department may make alternative arrangements or may opt to rely on its written submissions.

36. In the present case the appellant herself lives in Bangladesh and is unable to attend the re-hearing. However, she has a representative living in London. The appellant and her representative should therefore consider whether they wish to ask for the re-hearing to be held at a London venue, so that he can attend and both make any further submissions and answer any questions.

37. If the appellant wants her representative to attend a re-hearing in London, she or her representative should write to the Tribunals Service regional office in Newcastle-upon-Tyne within one month of the issue of this decision with that request.

Conclusion

38. For the reasons explained above, the decision of the tribunal involves an error of law. I must therefore 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 rehearing by a new tribunal subject to the directions that follow (section 12(2)(b)(i)). My decision is as set out above.

39. I stress again that I am making no decision nor indeed expressing any view on the issue of whether the appellant is properly entitled to bereavement benefit. That is a matter for the good judgment of the new tribunal. To do so it must review all the relevant evidence and make its own findings of fact. So the fact that this appeal to the Upper Tribunal has succeeded should not be taken as any indication as to the outcome of the re-hearing before the First-tier Tribunal.

Signed on the original
on 29 June 2010

Nicholas Wikeley
Judge of the Upper Tribunal