



Neutral Citation Number: [2019] EWCA Civ 571

Case No: C3/2018/0343

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**ADMINISTRATIVE APPEALS CHAMBER**  
**Upper Tribunal Judge H. Levenson**  
**CAF/1819/2016**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 04/04/2019

**Before :**

**LADY JUSTICE RAFFERTY**  
**LORD JUSTICE DAVIS**  
and  
**LORD JUSTICE BAKER**

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**Between :**

**HILDA DEAKIN**

**Respondent**

- and -

**SECRETARY OF STATE FOR DEFENCE**

**Appellant**

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**Ms Galina Ward** (instructed by the **Government Legal Department**) for the **Appellant**  
**Mr Nathan Searle** (instructed by **Hogan Lovells International LLP**) for the **Respondent**

Hearing date : 26 March 2019  
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**Approved Judgment**

**Lord Justice Davis :**

**Introduction**

1. This appeal raises a point of interpretation of some very convoluted provisions contained in the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 (“the 2006 Order”). Put shortly, the issue comes to this. Is the respondent to this appeal, Mrs Hilda Deakin, entitled to a restored war widow’s pension from the date when she first notified her application for such a pension (15 November 2014) or from the date when, as is agreed, she actually became entitled to such a pension (1 December 2000)?
2. The Upper Tribunal (Judge Levenson) on 14 September 2017 found in favour of Mrs Deakin on this point. The judge held that, on the proper interpretation of the 2006 Order, there had been no obligation on her to make a claim in 2000 and accordingly that she was entitled to a pension from that time. It is estimated that that may connote a backdated payment of in the region of £150,000. It may, or may not, be the case that possible offsets may then be needed in respect of other benefits received in the interim. But this court is not concerned with that.
3. Permission to appeal was granted by Patten LJ on 19 November 2018, on the ground that the appeal had realistic prospects of success. It was also suggested in the grant of permission that the appeal may raise an issue which was likely to be of some general application. However, this case has involved a somewhat unusual combination of circumstances; and, moreover, the 2006 Order has now been amended by an Amending Order with effect from 9 April 2018 in such a way that this particular point should not hereafter arise. We were in fact told that, so far as is known, there currently are only two other extant claims involving a point of the kind raised on this appeal.
4. The appellant Secretary of State was represented before us by Ms Galina Ward. The respondent (Mrs Deakin) was represented before us by Mr Nathan Searle. Neither had appeared in the Tribunal proceedings below. The case was very well argued on both sides.

**The Background Facts and the Proceedings Below**

5. Mrs Deakin (nee Mawer) was born on 14 September 1920. During the Second World War she married George Atkinson on 5 September 1942. He was then serving in the Royal Electrical and Mechanical Engineers. Sadly, the marriage was very short-lived as he was killed during service on 6 December 1942. There was no child of the marriage. She was awarded a war widow’s pension.
6. On 1 December 1945 she married Cyril Deakin. Under the legislative scheme then in force, her war widow’s pension ceased to be payable on her remarriage. Happily, this marriage was altogether more long-lived, lasting until Mr Deakin’s death on 30 November 2000. There were children of the marriage.
7. By virtue of supervening legislation (to which I will come) Mrs Deakin was entitled to a restored war widow’s pension from the day after the date of death of Mr Deakin. But she did not know that. She did not realise that she was entitled to a restored war widow’s pension. She only became aware of this when, for a number of reasons, she and her

family first were alerted in 2014 to the supervening change in the law. It may be that one further reason why she had not been so aware was that for some years now she had been living in Australia. At all events, the First-tier Tribunal was to find, by its decision of 28 April 2016, that the Secretary of State had made reasonable efforts to disseminate this information: and there has been no challenge on behalf of Mrs Deakin to that finding.

8. Mrs Deakin first applied for restoration of her war widow's pension on, as was agreed, 15 November 2014: albeit her actual signed claim form, as produced to us, was dated 31 January 2015 and stamped as received on 6 February 2015. On 23 February 2015 the Secretary of State awarded her a restored war widow's pension with effect from 15 November 2014
9. Mrs Deakin then challenged that on appeal to the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber). She was not present or legally represented at that hearing. The Secretary of State was represented by an official of the Veterans Agency. By its decision of 28 April 2016 the First-tier Tribunal rejected an argument that Mrs Deakin had been unable to claim earlier by reason of incapacity. It also, as I have said, found that the Secretary of State had made reasonable efforts to disseminate this information about the intervening change in the law. A further suggestion which had been raised to the effect that her war widow's pension should never have been withdrawn when she remarried on 1 December 1945 was (correctly on the then applicable legislation) rejected by the First-tier Tribunal. It does not appear that there had, in the alternative, been raised before the First-tier Tribunal a suggestion that Mrs Deakin was entitled, without the need for a claim at that time, to a restored war widow's pension following the death of her second husband on 30 November 2000. At all events, the First-tier Tribunal expressed no conclusion on such a point.
10. There was then an appeal by Mrs Deakin to the Upper Tribunal. By this stage Mrs Deakin was represented by a member of the Royal British Legion; and the Secretary of State appeared by counsel.
11. By his decision of 14 September 2017, Upper Tribunal Judge Levenson carefully reviewed the legislative scheme. On the issue of incapacity, he held that the First-tier Tribunal had given insufficient reasons for its conclusion. He indicated that he would, if that had been the only issue, have remitted the matter for a fresh hearing and decision. That conclusion is not challenged by the Secretary of State. The judge also rejected, however, the argument that the Secretary of State had failed to take sufficient steps to bring to the attention of those in the position of Mrs Deakin the changes in the law giving rise to a right, in the specified circumstances, to a restored widow's pension. That conclusion, in turn, is not challenged by Mrs Deakin.
12. However, the appeal was upheld by the Upper Tribunal Judge on the basis that the 2006 Order did not require a claim for a restored widow's pension to be made on the death of Mrs Deakin's second husband on 30 November 2000. She was adjudged to be entitled to such a pension from that date accordingly. It is this last point which provides the subject-matter of this appeal. It raises a pure point of interpretation of the 2006 Order.

### **The Legislative Scheme**

13. It was agreed before us that, under the then legislative provisions, payment of a war widow's pension was properly terminated on Mrs Deakin's remarriage on 1 December 1945.
14. Thereafter, the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 ("the 1983 Order") contained detailed provisions as to awards in respect of disablement and death. By Article 42(1) it was confirmed that a war widow's pension ceased to be payable if she married or lived with a man as his wife (subject only, under Article 42(2), to contrary direction by the Secretary of State "having regard to the special circumstances of the case"). Schedule 3 of that Order also set out, in tabulated form, the various commencing dates for various awards of pension.
15. A significant change, for present purposes, was effected by the Pensions Act 1995 ("the 1995 Act"). In particular, s.168(1) of that Act provided as follows:

“(1) In determining whether a pension is payable to a person as a widow under any of the enactments mentioned in subsection (3) in respect of any period beginning on or after the commencement of this section, 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.”

The 1983 Order was included in s.168(3). For present purposes, it is sufficient to say that it was agreed before us that as from 19 July 1995 war widows in the position of Mrs Deakin were entitled to a restored war widow's pension following the termination of a subsequent marriage. (I add that, more recently still, the position has been further extended so that remarriage or cohabiting does not cause the withdrawal of a surviving spouse's pension at all: but that is not relevant to the circumstances of this case.)

16. Following the 1995 Act, there was further amendment to the 1983 Order by, amongst other measures, the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Amendment (No. 3) Order 1996 ("the 1996 Amendment Order"). By Article 3A, as inserted by amendment into the 1983 Order, it was provided with effect from 20 December 1996 that it was a "condition precedent" to making one of the specified awards that a completed claim form be delivered. Article 3B related to cases where claims were not required. Sub-paragraph (3) provides:

“(3) A claim for a widow's pension under article 29 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) the Secretary of State for Defence has delivered to the Secretary of State copies of that member's medical and service records.”

17. The 1983 Order was in turn replaced by the 2006 Order: which, it is agreed, is the relevant Order for present purposes. It came into effect on 10 April 2006.

18. Part III of the 2006 Order is headed “Awards in respect of Death”. Article 22(1) provides:

“Under this Part, awards may be made in accordance with this Order in respect of the death of a member of the armed forces which is due to service before 6th April 2005.”

Article 23(1) then provides in the relevant respects:

“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 then specified rates]...”

Thereafter, provision is variously made in the following Articles for awards or allowances, frequently geared to cases of death “due to service”.

19. Article 33 (which is headed “Relationships subsequent to the award of a pension”) in the relevant respects, in the version applicable to the present case, provides as follows:

“(1) Subject to the following provisions of this article, any pension or allowance awarded under this Part of the 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.

(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) that 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 existed.

...

(4) In determining whether a pension is payable to a person as a surviving spouse in respect of any period beginning on or after 19<sup>th</sup> 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)(a) the reference to the termination of a marriage is to the termination of the marriage by death, dissolution or annulment”

20. Part IV of the 2003 Order is headed “Claims”. Article 34 (itself headed “Making of claims”) provides in the relevant respects as follows:

“(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 an 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;”

21. Article 35 (headed “Cases where claims are not required”) provides as follows in the relevant respects:

“(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 paragraph are satisfied.

...

(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.”

Thus Article 35(3) in substance replicates the corresponding provision in the now superseded Article 3B of the 1983 Order. It is the true interpretation of Article 35(3) which is central to this present appeal.

22. Article 46 provides that Schedule 3 was to have effect with respect to commencing dates for awards under the 2006 Order. Paragraph 1 of Schedule 3 provides in the relevant respects as follows:

“ (1) Subject to the following provisions of this Schedule, an award or an adjustment of an award shall have effect from such date as may be specified in the award, being a date not earlier than the date specified in subparagraph (2) which is relevant in the claimant’s case.

(2) The date specified in this subparagraph is whichever date is the latest in time of the date –

(a) following the date of termination of service, in a case under Part IV, following the date of death of the member;

(b) of the claim;

(c) of the last application for review; or

(3) Where in a case to which subparagraph (1) applies, the claimant satisfies the requirements of subparagraph (4) the award shall have effect from the date the subparagraph is satisfied.

(4) This paragraph is satisfied where the date of claim or application for review is made within 3 months of –

(a) the date of termination of service, or the date of death where an award is made in respect of a member’s death; or

(b) except where paragraph (a) applies, the date of notification of a decision on the claim or review.

...

(10) For the purposes of this paragraph, a claim shall be treated as made for a pension or allowance for which a claim is not required by virtue of article 35 on the date on which the relevant conditions of entitlement to the pension or allowance first became satisfied.”

Paragraph 2(1) of Schedule 3 then provides:

“In a case to which section 168 of the Pension Act 1995(1) (war pensions for widows: effect of remarriage) or article 33(2) applies, for paragraph 1(4)(a) of this Schedule substitute “the date of termination of a marriage or civil partnership, the date of judicial separation of the parties to a marriage, the date of a separation order relating to a civil partnership or the date the claimant ceased to live with another as a spouse or as a civil partner”.”

There are also, among other things, provisions in this Schedule adjusting the date of commencement in various situations: for example, in cases of incapacity or in cases of act or omission on the part of the Secretary of State causing delay in the submission of a claim. Although, as I have said, such matters featured in the Tribunal proceedings below, they have not featured on this appeal.

23. Finally, for present purposes, I would refer to the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions (Amendment) Order 2018 (“the 2018 Amendment Order”). That was made following the decision of the Upper Tribunal in the present case. It came into force on 9 April 2018. That, among other things, inserted after Article 35(3) an additional paragraph (3A) to this effect:

“(3A) Paragraph (3) does not apply to restorations of awards referred to in article 33(2).”

I should add that by then the original version of Article 33(2) had been superseded and replaced by a new Article 33(2) as from 6 April 2015.

24. So that amendment in 2018 connoted a statutory reversal – at all events for claims falling within the new Article 33(2) - of the decision reached by the Upper Tribunal in the present case. But that cannot resolve the issue of the correct interpretation of Article 35(3) as it stood prior to such an amendment. Ms Ward had sought, in her written argument, to place some reliance on that amendment as made in 2018 as showing what she said had always been the intention. Mr Searle, conversely, in his written argument had placed some reliance on that amendment as showing that it had been appreciated that an amendment was indeed necessary if such an outcome was to be achieved. But ultimately they agreed in oral argument that the subsequent amendment contained in the 2018 Amendment Order was of no real value as an aid to the interpretation of Article 35 in its original form; and I myself agree with them on that.

### **The arguments**

25. Ms Ward prayed in aid purposive arguments in support of her overall argument that the then provisions of the 2006 Order did require a formal claim for a restored surviving spouse’s (or civil partner’s) pension. She pointed out that where a member of the armed forces has died during service that fact will be known and the appropriate records will have been available. But where there is a subsequent marriage (or civil partnership) the Secretary of State may well have no means of knowing whether or when that subsequent marriage or civil partnership will have terminated and that a restored war pension is potentially payable. Further, in the absence of a claim, no provision will have been made for such a liability – a liability which, as the present case illustrates, could accrue to a very sizable sum.
26. She moved on from that to draw attention to the language of Article 35(3) and to the use of the present tense in Article 35(3)(b). She submitted that that made good sense in the case of the death of a member of the armed forces while serving. It made less sense in the case of a restored award of pension, which may arise many years after the death of a member of the armed forces. She also said that it would be an oddity that a claim would have been required had (for example) Mr Atkinson been invalidated out and then died, due to his service, many years later: but a claim would not have been required in the circumstances that in fact occurred here. In short, she said, Article 35 is to be treated



as in substance an administrative provision: and not as a provision designed to give a preferential status in respect of restored awards to surviving spouses or civil partners where the relevant death was due to service and whilst serving. That, she said, is further reinforced by the fact that it was perceived to be necessary to have express disapplication of the date of delivery of the claim form as being the commencement date in circumstances of (for example) incapacity or of fault on the part of the Secretary of State.

27. For his part, Mr Searle focused on the actual language of the 2006 Order. The words of Article 34(1) as included in brackets – inserted, he said, on a “for avoidance of doubt” basis – made explicit that the making of a claim as a condition precedent extended to restored awards. But that requirement for making such a claim as a condition precedent was itself subject to the exemption contained in Article 35. On the ordinary meaning of Article 35(3), that covered someone in the position of Mrs Deakin. Use of the present tense in Article 35(3) does not in any way controvert that. To the contrary, the predecessor to the Veterans Agency would have had the medical and service records of Mr Atkinson on his death (indeed, the Upper Tribunal had expressly so found): and it would be a nonsense for there to be a requirement for redelivery. Further, such a conclusion is also precisely accommodated by the provisions of paragraph 1(10) of Schedule 3. Overall, his submission was that the words are clear. There was, he said, no purposive approach to interpretation which could legitimately justify a departure from the actual meaning of the words, ordinarily read.

### **Disposal**

28. I saw a considerable amount of force in Ms Ward’s arguments. One can certainly see a case for seeing that that is how Parliament may well have wished to have approached matters (and indeed is unquestionably how matters have been approached, at all events for cases within the new Article 33(2), with effect from 9 April 2018). But ultimately I do not think that such an argument can prevail. It seems to me to go flat against the actual language which has been used. Further such an outcome, favourable to those such as Mrs Deakin, cannot be said to be devoid of sense or purpose.
29. One point needs to be cleared out of the way. Before the Upper Tribunal, the argument proceeded on the footing that Mrs Deakin’s right to a restored award arose under Article 33(2) (in its then version, as set out above). It was, however, agreed before us that that was incorrect. Article 33(2) related to situations where an award has ceased where the person has been, putting it shortly, cohabiting. At all events, it was agreed before us that it was Article 33(4) which applied to the present case. Consequently, the further arguments raised below as to the interpretative implications of the then version of Article 33(2) fall away. That said, it is very difficult to see that the outcome, in terms of an exemption or otherwise from making a claim, could or should be different depending on whether a particular case fell within Article 33(2) or Article 33(4).
30. Turning to Article 33(4), it may be noted that its provisions in effect replicate those of s.168(1) of the 1995 Act.
31. In my opinion, it is critical to bear in mind throughout that a restored award of this kind remains an award under Article 23. It is not to be treated as an award “under” Article 33. Rather, Article 33 confers the right, in the specified circumstances, to seek the restoration of an award.

32. That being so, as a matter of generality a restored award of a surviving spouse's pension thus falls within Article 34. It does so because it is plainly within the category specified in Article 34(2)(k); and the words in brackets in Article 34(1) – “(including any such award which follows an earlier award or a period which, had there been an award for that period, would have ended under Article 33(1))” – put beyond doubt that Article 34 extends to restored awards made as a result of the application of Article 33.
33. But Article 34 is qualified in its entirety by its opening words. Those words specifically subject the provisions of Article 34 to Article 35. And Article 35(3) then specifically exempts from the requirement to make a claim the case of “a claim for a surviving spouse's or surviving civil partner's pension under Article 23” in the circumstances specified in Article 35(3)(a) and (b). Since Mrs Deakin's claim is under Article 23 and since her case fulfils those prescribed circumstances, she was not required to make a claim. In my opinion, the wording of Article 35(3), naturally and ordinarily read, is too specific to admit of a contrary interpretation. It then follows, by reason of paragraph 1(10) of Schedule 3, that her claim is to be treated as made on 30 November 2000: and that she is entitled to a restored award from the following day accordingly.
34. I do not think that there is any real mileage in Ms Ward's argument based on the use of the present tense in Article 35(3)(b) (she accepted in point of fact there would be no possible need for redelivery of the relevant records). The point is neutral. There does not, as I see it, in fact seem to be any great precision in the use of tenses throughout the 2006 Order – I note, for example, that Article 23 itself is framed in the present tense. In any event, Article 3B of the 1983 Order, as inserted by the amendment in the 1996 Amendment Order, had in the corresponding provision used the words “has delivered”. There seems no rhyme or reason in thinking that use of the present tense in Article 35(3)(b) of the 2006 Order was designed to convey a different outcome.
35. I nevertheless acknowledge the force in Ms Ward's point that (in contrast with the position of currently serving members of the armed forces) it may be extremely difficult for the Secretary of State to know or have the means of knowing of the personal situation of a surviving spouse or surviving civil partner and whether or when any subsequent marriage or cohabitation has terminated. In consequence, there can, where no claim had been made, be no budgeting for such restored awards: which would have the capacity to be sizeable. The present case, indeed, is an illustration of that.
36. But in my view that consideration can not justify a departure from the plain words of Article 35. I do not think that an interpretation giving effect to the natural and ordinary meaning of the words of Article 35 can be said to be so devoid of sense and purpose as to justify failure to give effect to that natural and ordinary meaning. On the contrary, there are these further considerations:
  - (1) First, Mrs Deakin always was entitled to a restored award of her war widow's pension on the death of her second husband. Because she did not know of her rights at the time, she did not notify the Secretary of State at that time. Had she done so promptly, she would have received her restored award from that date. But in the circumstances here arising the Secretary of State has in the intervening years been spared from paying what otherwise would have been payable. This is a point to which the Upper Tribunal judge accorded considerable weight. I agree, however, with Ms Ward that that point is of only limited weight. It is of only limited weight just because it is the general scheme

of the 2006 Order that the commencement dates for awards are (ordinarily) geared to the making of a claim. So there certainly will be cases where claimants may receive an award from a commencement date which is later than the date on which the potential entitlement first arose. That said, and although I would not myself accord this point quite the weight that the Upper Tribunal did, it still, in my view, has at least some relevance in considering the sense of the outcome if a literal interpretation of the words is adopted.

- (2) Second, it very important to note that this exemption from the requirement to make a claim is limited to those who die “while serving”. Thus not only must the relevant death be “due to service” (Article 23) but in addition, for the purposes of Article 35(3), it must be during service. That significantly delimits the class of those who are exempt from the requirement to make a claim.
- (3) Third, and linked to the second point, it is by no means fanciful to think that a degree of preferential benevolence was designed to be extended to the surviving spouses and civil partners of those whose death was not only due to service but also was while serving. At all events, the general direction of travel of the Services Death and Disablement provisions over the years seems, by and large, to be one towards extension and inclusion rather than restriction and exclusion.

37. Accordingly, since the wording seems to me to be clear I consider that the natural and ordinary meaning of those words must prevail. The remedy, if it is not desired to maintain such a position, is to amend the 2006 Order; and in fact that is what has been done, with effect from 9 April 2018, by the 2018 Amendment Order.

### **Conclusion**

38. I therefore conclude that the Upper Tribunal judge was right to allow the appeal. His consequential direction, to the effect that the matter is to be remitted to the Secretary of State to calculate the award payable on the footing that Mrs Deakin was not required to make a claim for a restored widow’s pension on the death of her second husband, will therefore stand.
39. This appeal is accordingly dismissed. We were informed that the parties had agreed that there should be no order as to costs.

### **Lord Justice Baker:**

40. I agree.

### **Lady Justice Rafferty:**

41. I also agree.