IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2019-001376-FRP
Formally CFP/1198/2019

On a reference from Secretary of State for Work and Pensions

In the estate of E.S.

Before: Upper Tribunal Judge Wikeley

Decision date: 14 February 2022
Decided on consideration of the papers

Representation:

Referrer:	Mrs D Dean, DMA, Department for Work and Pensions
Respondent:	Ms KS (daughter)

DECISION

(1) This decision of the Upper Tribunal is given under section 4(1A) of the Forfeiture Act 1982.

(2) Subject to (3) and (4) below, the forfeiture rule as defined in section 1 of the Forfeiture Act 1982 applies as a result of the late claimant's involvement in the death of her late husband.

(3) The forfeiture rule applies to the underpayment of retirement pension amounting to £78,433.84 for the period from 19 June 1989 to 25 March 2018.

(4) However, I modify the effect of the rule so that the rule applies only to one-quarter of the above sum.

(5) I remit the case to the Secretary of State for a determination of the amount payable to the estate in the light of my decision.

REASONS FOR DECISION

Introduction

1. This is an unusual case, even by the standards of references under the Forfeiture Act 1982.

The Forfeiture Act 1982 jurisdiction

2. There is a rule of public policy that a person cannot benefit from their own wrongdoing, especially if that wrongdoing results in the death of another person. This rule, known as the forfeiture rule, is recognised by section 1(1) of the Forfeiture Act 1982. One consequence of the rule is that in principle a claimant who has unlawfully killed another person cannot rely on that person's death in order to obtain a social security benefit. However, section 4(1A) of the Forfeiture Act 1982 allows the Upper Tribunal to modify the effect of the forfeiture rule in cases of unlawful killing other than murder (see section 5).

3. The Upper Tribunal has a broad discretion in deciding whether to modify the effect of the forfeiture rule. Section 4(1B) provides as follows:

> "The Upper Tribunal shall not make a decision under subsection (1A) above modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the Upper Tribunal to be material, the justice of the case requires the effect of the rule to be so modified in that case."

4. Upper Tribunal Judge Ward has explained the thinking behind the forfeiture rule in Upper Tribunal unreported decision CFP/969/2014 (at paragraph 13):

> "The forfeiture rule does not exist to provide a further punishment over and above that imposed by criminal law. It does reflect a principle of public policy that no man (or in this case his estate) may benefit from his own wrong…. And, though the impact of the rule may be modified, it is a relatively rare case for it to be disapplied altogether."

5. It follows that it is only in an exceptional case that the rule does not apply (see also CG/14509/1996). The breadth of the discretion and the range of factors to be considered were also emphasised in *Dunbar v Plant* [1998] Ch 412 (per Mummery LJ at 427). However, that case is also authority for the proposition that the fact the claimant did not intend to cause death is not itself an exceptional circumstance.

6. Typically, two questions arise in cases under the Forfeiture Act 1982. First, does the forfeiture rule apply? Secondly, and if it does apply, should the rule be modified in some way? Before addressing those two questions, the background to the present reference needs to be explained, if only in outline at this stage.

The background to this reference to the Upper Tribunal

7. The claimant, who is now deceased, was born in May 1925. She was married for some 30 years to a farmer, although for the last 10 years of the marriage the couple had begun to lead somewhat separate lives due to matrimonial problems. In late 1986 the claimant's husband began an affair with another woman, who stabled her horses at the farm. In March 1987 he moved out of the

farmhouse into one of the outbuildings, but returned regularly to the farmhouse to use the bathroom. The claimant became aware of her husband's affair, which led to her suffering severe reactive depression. One night in April 1987, as he came out of the bathroom, the claimant shot him on the landing in the side with a shotgun. The farmer died in hospital some three weeks later, the causes of death being recorded as widespread abdominal sepsis and shotgun wounds to the abdomen.

8. The claimant, who was by then aged 62, went on trial in November 1987. She pleaded not guilty to murder but guilty to manslaughter on the basis of diminished responsibility, a plea accepted by the court and the prosecution. She was sentenced to three years' imprisonment. The Court of Appeal (Criminal Division) dismissed a subsequent appeal against the sentence – the Court's judgment is on the appeal file.

9. The claimant served about 19 months of the term of her imprisonment and was released in June 1989. Relatively little is known about the rest of her life. Her daughter (and executor) has spent much of her own life living and working abroad so has been able to provide only limited information. On her release from prison, it seems the claimant worked in a vineyard in the South of England for a while and then for several years as a live-in carer. She then went to live with her daughter for the last six years of her life. There is no evidence that she received any non-contributory (means-tested) social security benefits – a claim for state pension credit was apparently made shortly before she died but a query on that claim had not been resolved at the date of death, and so no payments had actually been made. However, for the few months before her death that she was in a nursing home the claimant received means-tested support with the cost of the fees.

10. The position as regards the claimant's receipt of social security benefits was as follows. At the time of her conviction, the claimant was in receipt of her own reduced rate Category A retirement pension (paid at 26% of the full rate) and a small additional pension. Obviously, her retirement pension was not payable while she was serving her prison sentence. When she was released, and for reasons that are not clear, the Department did not consider a forfeiture reference and simply put her own (reduced) retirement pension back in payment. When the claimant reached 80, she was awarded a higher Category D retirement pension together with the weekly age addition of 25p. This remained in payment until the claimant died at the age of 92 in March 2018.

11. If the forfeiture rule had not been applied when the claimant was released from prison in 1989, she would have been entitled to a basic pension at the full rate (then £43.60 a week) and an additional pension of £3.67, based on her late husband's national insurance contributions. This retirement pension would obviously have been subject to annual up-rating. The Department has calculated that the total underpayment of retirement pension for the period from the claimant's date of release from prison (19/06/1989) to her date of death (25/03/2018) amounts to £78,433.84.

12. I turn now to the two issues that need to be addressed.

Does the forfeiture rule apply in this case?

13. This is the simpler of the two questions. The short answer is yes. The question may be rephrased as asking whether the claimant had "unlawfully killed" her husband (see Forfeiture Act 1982, section 1(1)). As noted above, the claimant was charged with murder, but at trial the prosecution accepted a plea of manslaughter on the ground of diminished responsibility. Manslaughter, self-evidently, is a category of unlawful killing: see the Court of Appeal's decision in *Dunbar v Plant* [1998] Ch 412, applied by Mr Commissioner Rowland in reported decision *R(FP) 1/05* (paragraphs 14 and 15).

Should the forfeiture rule be modified in this case?

14. The next and more complex question, accordingly, is whether "having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the Upper Tribunal to be material, the justice of the case requires the effect of the rule to be so modified in that case."

15. I am satisfied that the rule should be modified. The claimant's conviction on the basis of diminished responsibility indicates the reduced responsibility that she bore for her crime and the death of her husband. There were undoubtedly powerful mitigating circumstances affecting the claimant's conduct on the fateful night in question. The Court of Appeal recognised that at the material time she was suffering from a severe depressive illness and in need of psychiatric help. Other mitigating factors were summarised by the Court of Appeal as "her well-attested good character, her unhappy marriage and hard life, and her genuine sense of remorse at what she had done." As to her previous good character, the Court observed that was "almost to understate the position because her sterling worth and warmth and kindness to others have been well-attested". All that said, the Court also noted the trial judge had ruled that the claimant's responsibility had not been impaired to the extent that it was merely minimal. There was, for example, some evidence of an element of deliberation – and the Court held that it was this "measure of deliberation which, albeit the result of a depressive illness, would have merited a longer sentence but for the very strong mitigating factors that were put before the learned judge."

16. There is one further and rather troubling complication to this case. The Secretary of State's representatives should by law have referred this case to the Social Security Commissioners (the forerunner of the Upper Tribunal) when the claimant was released from prison in 1989. Instead, the Department seemingly took it upon itself simply to reinstate the claimant's previous and personal entitlement to her own reduced rate Category A retirement pension. It simply overlooked or ignored the forfeiture rule issue. It is unclear why the Department took this approach and only belatedly made the reference nearly 30 years later. (I should stress this is no criticism of the current Secretary of State's representative, Mrs Dean, who has been helpful throughout.) I simply note this is not the first occasion on which a very late reference has been made (see *SSWP v LK (RP)* [2019] UKUT 421 (AAC).

17. However, it would not be appropriate to treat the Department's inordinate delay as a factor which weighs in the balance under section 4(1B). It is not a material consideration in the terms of that test. But it is perhaps not entirely irrelevant. It is relevant in that I consider I have to make the determination on the assumption that the reference had been properly made in 1989. I should

therefore put myself in the shoes of a Social Security Commissioner in say 1989 or 1990 and consider what decision about the forfeiture rule would have been taken then.

18. Weighing all relevant considerations into account, I consider that the case for a substantial modification of the rule is made out. However, the claimant's conduct did involve more than a minimal degree of responsibility for the tragic events that unfolded. I therefore do not consider this is a case in which the justice of the case requires that the rule of public policy should be deprived of any effect. The appropriate balancing of these various competing considerations appears to me to be to modify the application of the rule so that it applies to forfeit only one-quarter of the sum in issue since the claimant's release from prison. The balance is therefore due to the claimant's estate.

Conclusion

19. I determine the reference under the Forfeiture Act 1982 accordingly.

Nicholas Wikeley
Judge of the Upper Tribunal

Signed on the original on 14 February 2022