



EM v Secretary of State for Defence [2023] UKUT 222 (AAC)

**IN THE UPPER TRIBUNAL
000033-WP
ADMINISTRATIVE APPEALS CHAMBER**

UT Ref: UA-2023-SCO-

On appeal from Pensions Appeal Tribunals for Scotland

Between:

EM

Appellant

- and -

The Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 5 September 2023

Decided on the papers.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Pensions Appeal Tribunals for Scotland made on 14 December 2022 under case number PATS/E/22/0121 did not involve the making of any material error of law.

REASONS FOR DECISION

1. This is an appeal from a decision of the Pensions Appeal Tribunals for Scotland dated 14 December 2022 (“the PATS”), following a hearing on 14 December 2022. By that decision the PATS refused the appeal and upheld the Secretary of State’s decision of 8 October 2021. The Secretary of State had rejected a retrospective claim, made by the deceased appellant’s daughter on 15 March 2021, for restoration of a war widow’s pension for the period 1 October 1977 to 31 July 1995 to the appellant (or strictly speaking to her estate as the appellant had died on 9 August 2015).

2. Leave to appeal to the Upper Tribunal was granted by the President of the Pensions Appeal Tribunals for Scotland, Judge Caldwell KC on 20 March 2023 on the short basis that the appellant had stated an arguable case that was worthy of consideration by the Upper Tribunal.

3. It is necessary for the understanding of this appeal to first sketch in the factual background to it.

4. The appellant was born in October 1915. She married in July 1938 and her husband went on to serve in the RAF from August 1940 until he was medically discharged in August of 1944 because by then he, sadly, had pulmonary tuberculosis. It was accepted that the tuberculosis had been aggravated¹ by service and, because of this, when the appellant's then husband died on 12 December 1948 she became entitled to a war widow's pension. The appellant remarried in 1973, as a result of which the war widow's pension ceased to be payable to her. That marriage ended on the death of the appellant's second husband on 1 October 1977. No claim to have the war widow's pension was made by the appellant at that point in time. However, the appellant made a claim for restoration of her war widow's pension on 1 August 1995 and it was paid to her from that date of claim until she died on 9 August 2015. After the appellant's death, her daughter was responsible for the ingathering and winding up of her late mother's estate and it would seem it was in that capacity that the daughter made a claim, on 15 March 2021, for the war widow's pension to be restored in respect of her late mother for the period 1 October 1977 to 31 July 1995. It was that 15 March 2021 claim which was rejected by the Secretary of State for Defence in his decision of 8 October 2021.

5. I will continue to refer to the person on whose behalf it is being argued her war widow's pension ought to have been restored from 1 October 1977 to 31 July 1995 as 'the appellant' even though she died in August 2015. No discourtesy is intended

6. The issue on the appeal, as it was before the PATS, is whether under the applicable law the appellant was entitled to have a war widow's pension restored for the period 1 October 1977 to 31 July 1995 in circumstances where, as is accepted, no in-time claim was made by the appellant for that period.

7. The Royal Warrant concerning Retired Pay, Pensions etc dated December 1943 (Cmd. 6489) was the legislation that applied to the appellant up to and including the time of the death of her second husband on 1 October 1977. It was that legislation which provided that entitlement to the war widow's pension ceased when the widow remarried. Moreover, and for the purposes of this appeal more importantly, that legislation made no provision for restoration of the war widow's pension on the ending (for whatever reason) of the subsequent marriage. Accordingly, as a matter of the then applicable law, there was no legal basis for a war widow's pension being restored in October 1977 when the appellant's second husband died.

8. Nothing changed in this respect when the above Royal Warrant was replaced with the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983 ("the SPO 1983"). Article 42(1) of the SPO 1983 contained an identical general provision that a war widow's pension ceased to be payable if she married or lived with a man as his wife, but nothing in the rest of the SPO 1983 provided that the war widow's pension would be restored (with or without a claim) if that subsequent marriage ended.

¹ The appellant's family object to this characterisation of the role of the RAF in the appellant's first husband's tuberculosis. They seek a finding that his tuberculosis was caused by his service. However, that was not an issue which arose on the appeal before the PATS, nor did it need to arise, and as this appeal is being dismissed it is not for the Upper Tribunal to make findings as to the cause of the first husband's tuberculosis.

9. This legislative picture did change, however, with the enactment of the Pensions Act 1995 with effect from 19 July 1995. Section 168 of the Pensions Act 1995 provided on its enactment as follows (so far as is relevant to this appeal):

“War pensions for widows: effect of remarriage

168:-(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.

(2) For the purposes of this section—

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

(3) The enactments referred to in subsection (1) are—

(a) The Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983, and any order re-enacting the provisions of that order....”

(The underlining is mine and has been added for emphasis.)

10. I have underlined the words in section 168(1) of the Pensions Act 1995 because they show that the lifting of the statutory rule, that marriage by the war widow to a second husband ended entitlement to her war widow’s pension, only applied from 19 July 1995 onwards. Putting this another way, nothing in section 168 of the Pensions Act 1995 changed the law before 19 July 1995 or provided any lawful basis for a war widow’s pension being restored on the war widow’s second or subsequent marriage ending for any period before 19 July 1995.

11. This then leaves the period from 19 July 1995 to 31 July 1995. It is important to note in this respect that section 168(1) did not provide in its enacted form that from 19 July 1995 a war widow’s pension would be restored simply on the widow’s second or subsequent marriage having ended. Where section 168(1) benefitted the appellant, but only from 19 July 1995, was in laying down that her second marriage should be ignored for the purposes of deciding whether the war widow’s pension could be made payable to her again (i.e. restored), because that marriage had terminated before 19 July 1995. However, the opening words read, “[i]n determining *whether* a pension is payable” (my emphasis), and this makes it clear that whether a widow may have her war widow’s pension restored will depend upon her satisfying any other relevant rules in the governing statutory scheme.

12. At the time of the appellant’s claim for restoration of her war widow’s pension on 1 August 1995 the governing legislation in respect of war pensions, including a war widow’s pension, was the SPO 1983. At that time the SPO 1983 made no provision for an award to be made in the absence of a claim being made for that award: see Article 4 of the SPO 1983. The amendments made to the SPO 1983 with effect from 20 December 2006 under the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Amendment (No. 3) Order 1996 were to make clear that a

claim was required on a particular form under the SPO 1983 for entitlement to any pension under the SPO 1983 to arise, rather than to set out a (new) requirement for a claim to be made. The only relevant exception in respect of entitlement to a war widow's pension was in Article 3B(3)(a) of the SPO 1983, as inserted by the No.3 Amendment Order of 1986, which provided that a claim for a war widow's pension was not required if the service member in respect of whom such a widow's pension was payable had died in service. That rule could not have assisted the appellant as her first husband died after his service had ended.

13. I should add that it is not clear to me that the Secretary of State's decision which was under appeal in this case was concerned with a reconsideration of the decision made by him sometime on or about 1 August 1995 to restore the appellant's war widow's pension from 1 August 1995. The appeal to the PATS concerned the claim made by the appellant's daughter on 15 March 2021 for restoration of a war widow's pension to the appellant's estate for the period 1 October 1977 to 31 July 1995. If that was the correct claim under consideration by the Secretary of State in his decision of 8 October 2021, the governing statutory code is the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 ("the SPO 2006"). However the same result applies on either analysis as Article 35(3)(a) of the SPO 2006 (also) sets out that a claim for a war widow's pension (now called a "surviving spouse's or surviving civil partner's pension") is not required only where the member of the armed forces by reference to whose death the pension would be payable "died whilst serving in the armed forces".

14. Nothing said by the Court of Appeal in *Deakin v Secretary of State for Defence* [2019] EWCA Civ 571; [2019] 4 WLR 61, runs contrary to this analysis, which is largely how the PATS decided the appeal.

15. None of the appellant's grounds of appeal provide any persuasive legal basis for departing from the above analysis. The *only* exception to the general rule that a claim must be made in order to be entitled to a widow's pension is where (here) the husband of the widow died during or whilst in service. That exception did not apply in the appellant's case and therefore it was correctly decided that the war widow's pension only arose from the date of her claim on 1 August 1995. The fact that the appellant's first husband's death was due to or aggravated by, or as it is put "as a direct result of", his service does not alter this. The link between service and the tuberculosis gave rise to the appellant being entitled to a war widow's pension but only if, and from when, she made a claim for it.

16. It is for all these reasons that the appeal is dismissed.

**Approved for issue by Stewart Wright
Judge of the Upper Tribunal**

On 5 September 2023