IN THE UPPER TRIBUNAL **Appeal No: CFP/1016/2019**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Jones

DECISION

The Upper Tribunal decided that the Claimant is not precluded by virtue of the forfeiture rule as defined in section 1 of the Forfeiture Act 1982 from receiving a Category B retirement pension from 29 August 2007.

The Upper Tribunal is satisfied that the forfeiture rule does not apply to the Claimant. It is not satisfied that the Claimant unlawfully killed her late husband.

Therefore, no questions arise for determination as to whether the Claimant obtained a benefit in consequence of an unlawful killing nor whether the effect of the forfeiture rule should be modified. She is not precluded from obtaining the benefit of her category B pension. There should be no reduction in the Claimant's current and future pension entitlement nor has there been any overpayment of past pension payments which might be recovered.

This decision is made under sections 1 and 4 of the Forfeiture Act 1982 and Rules 26 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS

The reference

1. The Secretary of State for the Department for Work and Pensions ('the Secretary of State') made a reference to the Upper Tribunal on 17 April 2019 under section 4 of the Forfeiture Act 1982 ('the Act') and Rule 26 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the Upper Tribunal Rules 2008').

2. The reference is to determine whether the Claimant is precluded by virtue of the rule of public policy known as the forfeiture rule from receiving a Category B retirement pension which she has received since 29 August 2007. That pension is higher than it would otherwise be because she is receiving the benefit of her late husband's national insurance contributions.

3. The primary question of fact I have to determine is whether the Claimant unlawfully killed her late husband. If so, I will have to decide

whether she obtained a benefit in consequence and whether the effect of the rule should be modified nonetheless.

The issues in the case

4. The facts of this reference give rise to three issues:

a) whether the Claimant unlawfully killed her late husband such that the forfeiture rule applies pursuant to section 1(1) of the Act and she should be precluded from receiving the benefit of her husband's national insurance contributions in the form of a Category B retirement pension;

b) whether the Secretary of State's case should be struck out under Rule 8(3)(c) of the Upper Tribunal Rules 2008 because there is no reasonable prospect of it succeeding; and

c) whether the reference constitutes an abuse of process.

Issue 1 – whether the Claimant unlawfully killed her late husband such that the forfeiture rule applies

The Law

The Forfeiture Act 1982 and Upper Tribunal Rules 2008

5. Section 1(1) of the Act provides that: 'the "forfeiture rule" means the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.'

6. Sections 4(1), (1A), (1B) and 5 of the Act provide:

'4 [Upper Tribunal] to decide whether rule applies to social security benefits

(1) Where a question arises as to whether, if a person were otherwise entitled to or eligible for any benefit or advantage under a relevant enactment, he would be precluded by virtue of the forfeiture rule from receiving the whole or part of the benefit or advantage, that question shall (notwithstanding anything in any relevant enactment) be determined by [the Upper Tribunal].

(1A) Where [the Upper Tribunal] determines that the forfeiture rule has precluded a person (in this section referred to as "the offender") who has

unlawfully killed another from receiving the whole or part of any such benefit or advantage, [the Upper Tribunal the Upper Tribunal] may make a decision under this subsection modifying the effect of that rule and may do so whether the unlawful killing occurred before or after the coming into force of this subsection.

(1B) [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.

…….

5. Nothing in this Act…..or in any decision made under section 4(1A) of this Act shall affect the application of the forfeiture rule in the case of a person who stands convicted of murder.'

7. Rule 26 of Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules 2008") provides:

'26 References under the Forfeiture Act 1982

(1) If a question arises which is required to be determined by the Upper Tribunal under section 4 of the Forfeiture Act 1982, the person to whom the application for the relevant benefit or advantage has been made must refer the question to the Upper Tribunal.

(2) The reference must be in writing and must include—

(a) a statement of the question for determination;

(b) a statement of the relevant facts;

(c) the grounds upon which the reference is made; and

(d) an address for sending documents to the person making the reference and each Claimant.

(3) When the Upper Tribunal receives the reference it must send a copy of the reference and any accompanying documents to each Claimant.

(4) Rules 24 (response to the notice of appeal) and 25 (appellant's reply) apply to a reference made under this rule as if it were a notice of appeal.'

The Authorities

8. The nature of the inquiry to be conducted by Commissioners, now the Upper Tribunal, on a reference following a claimant's acquittal in criminal proceedings for a homicide offence was explained in *R(G) 2/90*. This was a decision of a panel of three Social Security Commissioners who prior to November 2008 held some of the same jurisdiction as Judges of the Upper Tribunal (Administrative Appeals Chamber). The Tribunal of Commissioners stated at paragraphs 20-21 of their decision:

'20. The endeavour to produce further exclusions such as one arising on an acquittal in criminal proceedings based on a deterrent view of the rule of public policy, must in our view, as a question of statutory construction of section 4(1), fail. Unpalatable or not, it is in our view the Commissioner's inescapable duty on a reference to undertake an inquiry as to the possible application of the forfeiture rule under section 4(1)….It is to the action of a claimant in bringing about death and not the subsequent conviction for the offence that the forfeiture rule relates – *see Decision R(G) 1/84 at paragraph 14 (a decision of a Tribunal of Commissioners)*. This decision in our view lends support to our conclusion that a Commissioner must reconsider the circumstances of the killing in each case.

21. The nature and the extent of the Commissioner's inquiry under section 4(1) on a reference must vary with the particular circumstances of each case and necessarily depends on the evidence brought before him or practically available to him. For example, it may be necessary to consider evidence brought forward after the criminal proceedings have been concluded, such for example as a divulging to the press by the claimant of an unlawful killing by him or her of the deceased. In such circumstances it would clearly be inequitable for the claimant to succeed in a reference before the Commissioner. There may never have been or be any criminal trial. There may only be produced to a Commissioner the verdict and the transcript of the summing-up, as in this case. It is also necessary to bear in mind that the strict rules of evidence do not apply before the Commissioner…Clearly the possibility exists that the Commissioner might reach a conclusion different from that reached in the criminal proceedings, (for example if there had been an acquittal on what might be thought of as a technicality rather than on the merits). We consider that a Commissioner should be slow to embark on what may appear to be a full retrial of criminal proceedings in a forfeiture case.'

9. The burden is upon the referrer, in this case the Secretary of State, to prove that the Claimant unlawfully killed a person and acquired a benefit in consequence of that action. A decision as to whether a claimant has unlawfully killed another person for the purposes of section 4 of the Act is made to the civil standard of proof (the balance of probabilities, what is more likely than not), a lower standard of proof than the criminal standard. This is explained at paragraphs 22-23 of the Commissioners' decision in *R(G) 2/90*:

> '22. We turn to the standard of proof applicable in a reference before the Commissioner……:
>
> > "*Proof of criminal offences in civil proceedings*. The standard of proof required to prove a criminal offence in civil proceedings is no higher than the standard of proof ordinarily required in civil proceedings……"
> >
> > ……
>
> 23. We accept as to the onus of proof the position….set out immediately below:-
>
> > "Moreover the raising of that question [the forfeiture question] does not in our judgment place any onus of disproof on the claimant. It is for the adjudication officer to justify the reference, and if it is maintained that there has been unlawful killing the onus in that regard also rests on the adjudication officer."
>
> We also respectfully agree…..that, once it is shown that the circumstances properly give rise to the question referred, an open submission on the merits may be made.'

10. Application of the civil standard of proof in civil cases where a party makes criminal, quasi-criminal or other very serious allegations was addressed by Richards LJ in the following terms at paragraph 36 to 37 of his judgment in *Giri, R (On the application of) v Secretary of State for the Home Department [2015] EWCA Civ 784 [2016] 1 WLR 4418*:

> 36. In *JC* the tribunal said (at paragraph 13) that the approach adopted in an earlier tribunal decision, that in relation to a question of deception "the standard of proof will be at the higher end of the spectrum of balance of probability", still held good. That was incorrect, as should have been apparent from the citation, in the same paragraph, from the judgment in *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468 (referred to by the tribunal under the title *R (AN) v Secretary of State for the Home Department*). I gave the judgment of the court in that case. Paragraph 62 stated:
>
> "Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the

> degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

37. That statement was subsequently approved, with an immaterial qualification, by the House of Lords in *In re D* [2008] UKHL 33, [2008] 1 WLR 1499 (see per Lord Carswell at paragraph 27). The judgment of the House of Lords in *In re B (Children)* [2008] UKHL 35, [2009] 1 AC 11, handed down on the same day as the judgment in *In re D*, was to the same effect. As Lord Hoffmann emphasised:

> "13. … I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not ….
>
> 15. … There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities …."

The background facts

The death of the Claimant's late husband and her acquittal for murder

11. The Claimant was acquitted at Newcastle Crown Court on 15 March 1993 of the murder of her late husband on 30 January 1992.

12. On 19 April 2019 the Secretary of State made a written reference under section 4 of the Act to the Upper Tribunal for it to determine whether the Claimant should be precluded by virtue of the forfeiture rule from receiving her Category B retirement pension received under section 48B of the Social Security Contributions and Benefits Act 1992. The Secretary of State's written reference consisted of a three-page submission setting out the statement of the relevant facts. This included the fact of the Claimant's acquittal and details and calculation of the Claimant's pension.

13. The Secretary of State's reference appended two letters from the Claimant's solicitor, Wholley Goodings Solicitors, dated 24 March and 29 June 1993 confirming her acquittal. The former letter was sent to the Widows Pension section of the Department of Social Security and the latter was sent to the Claimant herself.

14. The Secretary of State did not provide any further material, whether information or evidence, in relation to the death of the Claimant's late husband nor the criminal proceedings against her. This is not surprising given the 27 years which have passed since his death and the 26 years which have passed since the Claimant's trial.

15. As a result, the only factual submission and evidence within the reference relating to the Claimant's late husband's death and criminal proceedings against her was the bare fact of her acquittal for murder.

16. The Claimant has the benefit and good fortune in these proceedings of being represented by the same solicitor who represented her at her criminal trial. As he submits in written submissions dated 4 June 2019, 'the files relating to the criminal proceedings which would have been in the possession of Wholley Goodings LLP no longer exist and were destroyed in compliance with the guidance set down by the Law Society / Solicitors Regulation Authority'.

17. Nonetheless, the Claimant's solicitor was able to give a summary account as to the circumstances of the Claimant's late husband's death and the criminal proceedings, which the Secretary of State did not dispute in her submissions:

> '5. Circumstance of the Case
>
> In the early morning of the 30th January 1992 [her husband] was lying in bed on his right-hand side facing away from [the Claimant]. He had been out shooting the evening before using a two barrelled shotgun. This shotgun had not been put away by [her husband] and nor had his shooting accoutrements including a cartridge belt. The cartridge belt was on a briefcase left on the floor in the bedroom shared by the Claimant and [her husband]…. [The Claimant]'s account was that when she rose from bed the gun was simply standing up against the wall and that [her husband] told her to move it. As she did so the gun went off shooting [her husband] in the head and killing him outright. The prosecution case was that [the Claimant] had purposely loaded the gun and shot [her husband] on purpose citing issues around sexual abuse. In support of this contention, the prosecution cited [her husband]'s brother who was a shooting partner, to the extent that he believed that [her husband] always unloaded his gun when finished shooting and always replaced cartridges when they were used up and /or he took them from the ends of the cartridge belt. The cartridge belt when found had two cartridges missing the from the middle of the belt itself. This evidence was undermined at trial by the provision of a photograph which was on display in the parties' home showing [her husband] with a differing shotgun (but which was an illegal weapon being a repeating weapon) but most importantly with his cartridge belt with two cartridges missing from the middle of the belt similar to the way that the belt was found. Completely different to the way in which [her husband]'s brother described [him] being a careful and prudent gun user. [The Claimant] had given an account of what had happened from the moment of her arrest on the basis of the incident being an accident and that she moved the gun only at the request of her husband. To have acquitted, the jury had to have been convinced the incident was an accident.
>
> ……'

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The Pension

18. The Secretary of State's reference stated that the Category B retirement pension was awarded to the Claimant from and including 29 August 2007 when she reached retirement age. This was based upon her own contributions as well as the national insurance contributions from her late husband.

19. As of April 2018, the Secretary of State suggests the Claimant was receiving a pension of £158.81 a week. If she were not entitled to rely on her late husband's contributions, the Secretary of State suggests her pension should be £94.15 a week as of April 2018 (a reduction of around £64 a week). I assume the difference in the figures remains similar in respect of her pension as of April 2019.

20. The reference was to determine whether the Claimant was entitled to the higher rate of pension. Although not specifically encompassed by the reference, if the forfeiture rule applies, the Secretary of State might not simply reduce her future pension payments but also make a further decision to recover sums from pension payments previously made to her since 2007 if the statutory conditions to recover overpayments are satisfied.

<u>The parties' submissions</u>

21. On 3 May 2019 I issued directions for the service of submissions and evidence by the Claimant within six weeks, with submissions and evidence in reply from Secretary of State within a month thereafter. These were slightly more generous timescales than the one-month time limits provided by Rules 24 and 25 of the Upper Tribunal Rules 2008. I invited the parties to address me on three issues:

'a) why the Upper Tribunal should go behind the acquittal – what evidence is available that was not available to the criminal court (see *R(G) 2/90* which suggests that the Upper Tribunal is unlikely to go behind an acquittal unless satisfied that there is material evidence available that was not available to the criminal court);

b) whether the doctrine of abuse of process applies to prevent the DWP making such references in circumstances where a person has been acquitted, the DWP have provided no further evidence in support of an unlawful killing at the time of the reference, the death in question occurred over a quarter of a century ago and the pension has been in receipt for over a decade;

c) even if the forfeiture rule did apply to prevent further payments of a higher rate pension, whether the DWP would seek recovery of any overpayment of past pension receipts.'

22. In making directions I made observations: a) as to the different standards of proof in criminal proceedings for murder and civil proceedings under the Forfeiture Act; and b) that unlawful killing encompassed a range

of other forms of homicide beyond murder for example through manslaughter by provocation, diminished responsibility, unlawful and dangerous act or gross negligence.

23. On 4 June 2019 the Claimant's solicitor made submissions as referred to above. On 13 June 2019 he wrote with further representations and attached the death certificate of her late husband and a letter from her defence counsel following her acquittal at trial.

24. The Claimant's solicitor in his submissions dated 4 June 2019 argued that the Claimant's acquittal was not simply evidence and proof that she did not murder her late husband but that she did not unlawfully kill him (through gross negligence manslaughter). Within his helpful and detailed submissions, he argued the following:

'4b) The defence of [the Claimant] was entirely based upon the premise that the death was caused by an accident. The prosecution case was run on the basis that there was an intention to kill and the prosecution produced evidence to suggest that [her husband] would not have left a gun loaded and that he was very careful removing cartridges from a shotgun cartridge belt and would never have taken out two cartridges in the centre of the cartridge belt. Such evidence was found to be erroneous by virtue of a photograph showing at least one of these elements to be proved in favour of [the Claimant]. Since the decision to acquit had to rely upon the idea of the death being caused by accident then it is submitted that no other decision was possible or appropriate given the nature of the prosecution case. It should be noted that such information is based upon the memory of the conducting solicitor and of [the Claimant]…….

4c) As a result it is not accepted that in this particular case [the Claimant] was acquitted of murder but could still have unlawfully killed her husband. There are no other ways of unlawful killing than those stated above and an alternative verdict of manslaughter was not appropriate on the basis of the defence…..It is submitted that had the criminal court considered that that was appropriate then the Judge would have and did advise the jury about manslaughter but the jury still acquitted and did not seek to show any other form of criminal behaviour.

…….'

25. The Claimant's solicitor further argued that:

'it is immaterial that an acquittal is based upon the criminal standard of proof and that this Tribunal can proceed on the basis of a lower standard of proof since this Tribunal should not seek to go behind an acquittal based upon a decision surrounding accident.'

26. The Secretary of State, in written submissions on behalf of the Secretary of State dated 2 August 2019, replied:

'The first question that the Upper Tribunal judge asks, inter alia, is why the Upper Tribunal should go behind the acquittal? In my submission this is for the Upper Tribunal Judge to decide but it may be suggested that provided there is no presentation of new material evidence (that was not placed before the court at the time of the trial) then we should follow the view of the Tribunal of Commissioners' in paragraph 24 in *R(G) 2/90*. In that case the claimant had been charged with the murder of her husband and was acquitted by the court. Nevertheless, a forfeiture reference was made as and when the claimant decided to make a claim for Widows Allowance. The view in that case was that,

> "[24……the Tribunal of Commissioners placed] considerable reliance on the inferences to be drawn from the verdict of that jury. [This we think, both as a question of principle and on the authorities cited to us and discussed below, is the correct approach.] Where twelve good men and true or a majority of them……..after a full hearing in the criminal court reach on the merits of the case, and not on a technicality, not guilty verdict on the counts before them and there is no evidence that full evidence was not deployed before them, these must in our view be important considerations to the Commissioner in his inquiry. [The weight to be attached to the jury's verdict…in these circumstance is substantial, we think. It would certainly in our view be contrary to common sense to disregard such a verdict]."

In this particular case, the trial took place at the Newcastle Crown Court and the claimant was duly acquitted on 15th March 1993. In view of the length of time, I am unable to locate any existing court papers relating to this case, and the only evidence that exists is that which has been kindly provided by the claimant's solicitor'.

27. The Secretary of State's submissions of 2 August 2019 concluded:

'It is conceded that this is an historic case whereby the claimant was awarded and has been in receipt of a category b retirement pension from and including 29th August 2007. The Department apologises for making a forfeiture reference to the Upper Tribunal Judge after such a lengthy delay. Accordingly, it is respectfully suggested that the Upper Tribunal Judge has the power to strike out this application in the event of there being no real prospect of success, I respectfully submit that I would agree to this in the event of the Upper Tribunal Judge taking this course of action.'

Discussion and Decision

28. I follow the approach set out by the Commissioners' decision in *R(G) 2/90*. The fact of the Claimant's acquittal in criminal proceedings, is not of itself, sufficient to prove that she did not unlawfully kill her late husband. I

am under a duty to reconsider the circumstances of the killing and conduct a full inquiry on the merits of the evidence.

29. Although the Claimant was acquitted of murder by a jury, that decision was made to the criminal standard of proof (the prosecution was required to prove the allegation of murder so that a jury was satisfied so that they were sure or beyond reasonable doubt). I must apply the lower civil standard of proof.

30. Tribunals and civil courts are familiar with making findings equating to criminal offending on the balance of probabilities on the same or similar evidence following acquittals in criminal courts – see for example Civil Recovery Orders under the Proceeds of Crime Act 2002 such as in *Serious Organised Crime Agency v (1) David Gale (2) Teresa Mandy Gale (3) David Kenneth Gale (4) June Patricia Peel (By Her Litigation Friend The Official Solicitor)* (2011)[2011] UKSC 49 or civil claims based on allegations of murder such as in *Asghar Sabir Raja (Representing The Interests Of The Estate Of Mohammed Sabir Raja, Deceased) v (1) Nicholas Van Hoogstraten (2) Stitchacre Ltd (3) Rarebargain Ltd (4) Castries Land Ltd* [2005] EWHC 2890 (Ch).

31. In recent years there have also been inroads into the sanctity of a jury's not guilty verdict in criminal proceedings. Part 10 of the Criminal Justice Act 2003 ('Retrial for Serious Offences') provides limited statutory exceptions to the rule of double jeopardy. It allows for a further prosecution of a person acquitted by a jury of murder or other serious criminal offences in certain circumstances where there is new and compelling evidence and the Court of Appeal orders that a re-trial may take place.

32. It is indisputable that a person's acquittal for murder, is not of itself, proof that they did not unlawfully kill that person, whatever the standard of proof applied. Murder is only one type of unlawful killing. A person might not have murdered another but may still have unlawfully killed them. A person may be acquitted of murder but still have unlawfully killed a person in a range of possible ways. In England and Wales, homicide (unlawful killing) offences include offences other than murder such as manslaughter. Manslaughter often involves killing someone else without the intention to kill them or do them grievous bodily harm but only with the intention to do some harm (unlawful and dangerous act manslaughter). Further, manslaughter may also occur by reasons of gross negligence, provocation or diminished responsibility.

33. Therefore, in the right circumstances, where there is substantial or cogent evidence before the Tribunal, even if the evidence is not the same or lesser in quantity or quality than was available to the criminal courts, it would remain entitled to make a finding that a claimant had unlawfully killed another despite their acquittal on a charge of murder or manslaughter.

34. However, the Commissioners in *R(G) 2/90* wisely counsel that in practice, the nature of the inquiry before the Upper Tribunal is likely to be rather different from that before the criminal or civil courts. While the starting point is to consider all the evidence before it afresh and apply a lower standard of proof, the likely position before the Upper Tribunal is that it is unlikely to be in receipt of anything like the quantity or quality of evidence that was before the criminal or even civil courts. Indeed, even if the similar or same evidence were available, the Commissioners advise caution before embarking on a re-trial – see paragraph 21 of the decision cited above.

35. In this case, the only evidence provided to me by the Secretary of State is the bare fact of the Claimant's acquittal – not even any transcript of the summing up to the jury unlike in *R(G) 2/90*, let alone any statements from witnesses or evidence from the original trial.

36. Notwithstanding the difference in standards of proof between criminal and civil proceedings, the Secretary of State in its submissions also accepts the application of paragraph 24 of the decision in *R(G) 2/90*, as is cited in part in the submissions above. Even accounting for the different standards of proof and the acquittal not being determinative, I give due and substantial weight to the jury's not guilty verdict in this case as an important consideration. I rightly place reliance on the reasoning set out in paragraph 25 of the decision in *R(G) 2/90,* 'The jury had inter alia the advantage of seeing and hearing the witnesses before the. The position appears to be that the jury's verdicts were given on the merits and after a full trial.' This is particularly salient in the absence of any other evidence, cogent or otherwise and none that was not before the jury.

37. I infer from the Claimant's solicitors' submissions that a verdict of gross negligence manslaughter was left open as an alternative verdict to murder for the jury but they nonetheless acquitted her. The jury are likely to have heard and seen most of the relevant evidence and assessed the weight to be given it as it was tested during the trial process. I have not had that benefit and have no other cogent evidence available to me, let alone the oral evidence of any live witnesses, from which to make any other reasoned assessment. I decline to go behind their verdict of not guilty. I do not simply have less evidence than the jury but virtually no evidence on which to reach a contrary view or make a contradictory finding even to a lower standard of proof.

38. The only other material that is before me is a hearsay explanation given by the Claimant, through her solicitor, denying any unlawful killing on the basis of accident. This was her position at trial and is reflected in the not guilty verdict. The Upper Tribunal is not bound by the same rules of evidence as courts – see for example Rule 15(2)(a) of the Upper Tribunal Rules which allows for the admission of evidence which would not be admissible in a civil trial in the United Kingdom or that was not available to

a previous decision maker. Even though the rules of evidence in Tribunal proceedings mean that the Claimant's solicitor's submission can be admissible as evidence, it could not carry the same weight as evidence provided in a witness statement containing a statement of truth or sworn evidence at an oral hearing.

39. However, the Secretary of State in her submissions does not dispute the Claimant's evidence or explanation and there is nothing to gainsay or undermine the Claimant's defence. The Secretary of State provides no evidence from which it could be inferred that it is more likely than not that the Claimant unlawfully killed her late husband. The Claimant's denial appears to be accepted, or at least the Secretary of State advances no positive case.

40. In this case, where there is no evidence available to me other than the exculpatory explanation of the Claimant through her solicitor, as confirmed by the verdict of the jury, there is not only no fresh or additional evidence to that provided at the criminal trial, but far less evidence.

41. Paragraph 24 of the Commissioners' decision in *R(G) 2/90*, as cited above, is addressed by Judge Mark Rowland and Judge Christopher Ward, the editors, in their commentary at para 1.3, page 4 of 'Social Security Legislation 2018/19, Volume III, Administration, Adjudication and the European Dimension', published by Sweet & Maxwell:

> 'The rule can apply even where the person concerned has been prosecuted and acquitted of manslaughter, provided that the court of Upper Tribunal is nonetheless satisfied that the offence has been committed…., although the Upper Tribunal is unlikely to go behind an acquittal unless satisfied that there is material evidence that was not available to the criminal court (R(G) 2/90).'

42. I do not take the editors' commentary to be a statement of principle, and it cannot be, that the Upper Tribunal must be presented with fresh evidence not available to the criminal court in order to make a finding of unlawful killing where a Claimant has been acquitted of a homicide charge. That is because of the duty to conduct a general inquiry, reconsidering the circumstances of the killing and different standards of proof as explained by the Commissioners above. Nonetheless, in cases where a claimant has been acquitted, the Upper Tribunal would still need to be provided with cogent evidence, of a type provided in the criminal courts or at least other significant evidence, in order to be satisfied even on the lower standard of proof.

43. The editors' commentary properly reflects the likely common practice whereby the Upper Tribunal does not receive from the referrer anything like the quantity and quality of evidence presented in the criminal proceedings. If it does not have cogent evidence which can be re-presented from the criminal proceedings or other sources, it is unlikely that the Upper Tribunal

would go behind a not guilty verdict. All the more so if the Tribunal is without fresh evidence or additional evidence not available to the jury whether or not it was evidence that might have been available at the time of trial.

44. This case raises the question what the Secretary of State should do when informed that a claimant has been acquitted of murder and manslaughter, given that such a verdict is not conclusive of the forfeiture question and that reference of such a question is mandatory. Even if it were possible to obtain transcripts of the summing up and oral evidence at the trial, would it be proportionate to do so and might it be regarded as oppressive to engage in a further investigation routinely? Should a claimant at least be asked whether any insurance payment or inheritance arising out of the death has been forfeited? Might it be appropriate in some cases for the Secretary of State simply to refer the case and ask for directions?

45. I am hesitant to accept from the Secretary of State's bald statement that "*[i]n view of the length of time, I am unable to locate any existing court papers relating to this case, and the only evidence that exists is that which has been kindly provided by the claimant's solicitor*" that transcripts or documents from the criminal court proceedings could not be obtained if sufficient skill and effort were employed. It is not clear that the Secretary of State's representative looked beyond the Department's own records at all and, if he or she did, what sort of enquiries were made. Thus, one question that might otherwise arise is whether I ought to establish what enquiries the Department has made so as to be able to consider directing it to make further enquiries.

46. However, on the facts of this case, I am satisfied that it unnecessary to establish what enquiries were made and whether further evidence might yet be obtained. These questions can be avoided on the basis that the delay and the lack of any positive case for forfeiture being made by the Secretary of State make it inappropriate to prolong these particular proceedings.

47. In the circumstances where the Secretary of State has not raised a case for the Claimant to answer and her denial does not appear to be in dispute, there is no need for the Claimant to be called upon to reproduce her denial in a witness statement or oral evidence. As the Commissioners have explained, the Upper Tribunal should be slow to embark on a full retrial of criminal proceedings in a forfeiture case and there is no requirement for the Claimant's explanation to be tested for its reliability or credibility in light of the jury's verdict and absence of evidence in rebuttal.

48. For those reasons I also decline to conduct an inquiry of my own initiative into the reliability and credibility of the Claimant's explanation. I have no evidence, expert of otherwise, before me, such as may have been before the jury, as to the likelihood of: cartridges being left in a shotgun; the

gun being triggered accidentally; or the direction of the blast being pointed to the Claimant's late husband's head. I am not simply guided by the lack of evidence but also by the unfairness to the Claimant in seeking to explore questions of evidence 27 years after the event when the original case papers are no longer available and likely to be destroyed.

49. There may also be questions raised as to the Tribunal's ability to compel or direct a claimant to give further evidence and whether the privilege against self-incrimination continues to apply following an acquittal where there are now exceptions to the rule of double jeopardy if new and compelling evidence (such as a confession) arises.

50. Therefore, for these reasons, not least the delay in making the forfeiture reference and age of this case, I am not prepared to direct that further enquiries be made. I have made my determination based upon an assessment of the evidence as a whole which is available to me at present.

51. For all those reasons I am satisfied that the Secretary of State is unable to discharge the burden of proof on the balance of probabilities to prove the Claimant unlawfully killed her late husband. I am not satisfied she unlawfully killed her late husband. Therefore, the forfeiture rule does not apply to the Claimant. The questions of her receiving any benefit in consequence of the killing or modifying the effect of the rule do not arise.

52. I am further satisfied for the reasons set out above that, on the evidence provided, there is no reasonable prospect of the Secretary of State's case succeeding such that there would be a finding of unlawful killing or that the forfeiture rule would be applied.

Issue 2 - whether there is no reasonable prospect of the Secretary of State's case succeeding such that it should be struck out under Rule 8(3)(c) of the Upper Tribunal Rules 2008.

Strike out Application

53. As set out above, the Secretary of State has invited me to consider striking out the whole of the proceedings for a reference on the basis there is no reasonable prospect of the case succeeding for the purposes of Rule 8(3)(c) of the Upper Tribunal Rules 2008. The Secretary of State has had an opportunity to make representations in relation to the proposed striking out for the purposes of Rule 8(4). Indeed, the Secretary of State volunteered this potential course of action if I were so minded.

54. Rule 8(3)(b), (c) and 8(4) of the Upper Tribunal Rules 2008 provide:

'8(3) The Upper Tribunal may strike out the whole or a part of the proceedings if—

……..

(b) the appellant or applicant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly

(c) in proceedings which are not an appeal from the decision of another tribunal or judicial review proceedings, the Upper Tribunal considers there is no reasonable prospect of the appellant's or the applicant's case, or part of it, succeeding.

(4) The Upper Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant or applicant an opportunity to make representations in relation to the proposed striking out.'

55. I decline to strike out the reference. This is because I am not satisfied that I have the power to do so. The forfeiture reference is not an application and the Secretary of State is not an applicant but a referrer. As Judge Mark Rowland and Judge Christopher Ward explain in their commentary at paragraph 5.389, page 1756 of 'Social Security Legislation 2018/19, Volume III, Administration, Adjudication and the European Dimension', published by Sweet & Maxwell:

'Indeed sub-para (3)(c) has little application to social security cases because it does not apply to appeals from the First-tier Tribunal or judicial review proceedings……and there is no appellant or applicant in a reference under the Forfeiture Act 1982'.

56. It may be arguable that even though the Secretary of State is a referrer and not an applicant, Rule 8(3)(c) should be interpreted to apply to referrers as applicants. However, that is not the language of the rule – it refers to 'applicant's case'. In inquisitorial proceedings such as when making a reference, the referrer may not, at least initially, be advancing a positive 'case' such as occurs in traditional adversarial proceedings.

57. Further, one can see the public policy reason to exclude the exercise of a strike out power in forfeiture applications where the referrer may be under a duty to make a reference and in the very serious circumstances that give rise to questions of the application of the forfeiture rule ie. a killing. For the reasons set out above, a full inquiry and reconsideration of the circumstances should be made by the Upper Tribunal rather than the truncated approach which might be involved in a strike out decision.

58. Nonetheless I do record that, for all the same reasons set out above that I am not satisfied on the balance of probabilities that the Claimant unlawfully killed her late husband, I am also satisfied that there is no reasonable prospect of the Secretary of State's reference succeeding and proving the same (that the Claimant unlawfully killed her late husband and the forfeiture rule would be applied).

59. The Secretary of State has not provided, and is not likely to be able to provide, any evidence to prove there has been an unlawful killing other than

the bare fact of the Claimant's acquittal for murder. Both parties would acknowledge that given the age of the case and the destruction of relevant files, there is unlikely to be any further evidence forthcoming. I am not even in the position of the Commissioners in *R(G) 2/90* where they were provided with both the verdict and a transcript of the summing up. In the absence of any further evidence on behalf of the Secretary of State, there is no reasonable prospect of proving the forfeiture rule should apply.

60. The Secretary of State has not discharged the burden of proof and there is no reasonable prospect she will be able to do so. There is no reasonable prospect of any further evidence becoming available given the history of the case. If I did have the power to strike out the reference under Rule 8(3)(c), which I am satisfied I do not, I would have done so.

Issue 3 - Abuse of process

61. In my directions I invited submissions on whether the making of the reference by the Secretary of State constituted an abuse of the Court's process.

The law

62. The Upper Tribunal is a Superior Court of Record having the powers, rights, privileges and authority of the High Court in matters incidental to its function pursuant to section 25 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"). Thus, it is entitled to exercise an abuse of process jurisdiction.

63. As Judge Edward Jacobs explains in 'Tribunal Practice and Procedure' fourth edition, at paragraphs 12.44 to 12.45:

'12.44 In the courts, it may be an abuse of process to bring proceedings again on the same issue without fresh supporting evidence [*White v Aldridge QC and London Borough of Ealing* [1999] ELR 150], although this power must be exercised flexibly if the tribunal has an inquisitorial function [at [157]]. Under TCEA, the same result can be obtained by directing the party to produce further evidence.

12.45 In the courts, it may also be an abuse of process to attempt to bring proceedings on an issue that could and should have been raised in earlier proceedings [*Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31]. Under the TCEA, the tribunal might decide that it could not deal with the proceedings fairly and justly in such circumstances if the other party has relied on the issue not being raised in later proceedings.'

64. The abuse of process jurisdiction holds some jurisdictional overlap with res judicata and issue estoppel – this is explained by Lord Sumption in the Supreme Court at [23] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46* .

'……..Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank* at p 110G, "estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process.'

65. In these proceedings the Secretary of State is not the same party as the prosecutor, the issue is not identical to that in the prosecution and the standard of proof is not the same such that res judicata and issue estoppel do not arise. Nonetheless the Secretary of State, a state party, is seeking to bring proceedings on a similar issue to that brought by a prosecution agency without supporting or fresh evidence.

66. Further, the abuse of process doctrine is not limited to the re-argument of the same issue – such as involved in res judicata or issue estoppel. For example, the abuse of process jurisdiction may still entitle the Tribunal to strike out or stay proceedings where a party cannot obtain a fair trial. Fair trial rights are guaranteed by natural justice in the common law and supplemented by the safeguards under Article 6(1) to the European Convention on Human Rights.

67. It must be noted that the exercise of the abuse of process jurisdiction is an exceptional remedy as Judge Edward Jacobs explains in 'Tribunal Practice and Procedure' fourth edition, at paragraphs 12.25 to 12.28:

'In *Hunter v Chief Constable of the West Midlands Police*, Lord Diplock implied that there was a duty to strike out proceedings that were an abuse of process. This is now out of date. In the context of article 6, the decision to strike out proceedings must be a proportionate response to the conduct that has prompted it……..Striking out should be used as a last resort……..The Courts have declined to set out a comprehensive list of categories of conduct that involves abuse of process……Striking out should only be used in the clearest cases of abuse……'.

68. Nonetheless the importance and existence of the Upper Tribunal's full abuse of process jurisdiction to ensure fair proceedings may be amplified where Rule 8(3)(b) is unlikely to apply to the Upper Tribunal's jurisdiction in Forfeiture Act references. Rule 8(3)(b) provides for strike out where the appellant or applicant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly. The Rule is not likely to apply to Forfeiture Act references for the same reasons set out above - because the referrer is not an applicant.

The facts

69. On the facts of this case, there are many unattractive features to the Secretary of State making the reference. These gave rise to my original observations as to whether the doctrine of abuse of process may apply.

70. The Secretary of State made the reference over twenty-six years after the conclusion of the Claimant's criminal proceedings in 1993 and notification at the time by the Claimant of the jury's verdict. There has been an extraordinary delay in making the reference in 2019. No explanation for that delay has been provided by the Department, let alone a good reason.

71. The Claimant's criminal proceedings ended in an acquittal. The Secretary of State had no evidence to provide in support of the reference other than the mere fact of the acquittal, all other records unsurprisingly having been lost, perhaps partly as a result of the delay the department occasioned. Therefore, the Secretary of State was in no position to go behind the jury's verdict. That is perhaps the most important benefit that the Claimant has already obtained in these proceedings.

72. There is then the question of fairness to the Claimant – both whether she could receive a fair trial and whether it would be fair to try her. As the Claimant's solicitor points out, the files in relation to her criminal case having been destroyed, it would seriously prejudice her ability to defend herself and receive a fair trial in these proceedings. He also relies on an implied promise (or even legitimate expectation) that she would continue to receive her enhanced pension. He submitted:

> '3f) The files relating to the criminal proceedings which would have been in the possession of Wholley Goodings LLP no longer exist and were destroyed in compliance with the guidance set down by the Law Society/Solicitors Regulation Authority. As such there is no guarantee that the Claimant can receive a fair trial and that it would be unfair to have further process against the Claimant because it offends the Court's sense of justice and propriety to be asked to further try the issue in the circumstances of this particular case. In particular there has been delay which is causing prejudice to the Claimant, evidence has been destroyed, in view of the fact that benefits were awarded and continued for many years there is an implied promise not to proceed in this way. It is accepted that such powers should be used sparingly but it is submitted that to enforce repayment of the benefit which was awarded on the 29th August 2007 is inequitable and unjustifiable and would cause serious prejudice to the Claimant. The Court cannot abrogate the prejudice by regulating the admissibility of evidence since the Secretary of State's case is based entirely upon the idea of there having been an unlawful killing.'

73. It is difficult to disagree with the substance of these concerns. Nonetheless, I make no ruling on the applicability of the principles of legitimate expectation in the realm of benefit or pension entitlement in this case.

74. But for the sheer good luck that the Claimant's solicitor was still in practice some 26 years later, remembered her case, and continued to represent her, the Claimant might have been further hampered than she already has been in replying to this reference.

75. Further, although the Claimant does not seek to rely on this, the fact of this reference is likely to have caused her, being a mature woman over twelve years past retirement age, significant distress. This is not simply likely to be at the thought of her pension being reduced but also in resurrecting what are, no doubt, difficult memories.

76. The reference was made in April 2019 nearly twelve years after the Claimant first received her pension in August 2007. This is yet another extraordinary delay. No reason has been given by the Secretary of State for this inordinate delay – although a reasonable inference is that it appears to result from a Departmental trawl. No explanation is given for why it was not first raised in 2007 at the latest, if not in 1993. What can at least be said in the Secretary of State's favour is that there has at least been an apology that the reference was made so late.

77. The delay is compounded by the fact that the Claimant's solicitor who first wrote to the Secretary of State's forerunner, the Department of Social Security, regarding her acquittal and widows Pension on 29 June 1993. It appears that the confirmation of the acquittal was requested by the Department at the time. The Claimant has not sought to hide anything from the Secretary of State – the Claimant was in receipt of benefits at that time. As the Claimant's solicitor submits:

> 'The Claimant never made any secret of the fact of her husband's death and the circumstances surrounding it. Indeed, the Secretary of State refers to letters sent by the solicitors acting for the A at the time dated 24th March 1993 and 29th June 1993 confirming acquittal of the charge of murder. Whilst those letters have not been appended to the documentation sent to the Claimant and whilst the file of the Claimant's solicitors at the time is no longer in existence, it is believed that those letters simply indicated that [the Claimant] had been acquitted of all or any charges against her relating to the death of …her husband.
>
> ……..
>
> The letter of the 24th March 1993, we believe was handed in by [the Claimant] to yourselves to confirm the acquittal. Immediately prior to the acquittal she had been living with her Parents…but when that letter was handed into the Department of Social Security (as it was then) is unclear. We would suggest, however that that letter would have been handed into DSS shortly after its date of the 24th March 1993 and consequently the Widow's Pension Section again would have been aware of that issue at that time.'

78. It appears from the fact that the Claimant's solicitors notified the DSS in 1993 of her acquittal that forfeiture of her widow's benefit was contemplated at that time. It appears from the lack of any mention of a forfeiture reference at the time that it was decided by the Secretary of State that forfeiture was not appropriate (perhaps without due scrutiny or proper attention) and without any reference having been made to a Social Security Commissioner. Had there been a reference in 1993 or shortly thereafter, the Commissioner would presumably have determined whether or not the Claimant had unlawfully killed her husband, even if he or she was then minded to grant relief. Such a finding in relation to widow's benefit could then have been relied upon for the purposes of the Category B retirement pension claim as well.

79. Further still, at face value, it appears almost perverse that the Secretary of State makes a reference in April 2019, and some four months later, albeit after receipt of the Upper Tribunal's observations and the Claimant's submissions, voluntarily concedes the reference should be struck out on the basis the Secretary of State advances no positive case and that it stands no real prospect of success.

Discussion and decision

80. Against the catalogue of criticism of the Secretary of State set out above, I accept that an overall assessment of whether the reference constitutes an abuse of process is more nuanced than simply accepting the delay and failings by the Secretary of State and unfairness argued on behalf of the Claimant.

81. Ultimately, I have concluded that these proceedings could be dealt with justly and fairly and the Claimant can still receive a fair trial despite the lengthy and unexplained delay by the Secretary of State which may have resulted in all the relevant papers being destroyed. I have been able to resolve the substantive merits of the reference in the Claimant's favour and dismiss the application of the forfeiture rule for the reasons set out above.

82. Further, a strong argument on behalf of the Secretary of State is that she was under a positive duty to make the reference. It might be said that the Secretary of State acted reasonably in 2019, even though not before, and was complying with her duty. The referrer is not in the identical position as a claimant or applicant in adversarial litigation. The making of a reference might be seen as an inquisitorial or more neutral act than bringing proceedings or making an application where there is an active case asserting an allegation, claim or right.

83. Once the lack of quality of the Secretary of State's evidence and inability to rebut an exculpatory explanation had become clear, as a result of the Claimant's submissions and evidence, the Department conceded the

reference should be determined in the Claimant's favour. It might be said in the Secretary of State's favour that this was due process properly in action.

The nature of the duty to refer

84. The Secretary of State's argument is that there can be no abuse of process in making this reference when the Department was under a positive duty even in historic cases to ask the Upper Tribunal to inquire into the killing. The Secretary of State would rely on paragraphs 18-19 of the decision in *RG (2)/90* in addition to paragraph 20 already cited above:

> '18…….At that point in its decision the Tribunal of Commissioners was not concerned with any distinction between being *entitled* and being *bound* to reconsider the circumstances [of a killing for which a Claimant has been acquitted by a jury] but that issue has been argued before us. In our view, under the statutory provisions of section 4(1) of the Forfeiture Act it is the Commissioners' mandatory duty in the circumstances there envisaged to undertake an inquiry. Section 5 of the Forfeiture Act provides the only exclusion, and that is in the case of a conviction of murder
>
> 19…….The adjudicating authority is similarly bound to cause to be referred or to refer a case in which a forfeiture rule question arises to a Commissioner – the Regulation uses the word "shall" in this regard. It is also then for the Commissioner "to determine" the referred forfeiture rule question. In our view these provisions are consistent with and support our conclusion as to there being a duty'.

85. The Secretary of State (in the same position as the adjudicating authority) placed reliance on her positive duty to make a reference, however historic. Although the Department did not rely on this further point in argument, its position is strengthened in that the Commissioners in *RG2/90* found there to be such a positive duty applying the procedure rules then in force – Regulation 8(1) of the Social Security Commissioners' Procedure Regulations 1987.

86. Regulation 8(1) stated:

> 'Where a forfeiture rule question arises in a case before an adjudicating authority and that authority is not satisfied that the case can be disposed of without that question being determined, the adjudication authority shall…….refer the case to a Commissioner to determine that question'.

87. It is arguable that Regulation 8(1) expressly envisaged a 'screening' or 'preliminary' decision made by the referrer before making any reference as to whether it was satisfied that the case could be disposed of without that question being determined on a reference to the Commissioners. However, I doubt that the old regulation 8(1) did envisage that the "screening" or "preliminary" decision related to the quality of evidence to prove an unlawful

killing. More likely, the Regulation merely contemplated that it might not be necessary to determine the forfeiture question because the relevant claim for benefit might fail on other grounds - e.g. a lack of contributions paid by the deceased.

88. The current procedure rule is contained in Rule 26 of the Upper Tribunal Rules 2008. The wording of Rule 26(1) is: 'If a question arises which is required to be determined by the Upper Tribunal under section 4 of the Forfeiture Act 1982, the person…must refer the question'. It does not replicate Regulation 8(1) nor provide for any preliminary decision by the referrer whether the question requires determination before the making of a reference to the Upper Tribunal.

89. Rule 26 of the Upper Tribunal Rules 2008 uses similar mandatory wording that the referrer 'must refer' if a question arises for determination but the provision requiring a 'preliminary' decision by the referrer was presumably not replicated in the Upper Tribunal Rules 2008 because it was strictly unnecessary.

90. The non-replication of the words from Regulation 8(1) of 'that authority is not satisfied that the case can be disposed of without the question being determined' in the Upper Tribunal Rules 2008 lends further support to there being no discretion for the referrer to decide as a preliminary matter before making a referral as to whether the question of forfeiture needs to be determined. Nonetheless, it remains arguable that Rule 26 does provide that a question need arise for determination before a reference must be made. It may still imply some level of pre-reference scrutiny by the referrer.

91. Even under Regulation 8(1), where there may have been a statutory 'preliminary' threshold to cross before making a reference - the Commissioners' decision in *RG 2/90* suggests it was a low preliminary threshold. At paragraph 23 of the decision they refer to 'the circumstances properly give rise to the question referred' - the Commissioners envisaged that the referrer was otherwise under a positive and apparently unlimited duty to make references.

92. In my view when considering the extent of the Secretary of State's duty to make a reference, a distinction should be drawn between the issue as to whether a forfeiture question arises and the issue as to whether there is sufficient evidence upon which the forfeiture rule could properly be determined to be applied against a claimant.

93. It seems to me, that where a claimant has been charged with an unlawful killing, there has been a criminal trial in which the jury has returned a verdict and the victim was the relevant contributor to a pension or benefit, a forfeiture question is almost certain to arise.

94. The inference is that in order to prosecute, an independent prosecuting authority has been satisfied that, applying the sufficiency of evidence test under the code for crown prosecutors, an objective, impartial and reasonable

jury, properly directed and acting in accordance with the law, was more likely than not to convict the defendant of the homicide charge alleged. Further, if the trial judge has left a relevant count to the jury to return a verdict, rather than ruling there was no case to answer, then the judge must have decided there was sufficient evidence available on which a jury properly directed could convict. Even if there has been an acquittal, the implication must therefore be in most cases that a jury could properly have found on the evidence then available that there had been an unlawful killing by the claimant.

95. I can see the public policy reasons why the Secretary of State would want to be cautious not to fail to make references given the seriousness of the conduct which is potentially involved in the application of the forfeiture rule. Therefore, even if there is not a duty in to make references in all cases, generous leeway must be available to the referrer and any potential ambiguity resolved in favour of the Secretary of State's duty to make the reference – leaving the Upper Tribunal as the ultimate decision maker.

96. However, if there has been an acquittal and none of the evidence upon which the prosecution, judge or the jury formed their respective views is now available, it is unlikely the Upper Tribunal could properly find, even on the balance of probabilities, that a claimant unlawfully killed the contributor unless the claimant confesses (or at least fails to maintain a denial) or there is some other evidence available.

97. In such a case, it seems to me that the Secretary of State remains bound to make a reference but ought, either when making the reference or (as was done in this case) following the claimant's reply, to suggest that the question be determined in the claimant's favour.

98. Similarly, where a claimant stands convicted of murder of the contributor, the Secretary of State is bound to (and does) refer the forfeiture question even though it can only be decided against the claimant pursuant to section 5 of the Forfeiture Act set out above. Otherwise, the Secretary of State would effectively be determining the forfeiture question himself or herself, which is not permitted even in an obvious case.

99. Aside from the legal duty to refer, there are practical concerns as to the Secretary of State's ability to obtain all relevant evidence if it does not refer. The Department may not have all the evidence gathering powers, abilities or resources as the Tribunal. These concerns suggest that the referrer should not lightly be left as the ultimate arbiter of factual questions but that the Tribunal should be. The Upper Tribunal has all the relevant powers to make directions to obtain further evidence and explore its reliability.

100. Moreover, this approach enables the Upper Tribunal to consider whether the circumstances justify any attempt to find evidence from sources not approached by the Department for Work and Pensions. In the present case, the Department may have approached the Crown Court but it is

unlikely that it approached either the police or the Public Record Office and it may be that both might have held some material. On the other hand, unless there is an extant transcript or recording of the oral evidence given in the trial, which I doubt is kept where there has been an acquittal, it would probably be unfair to place any weight on other written evidence and so there may be no point in making further efforts to obtain it.

101. I am not aware of the sort of material that the police are able to retrieve from deep storage in historic cases and courts may mistakenly state that records are no longer available when in fact, although they are no longer retained by the court, they are either in remote storage or with the Public Records Office. I have no information before me as to HMCTS's policy as regards the retention of court documents and recordings or transcripts of evidence or summings-up in homicide cases where the defendant is acquitted (and, indeed, where the defendant is convicted, given that a question of modifying the forfeiture rule may then arise).

102. Perhaps in another case, where the acquittal is recent, there should be an oral hearing and the Department's views on the question how it should generally proceed in the case of an acquittal can be obtained. One can imagine that it might generally not wish to go behind an acquittal - it would often be disproportionate even to think about doing so, given the complexity of the issues and the small amount of benefit at stake. However, it might be different where, for instance, a victim's family had made it known that they were unhappy with the verdict, particularly if there might be proceedings in the courts under sections 2 or 3 of the Act as to whether the forfeiture rule applies and should be modified.

Conclusion on the facts

103. Any decision not to make a forfeiture reference following an acquittal would require the Department to have all the potentially relevant evidence before it in order to be confident that there is no question that requires determination on a reference. In the vast majority of circumstances this is unlikely to occur until the referrer has received the evidence or response of the claimant in reply to the reference.

104. That is arguably what happened in this case – as soon as the Secretary of State received the robust response on behalf of the Claimant it accepted that the question would only be determined in one way. On the facts of this case therefore, it is likely that the Department was entitled to await the Claimant's response before adopting a positive position and only if the Secretary of State had received the material before she made the reference, might she not have proceeded to make a reference.

105. Therefore, even on the unattractive facts of this case, I do not go so far as to come to the conclusion that a reference should not have been made by the Secretary of State. I incline to the view that the Department was bound to refer the forfeiture question in this case unless it had already been

referred in relation to the widow's benefit claim and the Commissioner had decided that the Claimant had not unlawfully killed her husband. The bare fact of an acquittal suggests a threshold had previously been crossed deciding that there was available evidence on which a properly directed jury could convict. There is now further evidence from the Claimant which was not available to the Department at the time of the reference which has become available to it and to the Upper Tribunal. That was likely to be the case at the time the reference was made. There was, at that time, a question that arose which required determination.

106. It is therefore likely that only in the most exceptional circumstances, where it is unarguable that there is no question to be determined by the Tribunal, or to do so would be so oppressive or unfair, that the initial making of a reference might constitute an abuse of process.

107. Likewise, exceptional circumstances where the referrer may not be under a positive duty to make a reference may be in cases where there has been a killing but there is no arguable or no reasonable evidence that it may be unlawful. The positive duty may not arise where the Secretary of State does not even have prima facie evidence to decide that a question arises for determination on a reference. Even that decision would have to be approached cautiously.

108. Nonetheless, the positive duty should not relieve the Secretary of State of giving some consideration before making a reference as to the quality and quantity of the evidence she possesses or is available following a claimant's acquittal and whether an inquiry may uncover more. Each case must be considered on its merits.

109. As the Commissioners in *RG 2/90* observed, an acquittal in the criminal courts may have followed a 'technicality' such as based upon the inadmissibility of key evidence or other procedural grounds. In contrast, the acquittal may have been a clear indication of the substantive merits of the case. For example, a Judge may have made a ruling there was no case to answer (the prosecution's evidence did not even give rise to a reasonable prospect the jury may convict) and directed the jury to acquit. Such evidence, if available to the referrer, and in the absence of any other further evidence potentially available, would be relevant to the decision as to whether there was a question to be determined and whether a reference should be made.

110. It is arguable that where the Secretary of State has no evidence other than the bare fact of an acquittal, but none of the evidence from the trial, not even a transcript of a summing up, *and there is no other evidence that could ever be forthcoming, from the claimant or other source*, that there may be no positive duty to refer. However, the fact that there has been a prosecution for a homicide, ie. that an independent prosecutor has decided at some point in time that there was sufficient evidence to charge, is some independent evidence of unlawful killing in contrast say to the mere fact of an arrest

without charge. If the Secretary of State has no material available to make any positive assessment of the quality of the evidence other than the acquittal itself then the positive duty to refer is still likely to apply.

111. In my view, while the Secretary of State or referrer should consider the evidence available before making a reference and it might only then be made if the question properly arises which requires determination, public policy requires generous leeway be given to the Secretary of State in favour of making references in all but obvious cases. Considering the circumstances where references are properly to be made means that there is some prospect of there being a question that requires determination. A wide measure of discretion should be afforded to the Secretary of State, in line with the positive duty, when deciding whether a question arises which must be determined on a reference.

112. Therefore, while I introduced the potential in my observations and directions, I am not satisfied that "abuse of process" is the appropriate remedy to be applied in this case or in most cases. Generally, except in the most extreme cases, there will be other more proportionate ways to remedy delay or unfairness in the Tribunal proceedings rather than striking them out as an 'abuse of process'. This is all the more so because the reference to the Tribunal is inquisitorial in nature, and potentially non-adversarial. In most circumstances, unfairness to a claimant due to delay could be addressed by discounting evidence against the claimant or even refusing to admit it. In this case, I declined to make further inquiries or receive any further evidence following receipt of the Claimant's solicitor's exculpatory submission and evidence and the Secretary of State's concession.

113. Ultimately, while deprecating the Secretary of State's conduct in making this reference in the circumstances described above: without supporting evidence; so late; without explanation for the inordinate delay; and where the Claimant's ability to respond was prejudiced by the destruction of papers, I am not prepared to condemn the reference or strike it out as an abuse of process. The abuse of process jurisdiction is an exceptional remedy and I consider that a generous margin of leeway should be given to the Secretary of State in light of the extent of her duty to make references.

114. In any event, it would be disproportionate to determine that the making of the reference constituted an abuse of process where I can provide full relief to the Claimant on the substantive grounds. She has been able to receive a fair trial on the merits of the referral which I have determined in her favour. If her original solicitor had not been available to represent her, recall the facts and make helpful submissions, and if the Claimant had demonstrated further prejudice in her ability to respond, my ruling may have been different.

115. As a footnote to this decision, I would hope the Secretary of State's procedures are improved such that the Department is not making further

references over a decade after a claimant has begun to receive benefits or pension entitlements. I would hope that Departmental procedures would be reviewed in light of the age of this referral and my decision.

Decision on the papers without a hearing

116. I am satisfied that I should proceed to make the decisions above without a hearing pursuant to Rule 34 of the Upper Tribunal Rules 2008. It is in the interests of justice to do so.

117. Neither party has requested an oral hearing of the reference so I have had regard to any view expressed for the purposes of Rule 34(2). I have all the material before me which I need to decide the case and an oral hearing would be unlikely to add anything. In light of the Secretary of State's submissions inviting the reference to be struck out, there was unlikely to be any dispute about the outcome of the case. I also bear in mind that the matters involved are already very old (between 12 and 27 years). Listing the case for hearing would only cause further unnecessary further delay and potential stress and upset for the Claimant.

Conclusion and determination of the reference

118. I have decided and determined that the Claimant is not precluded by virtue of the forfeiture rule as defined in section 1 of the Forfeiture Act 1982 from receiving a Category B retirement pension from 29 August 2007.

119. I am satisfied that the forfeiture rule does not apply to the Claimant. I am not satisfied that the Claimant unlawfully killed her late husband.

120. Therefore, no questions arise for determination as to whether the Claimant obtained a benefit in consequence of an unlawful killing nor whether the effect of the forfeiture should be modified. She is not precluded from obtaining the benefit of her category B pension. There should be no reduction in her current and future pension entitlement nor is there any overpayment which might be recovered.

121. The Secretary of State retains the right to apply for the decision to be set-aside if the requirements of Rule 47(1) of the Upper Tribunal Rules 2008 can be satisfied – for instance where there is a relevant change in circumstances after this decision is made. The Secretary of State retains the usual right to seek permission to appeal this decision pursuant to Rule 44.

Signed on original on

Rupert Jones
Upper Tribunal Judge

30 September 2019