Administrative Appeals Tribunal decisions

'Custody, care and control' of children

PARKS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/190)

Decided: 31 July 1984 by I.R. Thompson.

Lynette Parks had been granted a widow's pension in 1977, following her divorce. The rate of that pension was calculated on the basis that Parks had the custody, care and control of 3 children of the marriage. However, each of the children lived away from Parks for various periods between 1978 and 1982; and, during those periods, the DSS reduced Parks' widow's pension. Parks asked the AAT to review the decision to reduce her pension.

'Custody, care and control'

Section 63(1A) of the *Social Security Act* provides that the basic rate of a widow's pension is to be increased by a a fixed amount for each child in the widow's 'custody, care and control'.

The evidence before the Tribunal showed that each of the children had spent substantial periods of time (ranging from 8 months to 32 months) living with their father, with Parks' brother and with her mother. During some of those periods, Parks had maintained regular contact with her children and had made some contribution to their maintenance; but she had not exercised any control over their day-to-day activities.

The AAT pointed out that the phrase 'custody, care and control' of a child had been used in a number of sections in the Act. In particular, it was used in the Part IV, which relates to family allowance; and its meaning in that Part had been considered in a number of decision – *Dowling* (1982) 6 *SSR* 61, *Brakenridge* (1983) 15 *SSR* 152 and *A* (1984) 19 *SSR* 199.

The AAT said that, when the phrase was used, the clear intention of the legislature was to provide money to assist people to support children in their custody, care and control:

> It is necessary for the expression to be construed with that consideration in mind. In *Re Dowling* and *Re Brakenridge* the Tribunal held that for a person to be qualified to receive payment by having custody, care and control of a child it was not sufficient for him to have only custody, only care or only control of the child, or only two of them. He must have all three. The decision in *Re A* was to similar effect. I can find no reason for taking a different view in this case.

(Reasons, para. 13).

The Tribunal pointed out that earlier decisions (such as *Dowling* and *A*) had decided that the word 'custody' carried its normal legal meaning. In the present case, Parks had had the legal custody of all 3 children throughout the relevant period. However, in the opinion of the Tribunal, she had not had their care and control during the periods when the children had lived with their father, her brother or her mother. This was because she had not retained any 'measure of oversight of the [children] with a view to [their] protection, preservation or guidance: nor had she continued 'to some degree to control, check or direct the [children's] action and have domination over the [children].: Reasons, para 19.

The AAT observed:

> 21. To find that the applicant did not have care and [control] of the children during the material periods accords with the clear legislative intent of the Act. The rate of pension payable to a widow who has the custody, care and control of a child is increased because of the additional financial burden which she has as the result of having such custody, care and control and so as to enable her to provide adequate support for the child.

The Tribunal said that, because Parks had not had the care or control of the children at the relevant times, it was not necessary to decide whether the view expressed in earlier decisions (such as *Dowling* and *A*), that 'custody' had its normal legal meaning, was the correct view.

Formal decision

The AAT affirmed the decision under review.

MRS B and DIRECTOR-GENERAL OF SOCIAL SECURITY and MR B (No. V83/205)

Decided: 2 October 1984 by R. Balmford.

Mrs B and her husband had been divorced in 1973, when custody of both children (A & C) had been granted to Mr B. In September 1980, A & C had begun to live with Mrs B, although there was no change to the custody order. Throughout the period covered by this review (December 1981 to June 1983) the children spent the bulk of their time (38 weeks a year) with Mrs B and the rest of their time with Mr B.

By the end of 1981, Mrs B had been granted a family allowance for both children – a 'child family allowance' under s.95(1) for C, who was under 16, and a 'student family allowance' under s.94(2A) for A, who had turned 16 and was a full-time student.

Following an application from Mr B, the DSS decided to pay to him the whole of the student family allowance for A and one half of the child family allowance for C from December 1981 (these were the first and second decisions).

Following an approach from Mrs B, the DSS then decided to divide equally between Mrs and Mr B the student family allowance for A from December 1981 (this was the third decision).

Mrs B sought review of each of these decisions.

The legislation

Section 95(1) of the *Social Security Act* provides that 'a person who has the custody, care and control of a child . . . is qualified to receive family allowance in respect of each such child'.

Section 94(2A) provides that a full-time student between 16 and 25 years of age, who 'is wholly or substantially dependent on another person', is to be treated for family allowance purposes, as a child in the custody, care and control of that other person.

Section 103(1) provides that a family allowance is no longer payable to a person if a person ceases to have custody, care and control of the child.

Section 105 provides that a family allowance is to be applied 'to the maintenance, training and advancement of the child in respect of whom it is granted.'

Section 99A provides that the Director-General may divide the family allowance for a child between two persons each of whom is 'qualified to receive a family allowance in respect of the same child'.

Section 103A(1) allows for the calculation of a daily rate of family allowance to allow payment of family allowance for any period less than the normal family allowance period (namely, 1 month).

The AAT's decision

The Tribunal decided that the **student family allowance** for A should be paid to the parent with whom A spent the greater part of any family allowance period. The student family allowance was only payable, under s.94(2A), to the person upon whom the student child was 'substantially dependent', which meant financially dependent for the greater part of any family allowance period, in the sense of providing the child's needs for food, shelter and minimal clothing. The AAT said that the evidence established that these needs were largely (if not totally) satisfied by Mrs B, apart from any family allowance period, the greater part of which A spent with his father.

However, the AAT said the **child family allowance** for C could not be divided between C's parents. Only Mr B could qualify for this allowance and then only for those days when C was in Mr B's custody, care and control. This was because, according to s.95(1), child family allowance was only payable to the person who had 'custody, care and control' of the child.

The term 'custody' might be interpreted as referring to a state of fact – that is, 'effective or actual care and control of a child by parent'. That interpretation

would serve the purposes of the payment of family allowance (to provide for the 'maintenance, training and advancement of the child': s.105). And, in the present case, it would have avoided the result of no allowance being payable for C for those periods which C spent with her mother.

However, that reading of 'custody' was inconsistent with such decisions as *Dowling* (1982) 8 *SSR* 80; *A* (1984) 19 *SSR* 199 and *Qazag* (1984) 20 *SSR* 219, where it had been decided that 'custody' meant legal custody. Although the AAT would have adopted a different interpretation of that term, it felt bound to 'decide this matter consistently with earlier decisions of the Tribunal, and thus on the basis that the expression "custody, care and control" is cumulative, and that "custody" has its normal legal meaning': Reasons, para. 56.

Accordingly, as Mrs B had at no time had the legal custody of C, she could not be eligible for child family allowance for C, even though she had the care and control of C for most of the relevant period.

The AAT conceded that its conclusions as to the payment of family allowance for either child were not satisfactory from the point of view of the parents, the children or the DSS. This, the Tribunal said, was a reflection of the insufficient attention given by Parliament to the wording of the legislation. In particular, the legislation appeared to have been drafted on the assumption (which the AAT described as 'clearly unwarranted') that the custody of children would remain stable. The AAT observed:

> While the amount of family allowance is, for many of its recipients, significant, it is, however, small in relation to the administrative cost involved in allocating it between two competing parents. It would seem desirable that, if the family allowance is to be fairly allocated as between separated or divorced parents, some more absolute principles should be enunciated by Parliament to enable these matters to be dealt with with the minimum of expensive administration.

(Reasons, para. 69).

The Tribunal concluded by observing that the first and second decisions of the DSS (in effect, to cease paying to Mrs B the whole of the family allowance for the two children) had been made without any prior notice to Mrs B. Not only was this a breach of s.99A of the Act, but it was also inconsistent with the general principles of natural justice, which required the DSS to 'listen fairly to both sides', as the House of Lords had put it in *Board of Education* v *Rice* [1911] AC 179.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the following directions (relating to the period between December 1981 and June 1983):

(a) that A had been wholly or substantially dependent on his father for any family allowance period the greater part of which he spent with his father;
(b) that A had been wholly or substantially dependent on his mother for the remainder of the relevant time;
(c) that C had not, at any time, been in the custody, care and control of her mother; and
(d) that C had been in the custody, care and control of her father for any period of time which she had spent with her father.

HUNG MANH TA and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. D83/12)

Decided: 15 October 1984 by A.N. Hall.

Hung Manh Ta had come to Australia with his son as a refugee from Vietnam in 1983. In June 1983, he had been told by the Department of Immigration and Ethnic Affairs that his wife and 3 youngest children would be nominated to the Vietnamese government under the orderly departure programme; but that the immigration of his wife and three children to Australia was contingent upon the Vietnamese government issuing them with exit visas.

In July 1983, Hung Manh Ta claimed family allowance for his three children in Vietnam and, when the DSS rejected that claim, he applied to the AAT for review.

The legislation

Section 95(1) of the *Social Security Act* provides that 'a person who has the custody, care and control of a child . . . is qualified to receive a family allowance in respect of each such child . . .'

Section 96(1) of the Act provides that the family allowance is not to be granted unless '(b) the child . . . is living in Australia . . .' However, s.96(5) provides that this requirement (that the child be in Australia) does not apply where the child is living outside Australia, the claimant is living in Australia, 'and the Director-General is satisfied that the claimant intends to bring the child to live in Australia as soon as it is reasonably practicable to do so.'

Claimant must have custody, care and control

The Tribunal said that s.95(1) laid down a fundamental requirement which had to be satisfied in order to qualify for a family allowance. Section 96(5) could not be read as modifying that requirement and, accordingly, Hung Manh Ta could only qualify for family allowance for his 3 children in Vietnam if he had the 'custody, care and control' of those children.

Meaning of 'custody'

The Tribunal said that s.95(1) should not be read as requiring that a claimant for family allowance must have the legal custody as well as the physical care and control of the child or children in question. For the purposes of qualifying for family allowance, the phrase 'custody, care and control' was 'a composite expression referring essentially to the responsibility for the actual day to day maintenance training and advancement of the child (see s.105)': Reasons, para 52.

Earlier decisions of the Tribunal, such as *A* (1984) 19 *SSR* 199, *Qazag* (1984) 20 *SSR* 219 and *Mrs B* (noted in this issue of the *Reporter*), which had decided that 'custody' meant legal custody, should not be followed, the AAT said:

> 51. In social welfare legislation, it cannot, in my view, have been the intention of Parliament that child endowment (now family allowance) should only be payable for children who are in the custody, care and control of the person legally entitled to custody. Section 95(1) does *not* require that there be a familial relationship between the claimant and the child to whom the claim relates. Neither does the definition of 'child' impose any such requirement. There are many circumstances in which a person who, in fact, has the actual care and control of a child but who, in law, may not have legal custody of the child, would be denied family allowance if that were so. A foster parent caring for a child abandoned by its parents would be one such example (cf. *Re Brakenridge*). A child of divorced parents in the legal 'custody' of one parent, but in the physical 'care and control' of the other would be another example (but cf. *Re Mrs B*). I can see no indication whatever in the provisions of Part VI of the Act that children from disadvanted or broken homes were intended to be discriminated against in this way.

Claimant not eligible

Turning to the facts of this case, the AAT concluded that the 3 children in Vietnam were in the custody, care and control of Hung Manh Ta's wife. The fact that Hung Manh Ta had legal custody of his children in Vietnam was not relevant because he had been 'obliged by circumstances beyond his control to delegate essentially the whole of the custody, care and control of his 3 youngest children to his wife for an indeterminate period'; because there was no guarantee that he would be able to bring his wife and children to Australia; because he had no power to bring the children under his personal control; and because his contribution to their maintenance was not enough to establish that he had custody, care and control over the children.

Formal decision

The AAT affirmed the decision under review.