Family allowance: absence overseas

PRIFTIS and SECRETARY TO DSS (No N85/363)
Decided: 11 March 1986 by R.A. Balmford, J.H. McClintock and A.P. Renouf.

Maria Priftis and her husband had migrated to Australia from Greece in 1969. She was granted a family allowance for her 2 children in September 1971. In 1976, after Mr and Mrs Priftis had purchased a home and taken out Australian citizenship, they returned to Greece for 6 months because of the illness of Mr Priftis' mother.

After their return to Greece the family extended their stay on several occasions because of the continuing illness of Mr Priftis' mother. Mrs Priftis wanted to return to Australia and this led to some disputes between her and her husband. Shortly before the death of Mr Priftis' mother in March 1978, Mr and Mrs Priftis separated.

Mrs Priftis now found herself unable to return to Australia because she could not afford return tickets for herself and her children and because her children were included on Mr Priftis' passport.

In 1981, Mr and Mrs Priftis were reconciled on the understanding that they would return to Australia. However, they were unable to make the return journey until September 1984, when they eventually put together the money to pay for their tickets.

After her return to Australia, Mrs Priftis applied to the DSS for payment of family allowance for her 2 children for the 8 years of the family's absence. (The DSS had suspended payment of the allowance following the family's departure from Australia in 1976.) When the DSS rejected Mrs Priftis' application, she asked the AAT to review that decision.

The legislation

Section 103(1) of the *Social Security Act* provides that family allowance ceases to be payable to a person if either the person ceases to have her 'usual place of residence in Australia' unless her absence is 'temporary only' (para.(d)) or the child 'ceases to be in Australia' unless the child's absence is 'temporary only' (para.(e)).

'Usual place of residence'

The AAT adopted the meaning given to this phrase by the Federal Court in *Hafza* (1985) 26 *SSR* 321 - that a person could only have a 'usual place of residence' in Australia if the person, during any particular period, ordinarily ate, slept and lived in a place in Australia.

Taking that approach, the AAT decided that Mrs Priftis had ceased to have her 'usual place of residence' in Australia from the time when she left Australia in 1976. The AAT then turned to the question whether Mrs Priftis' and her children's absences from Australia could be regarded as 'temporary only' for all or part of that period. In approaching this question, the AAT divided the period between 1976 and 1984 into 3 separate periods.

The first period

The first period, the AAT said, ran from the family's departure from Australia in May 1976 until the death of Mr Priftis' mother in March 1978.

In that period, the AAT said, the absence of Mr and Mrs Priftis from Australia was 'limited to the fulfillment of a passing purpose' - namely, attending to Mr Priftis' mother; and, on the approach adopted by the Federal Court in *Hafza* (above), the absence of Mrs Priftis and her children in that period was 'temporary only'.

The second period

The AAT treated the period from 1978 to 1981, when Mr and Mrs Priftis were separated, as the second period.

The AAT noted that, during this period, Mrs Priftis was anxious to return to Australia but she did not have access to her children's passport nor to the money necessary to purchase tickets.

The AAT said that it was not necessary to decide the difficult question whether Mrs Priftis' absence from Australia was 'temporary only' during this period because it had concluded that her children's absence from Australia was not 'temporary only'; and that conclusion was sufficient to prevent payment of family allowance under s.103(1)(e).

The AAT pointed out that, during this period, the movements of the children were controlled by their father, who held their passport and, accordingly, 'the absence of the children is inevitably linked with the absence of their father': Reasons, para.32.

During this period, Mr Priftis had no definite intention to return to Australia:

> 'His absence from Australia could not be said to have been, during that period "temporary only". And, as he controlled the movement of the children, and was able to and did restrain them from returning to Australia, in our view the children's absence during that period cannot be regarded as having been "temporary only" in terms of the manner in which that expression was interpreted by Wilcox J. in *Hafza*.'

(Reasons, para.33)

The third period

The AAT then turned to the last period, from the reconciliation of Mr and Mrs Priftis in 1981 until their ultimate return to Australia in 1984. In this period, the evidence showed that both Mr and Mrs Priftis had a clear intention to return to Australia and that their delay was caused only by the difficulty in obtaining money. However, the AAT concluded that, during this period, their absence from Australia had not been 'temporary only':

> 'By the time of their reconciliation they had been in Corfu for 5 years, and their absence in total amounted to over 8 years. We do not think that the period of 3 years attributed to the necessity to obtain enough money to enable their return can be described as occasioned by "the fulfillment of a passing purpose". The obtaining of money does not seem to have been pressed very hard.'

(Reasons, para.34)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Mrs Priftis had been qualified for family allowance from the time of her departure from Australia in May 1976 until March 1978.

DONOVAN and SECRETARY TO DSS (Nos Q84/180, Q85/27)
Decided: 12 March 1986 by J.O. Ballard.

Francis Donovan had worked in Papua New Guinea between 1966 and 1982, when he entered into a *de facto* marriage with a woman, J. In 1980, they had a daughter, D.

In January 1982, Donovan returned to Australia and obtained employment in Queensland. He regularly sent money to J for herself and D until early 1984, when Donovan became unemployed.

Donovan had been granted family allowance for his daughter in September 1983. When he sought payment of additional unemployment benefit for his *de facto* wife and his daughter early in 1984, the DSS refused that application and cancelled the family allowance being paid to him for his daughter. Donovan asked the AAT to review those two decisions.

Late in 1984, Donovan applied to the State Housing Commission for accommodation for himself and his family and was placed on a waiting list. At the end of 1984 J and D visited Australia for 2 months and Donovan and J were married. Early in 1985 (shortly after his wife and child had

returned to new Guinea) Donovan was convicted of a criminal offence and sentenced to imprisonment.

In his evidence to the Tribunal, Donovan said that he anticipated that he would be released from prison early in 1985, would obtain employment as a taxi driver and be allocated accommodation by the State Housing Commission, so that he would be able to bring his wife and daughter to Australia.

The legislation

Section 95(1) of the *Social Security Act* provided, at the time of the decision under review, that family allowance was payable to a person who had 'the custody, care and control of a child'.

According to s.96, family allowance could only be paid for a child outside Australia if the claimant was living in Australia and the Secretary was satisfied 'that the claimant intends to bring the child to live in Australia as soon as it is reasonably practicable to do so'.

Section 112(2) provided that additional unemployment benefit could be paid to a married person if that person had a dependent spouse resident in Australia.

Section 112(5) provided for the payment of additional unemployment benefit to a person who had the 'custody, care and control of a child'. Section 106A provided that a person outside Australia could not be treated as a child of a beneficiary unless the Secretary was satisfied that the beneficiary 'intended to bring the person to live in Australia as soon as it was reasonably practicable to do so'.

Additional benefit for wife

The AAT pointed out that, during the period in question, J had not been resident in Australia and, even if she had been dependent on Donovan, he was not qualified to receive additional unemployment benefit for her.

Additional benefit for child

The AAT accepted that Donovan intended to bring his daughter to Australia as soon as reasonably practicable. Accordingly, the only question was whether he could be said to have the 'custody, care and control' of his daughter so as to be entitled to family allowance and additional unemployment benefit for her.

The AAT referred to the decision in *Hung Manh Ta* (1984) 223 *SSR* 247, where a Vietnamese refugee living in Australia was held not to have the 'custody, care and control' of his children who were still in Vietnam living with their mother. The AAT said that the facts of *Hung Manh Ta* were very different from the facts of the present case:

> '27. A crucial distinction between *Ta's* case and this case is that in this case the circumstances which determine when D joins the applicant are circumstances within the applicant's control. These concern his general establishment in North Queensland and in particular in obtaining regular work and accommodation for the family . . . Those plans were faced with no external impediment save those which it was for the applicant to overcome . . .
>
> 28. In *Ta's* case Mr Hall said:
>
> "He is powerless to limit the period or the scope of his wife's custody, care and control of the children. He is powerless to control their movement out of Vietnam . . ."
>
> On these facts it cannot be said that the applicant is powerless to limit the period or scope of his wife's custody, care and control of the children [*sic*] nor that he is powerless to therefore remove them [*sic*] from Papua New Guinea. On the contrary, both of these things are within his power. As a result the situation is essentially different from that in *Ta's* case.'

Accordingly, the AAT concluded that Donovan was entitled to payment of family allowance and to a higher rate of unemployment benefit in respect of his daughter.

Formal decision

The AAT set aside the decisions under review and remitted the matter to the Secretary with directions that Donovan was entitled to family allowance for his daughter from the date of its cancellation and to additional unemployment benefit for his daughter.

Married persons: 'special reason' to treat as single

FAGUE and SECRETARY TO DSS (No N85/11)

Decided: 6 March 1986 by R. A. Hayes and G.P. Nicholls.

Mr and Mrs Fague had been granted age pensions in 1980, free of the income test because each of them was over 70 years of age. At that time, they were living apart because Mrs Fague was suffering from an 'almost total mental incapacity' and the DSS was paying their pensions at the single rate.

In October 1983, following the introduction of an income test for pensioners aged over 70, Mr and Mrs Fague's pensions were reduced because of their combined income. In June 1984, their pensions were reviewed and, because of the level of their combined income, the DSS cancelled their pensions. Mr Fague then asked the AAT to review that decision.

The legislation

Section 28(1A) of the *Social Security Act* fixes two rates of a pension - a higher rate for 'an unmarried person' and a lower rate for a married person whose spouse is also receiving a pension.

Section 28(1AAA) authorises the Secretary to pay the higher 'single' rate of pension to married pensioners where the Secretary is satisfied that their living expenses are higher because illness or infirmity has prevented (and will continue to prevent) them living together.

Section 28(2) establishes the pension income test, under which the rate of age pension is to be reduced by reference to the pension's income.

Prior to September 1984, s.29(2) provided that the income of a husband or wife should be taken as half the total income of the husband and wife -

> '(a) except where they are living apart in pursuance of a separation agreement in writing or a decree, judgment or order of a court; or
>
> (b) unless, for any special reason, in a particular case, the Secretary otherwise determines . . .'

From September 1984, that provision was replaced by s.6(3), which provides for 50% of the total income of a married couple to be attributed to each married person; and s.6(1), which excludes (unless the contrary intention appears) from the definition of 'married person' -

> '(a) a legally married person . . . who is living separately and apart from the spouse of the person on a permanent basis; or
>
> (b) a person who, for any special reason in any particular case, the Secretary determines in writing should not be treated as a married person . . .'

A 'special reason' to disregard income

In the present case, the income which had been taken into account when applying the income test to Mr and Mrs Fague's pensions had consisted, for the most part, of income received by Mr Fague from his investments. However the DSS had also taken into account some interest payments accruing on Mrs Fague's investments, although neither she nor Mr Fague had access to that income because she was incapable of dealing with, or authorising any other person to deal with, her property.

Nevertheless, the AAT said that the former s.29(2)(b) did not allow Mr or Mrs Fague to have their incomes treated separately. This was because there was a special provision in the *Social Security Act*, s.28(1AAA), for dealing with the financial problems of a husband and wife who were obliged to live apart because of illness or infirmity: