

Administrative Appeals Tribunal decisions

Family allowance: children overseas

HO and SECRETARY TO DSS
(No. N86/327)

Decided: 28 November 1986 by R. A. Hayes, M. S. McLelland and J. H. McClintock

Van Luc Ho arrived in Australia in January 1984. Seven of his children remained in Vietnam with his wife. In June 1984 he applied for family allowance in respect of these children. This application was granted and the allowance was paid from January 1984. It was cancelled in September 1984 on the basis that he did not have 'custody, care and control' of his children. He applied to the AAT for review.

The facts

The applicant had been unemployed for most of his time in Australia. His 22 year old son who had arrived with him in Australia earned about \$390 per week.

The applicant had sent 23 parcels, a total value of about \$2,000, to his wife. He had also sent medication, cloth and a television set with a total value of \$1,900. Gold bars to a value of \$4,330 had also been sent to his wife.

The applicant intended to bring his family to Australia. By the date of the hearing he had become an Australian citizen and his sponsorship of his family had been approved by the Australian Government.

Close written communication had been maintained between the applicant and his wife. The applicant regarded himself as the head of the family and he set standards of conduct for his children. He had persisted in maintaining his position as head of the household in keeping with traditional family values of his culture.

In effect the Tribunal came to the conclusion that he performed the same functions that he would perform if he lived with his family and travelled away on business.

The legislation

Section 95(1) of the *Social Security Act* as it read prior to 5 September 1985 provided that a person who had 'custody, care and control of a child' was qualified to receive family allowance in respect of that child.

From 5 September 1985, s.95(1) was amended to provide that a person who had a 'dependent child' was qualified to receive family allowance. 'Dependent child' was defined in s.6(1) as a child under the age of 16 years who is in the custody, care and control of the person, or where there is no

person who has the custody, care and control where the person has wholly or substantially the care and control of the child. The definition of 'dependent child' also includes a student child who is wholly or substantially dependent upon the person.

'Custody, care and control'

The Tribunal referred to the decision in *Le* (1986) 32 SSR 403 but distinguished it on the basis that the facts were quite different. In *Le* the marriage had broken down and the wife had formed a new relationship. The two children were not even living together. Reference was also made to *Ta* (1984) 22 SSR 247 where the Tribunal had suggested that a person could retain 'custody, care and control' even though the person had delegated some part of it to others.

In the present case the Tribunal took a different approach to delegation. The issue was one of a parent retaining parental sovereignty and autonomy over the children. Delegation, rather than being evidence of the loss of such sovereignty, could be seen to be an indication that it is continuing to exist. The example of a child being placed in a boarding school was given by the Tribunal.

Is the parent still 'sovereign'?

The question to ask was whether the applicant has retained parental sovereignty and autonomy notwithstanding the separation from his wife and children. To answer that question it is necessary to consider whether (1) the applicant has continually and consistently asserted his or her parental sovereignty and autonomy; (2) the assertion of sovereignty and autonomy has been accepted and respected by those affected, particularly the children, spouse and delegates (if any); (3) this care can be demonstrated by the ongoing provision of significant material and emotional support.

Having found that the applicant had maintained strong bonds with his family which enabled him to maintain the traditional role of husband and father, the AAT concluded that the applicant met the above criteria and so qualified for family allowance.

Formal decision

The Tribunal set aside the decision under review.

PHAN and SECRETARY TO DSS
(No. Q86/88)

Decided: 18 November 1986 by J. B. K. Williams, H. M. Pavlin and N. C. Davis

The applicant had been in Australia since July 1983. His wife and son remained in Vietnam. In August 1983 he lodged a claim for family allowance in respect of his son in Vietnam. He supplied evidence of the sponsorship of his family to emigrate to Australia as well as documents confirming his sending of two amounts of \$100 between December 1983 and March 1984. In August 1984 he also sent a parcel worth \$74.50 to his wife.

In September 1984 family allowance was cancelled on the basis that he did not have the 'care, custody and control' of his child. In particular the DSS informed him that as he could not provide evidence of being able to control the movement of his child (that is visas) he failed to meet the criteria in the Act. The applicant applied to the AAT for review of that decision.

Custody, care and control when child overseas?

The legislation is set out in *Ho*, this issue. The issue was whether the applicant had the custody, care and control of the child in Vietnam.

The Tribunal referred to the decisions in *Ta* (1984) 22 SSR 247 and *Le* (1986) 32 SSR 403. In relation to the effect of the applicant's sending of money to his family in Vietnam the Tribunal commented:

'...as was pointed out in *Ta's* case, that fact alone is not enough to justify the conclusion that he had the custody, care and control of the child. The applicant in this case was, in our view, in the same position as Mr *Ta*. He was powerless to control the movement of his child from Vietnam to Australia unless the relevant authorities in each of those countries issued the necessary documentation. He was obliged by circumstances over which he had no control to delegate custody, care and control to his wife for an indefinite period. Such instructions as he may have given to his wife in letters to her may or may not have been carried out and he would have no means of knowing whether they had or not. If she did not, then he was powerless to take any effective action to bring the child under his personal control.'

(Reasons, pp.12-13)

As a result the applicant could not meet the necessary criteria and was not eligible for family allowance. There was some suggestion that as a result of this decision the applicant may not

have been entitled to the resumption of payment which took place after the applicant's family had been granted visas. However, the DSS did not pursue this issue.

Formal decision

The AAT affirmed the decision under review.

Recovery from compensation

CARDER and SECRETARY TO DSS (No. V85/456)

Decided: 27 October 1986 by H. E. Hallowes

The applicant asked the AAT to review a DSS decision to recover payments of sickness benefit he received in respect of a period for which he received payment for loss of wages from the Motor Accidents Board (MAB). The sum involved was \$883.80. The DSS also sought to recover an overpayment of \$147.30 in unemployment benefit which the applicant asked the AAT to review.

The legislation

Section 115B of the *Social Security Act* allows the DSS to recover payments of sickness benefit where a person receives payments as compensation for that incapacity.

Sub-s.115(2) provides that a payment by way of compensation shall include payment of damages, payments under insurance or compensation schemes under State laws and other payments which are in the nature of compensation or damages.

Section 115E allows the Secretary to disregard the payment of compensation if there are 'special circumstances' in the case.

The facts

Mr Carder suffered a whiplash injury in a car accident in June 1983. This prevented him from working. He received payments from the MAB to the sum of \$1,240. He received at least some of this amount while in receipt of unemployment or sickness benefits.

Was the MAB payment 'compensation'?

The Tribunal had before it some evidence that suggested the MAB did not consider its payments compensation payments. This view appeared to have given rise to the practice of requiring the client to repay the DSS and then receive the relevant amount from the MAB rather than the MAB refunding the amount directly to the DSS as is the purpose of the procedure set down in sub-s.115B(3). [That procedure allows the DSS to notify the person paying compensation that they are required to pay the Department directly.]

There was thus a question as to whether the MAB payment was by way of compensation for the

incapacity. The AAT referred to s.25 of the *Motor Accidents Act* which is headed 'Compensation for deprivation or impairment of earning capacity'. Reference was also made to the Federal Court decision in *Siviero*, unreported, 12.9.86 which said that compensation for loss of wages would presumably be regarded as compensation in respect of the incapacity.

The conclusion of the AAT was that the MAB payments were compensation payments in respect of the incapacity within the meaning of sub-s.115(3).

Did special circumstances exist?

The AAT then turned to whether 'special circumstances' existed such as would allow the Secretary to treat the payment as not having been made pursuant to sub-s.115(3).

Referring to *Ivovic* (1981) 3 SSR 25 the Tribunal asked whether there were circumstances in the case which would render recovery of the amount 'unjust, unreasonable or otherwise inappropriate'.

The applicant was deeply in debt and his wife and daughter both were in ill health. The applicant's wife had notified the DSS immediately she received the MAB payments but had been advised that the MAB would pay the DSS back. In the meantime she was told the payments of benefit were in order. In April 1984 the applicant's second child died. This raised funeral expenses in addition to mortgage commitments at that time. The applicant separated from his wife in December 1985 and his income fluctuated depending upon the demand for his skills as a carpenter.

The misleading advice as to the payment to the DSS by the MAB was not considered to be a special circumstance such as would make recovery unjust, unreasonable or inappropriate. The AAT considered the precarious financial position of the applicant but the fact that public moneys have been expended was regarded by the AAT as the paramount consideration. The Tribunal had heard from the applicant that he expected to be able to get over his unfortunate position and was satisfied that he would then be able to repay the money.

Thus the AAT affirmed the decision with respect to the recovery of sickness benefit.

Overpayment of unemployment benefit
The DSS argued that the applicant had failed to notify them of receipt of income (the MAB payment) while in receipt of unemployment benefit.

The AAT found on the evidence that the applicant's wife had informed the DSS of the payment. They were aware of the receipt by him of the payments and chose to continue payment of the benefit. The AAT concluded that there was no debt due to the Commonwealth in respect of the unemployment benefit. He had not failed to disclose the payment and had not been a contributory cause of the overpayment. The DSS would have paid the benefit according to the AAT even if the applicant had produced a receipt from the MAB.

The AAT set aside the decision in relation to the overpayment of unemployment benefit.

PAPAGEORGIU and SECRETARY TO DSS (No. V86/245)

Decided: 27 October 1986 by H. E. Hallowes, G. Brewer and R. W. Webster

Helen Papeorgiou sought review of a DSS decision to recover payment of rehabilitation allowance to the sum of \$15,394.95 after she recovered \$200,000 in a common law settlement.

The applicant had been hit by a car in 1981 when aged 13 and sustained severe head injuries. She attended a rehabilitation centre after the accident for about one year and returned to school where she completed Year 11. She subsequently developed tremors in her left hand and both legs and suffered from dizziness. Her parents had not been supportive and she assisted in the home. She could generally care for herself. Her employment prospects had been described as 'bleak' although she remained optimistic about overcoming her disability.

The legislation

Section 135R(1A) of the *Social Security Act* allows the Secretary to recover from a person who has received a rehabilitation training allowance the amount paid in that allowance from any compensation they receive in respect of the disability which necessitated that training.

Section 135R(1B) allows the Secretary to release the person from