Federal Court decision

Family allowance: child overseas

SECRETARY TO DSS v VAN LUC HO
Federal Court of Australia
Decided: 27 October 1987 by Davies J.

This was an appeal from the decision of the AAT in *Ho* (1987) 36 *SSR* 454 in which it had been decided that the applicant was eligible to receive family allowance in respect of his children in Vietnam.

The facts

Van Luc Ho had arrived in Australia from Vietnam in January 1984. Seven of his children remained in Vietnam with his wife. He sent numerous parcels to his wife in Vietnam to a total value of about $8,000. He intended to bring his family to Australia and had obtained approval to sponsor their migration by the date of the AAT hearing. He had also maintained close communication with his wife and had set down standards of conduct for his children in that communication.

On this basis the AAT had found that the applicant had the 'custody, care and control' of his children as required by section 95(1) of the *Social Security Act* in order to qualify for family allowance in respect of a child. In this context the AAT had focussed on whether the applicant had retained 'parental sovereignty and autonomy', notwithstanding that he was physically separated from his children.

Parental sovereignty irrelevant

The Federal Court reviewed the authorities on the meaning of 'custody, care and control' and concluded that the issue was one primarily of fact, based on who had the actual day to day care and responsibility for the child. Thus, the AAT's reference to 'sovereignty' was inappropriate:

> 'The words 'sovereignty and autonomy' are not appropriate these days, and perhaps never were, even to describe the right of legal custody which a parent may have in relation to his or her children. But even if they were, they are not an appropriate test when the issue is factual custody and control. That issue is determined by the facts of the case, facts which show who is caring for the child, who has undertaken that responsibility. The words 'sovereignty and autonomy' import concepts of entitlement whereas the family allowance provisions are concerned with what actually occurs.'

(Reasons, p.18)

The Tribunal was wrong in substituting its own test for family allowance for that set down in the Act. It should have applied the test of who had the 'custody, care and control' of the children only and not reconstructed the test in terms of 'sovereignty and autonomy.'

Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter to the AAT to be reheard according to law.

Background

RECOVERY OF OVERPAYMENTS: DUBIOUS TACTICS BY THE COMMONWEALTH GOVERNMENT

Last September, the Commonwealth Government cut short a Victorian Supreme Court hearing of a claim for recovery of overpayment of widow's pension, abandoning its claim to repayments, and paying the defendant's costs. The Commonwealth, which had obtained judgment against the defendant, Mrs T, in the Magistrates' Court, apparently did not want the issues of law raised by Mrs T's case decided in the Supreme Court.

We believe an account of the tactics adopted by the Commonwealth in its 5-year pursuit of the overpayment, and the legal arguments which were to be raised on Mrs T's behalf, may be useful to agencies advising clients who are facing claims for recovery of Social Security overpayments.

Between July 1974 and August 1979, Mrs T received overpayments of widow's pension amounting to $4200. Mrs T had informed the Department of Social Security that she was employed, and had correctly stated her rate of pay in July 1978. The DSS alleged that she had failed to notify the Department of the increases in salary she received between that date and August 1979. Mrs T stated that she had notified DSS of all increases. In fact, she had in her possession a copy of one such letter sent in June 1978.

The DSS had no record of any communication with her for the entire 5 years of the overpayment period, and had no record of receipt of the 1978 letter. Mrs T believed that part of her file had been lost by DSS when files were transferred from Spring Street to regional offices. She was fortified in this view by DSS's admitted inability to locate her family allowance file at the time of the Magistrates' Court hearing.

In December 1982, DSS wrote to Mrs T requesting return of the overpayment. Section 140 of the Social Security Act at that time dealt with recoveries - see now s.181.* Sub-section (1), which applies when the recipient of an overpayment is no longer receiving a pension or benefit, provides that the overpayment can only be recovered if it was made 'in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision' of the Social Security Act.

Mrs T appealed successfully to the Social Security Appeals Tribunal against the DSS decision to seek recovery of the overpayment. The SSAT was not satisfied that Mrs T had failed to notify DSS of the increases in her salary, and considered that 'in those circumstances there would be no proper legal basis upon which the DSS could proceed . . . under the provision of s.140(1)'.

*The consolidation of the *Social Security Act* which came into effect on 2 July 1987 has not affected the legal issues discussed in this article.

The DSS rejected the SSAT's recommendation. Mrs T appealed to the AAT in April 1985.

Some 6 weeks before the appeal was to be heard, the Commonwealth issued proceedings in the Melbourne Magistrates' Court for recovery of the money. By that time, more than 6 years had passed since all but $400 of the overpayment had been made.

The DSS obtained an adjournment of the AAT hearing on the basis that it wished to test the question whether the *Limitation of Actions Act* (Vic.) applied to s.140(1) of the *Social Security Act* and consequently barred recovery of all but $400 of the overpayment. In order to obtain the adjournment, the Department undertook not to execute on a Magistrates' Court judgment until the original decision to seek recovery had been reviewed by the AAT.

The Department's 'test case' and the value of its undertaking evaporated when it emerged that the Magistrates' Court summons sought recovery not under s.140(1) of the *Social Security Act*, but under the principle in *Auckland Harbour Board v The King* [1924] AC 318, that the money had been paid out of consolidated revenue without authority of Parliament.

The Commonwealth's choice of the *Auckland Harbour Board* action prejudiced Mrs T in several ways.

(1) To recover under s.140(1), the DSS had to demonstrate that the overpayment resulted from Mrs T's 'false statement or representation,

failure or omission', the point on which the DSS had failed in the SSAT. The *Auckland Harbour Board* action does not require the overpayment to be the fault of the recipient; the fact that the payment is unauthorised is sufficient.

(2) There is a strong argument that, as a result of the *Judiciary Act* (Cth) s.64, the Victorian *Limitation of Actions Act* applies to s.140(1) of the *Social Security Act* and barred all but $400 of the Department's claim. While it is also possible that the *Judiciary Act* has the same effect on the *Auckland Harbour Board* action, the question is considerably more obscure.

(3) It does not appear that the AAT has jurisdiction to review a decision of the DSS to seek recovery under the *Auckland Harbour Board* rule since such a decision is not made under the *Social Security Act*.

Mrs T was unsuccessful in the Magistrates' Court, but obtained an order to review the magistrate's decision in the Supreme Court. Counsel for Mrs T planned to make the following submissions.

(a) Section 140 of the *Social Security Act*, which expressly authorises recovery only in the circumstances defined by s.140(1) and s.140(2), by implication authorises retention of the overpayment in all other cases (as, for example, in Mrs T's case, where the overpayment was not within s.140(1) because it was not due to the recipient's false representation or omission, or within s.140(2) because she was no longer obtaining a pension or benefit). Since retention of such overpayments is impliedly authorised by Parliament, the amount paid in error had been duly appropriated, and the *Auckland Harbour Board* rule had no application. While the case of the *Commonwealth of Australia v Burns* [1971] VR 825 held that *Auckland Harbour Board* was not excluded by a similar express recovery provision in the *Repatriation Act* (Cth), the decision was either wrong or could be distinguished.

[This view of s.140 as the sole means of recovery is strengthened by the availability of review by the AAT of a decision to recover under s.140. Such review is not available should the Department rely on the *Auckland Harbour Board* rule. Why would Parliament allow a person who had obtained an overpayment by deliberately misleading the Department a chance to review the decision to recover in the AAT, but deny any review to a person who through no fault of their own had received an overpayment?]

(b) The Commonwealth's action was barred under the *Limitation of Actions Act*. If recovery was sought under s.140 of the *Social Security Act* the action was for a sum recoverable by virtue of an enactment and no action could be brought more than six years after the date the money fell due. The Commonwealth, as a litigant, is in the same position as an ordinary citizen and is bound by the State *Limitation of Actions Act (Maguire v Simpson* (1977) 139 CLR 362).

(c) If the first submission was wrong and the Commonwealth was entitled to seek recovery under the *Auckland Harbour Board* rule, then this action was also barred by the *Limitation of Actions Act*. There is a line of cases interpreting the *Service and Execution of Process Act* (Cth), which held that, where a person is obliged by law to repay money, an agreement to repay it will be implied, and consequently an action for repayment is based on contract. (See, for example, *DCT v Jonrich* (198) 70 ALR 357 at 368). The *Limitation of Actions Act* applies to implied contracts to prevent recovery outside the six year period.

So, in September 1987, the Department had said it wanted a test case on recovery of overpayments under the *Social Security Act* and the *Limitation of Actions Act*. It had obtained an adjournment in the AAT on this basis. After the long delay of getting proceedings to court; after the expenditure of large amounts of public money in legal and administrative costs; after extracting a high price from Mrs T who worried for years about how she was going to repay what would have been a huge debt for her (especially if costs were awarded against her); after all of this, the Commonwealth decided that it no longer wished to proceed.

We believe that the Commonwealth declined to argue Mrs T's case because it feared that *Burns'* case, which permits it to avoid the statutory safeguards of s.140 of the *Social Security Act*, the *Limitation of Actions Act*, and review by the AAT, would be overruled. We believe that the Commonwealth is using these same tactics against other defendants. If this is so, its legal right to do so should be vigorously challenged.

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SOCIAL SECURITY APPEALS TRIBUNALS: A SYSTEM IN JEOPARDY.

Two broad developments in social security policy and administration have placed the role of Social Security Appeals Tribunals in jeopardy, and raised serious doubts about their capacity to contribute effectively to the development of welfare policy and administration.

The first area concerns the independence of the SSAT and its credibility as a forum for the review of administrative decisions. As long as the SSAT lacks decision-making power, its independence and credibility are tenuous and reliant largely on a minimal veto rate. The more often its recommendations are vetoed, the more it becomes just another bureaucratic hurdle for aggrieved clients.

In the face of a rising veto rate, no firm resolve has been shown to contain the rate or to equip the SSAT with decision-making power and thereby guarantee its effectiveness as an independent mechanism for review. For example, the Minister's response (*Australian Society*, March 1987) to the article by Peter Hanks (*Australian Society*, January 1987) was, in effect, a denial that the problem existed.

To paraphrase Carney and Hanks ('Administrative Review: What is its Impact on DSS?' (1987) 12 *LSB*), the result is that the SSAT is increasingly becoming a cruel deception, which serves to mislead appellants into believing that their legitimate grievances are likely to be remedied.

The question of independence has been raised by other issues, including the initiation of debt recovery or prosecution notwithstanding that a relevant SSAT appeal is pending; the failure to provide immunity from subpoena of SSAT members or documents; and the attempt to limit the jurisdiction of the AAT by denying, through ministerial directive, the SSAT jurisdiction to hear appeals on decisions to prosecute.

The second matter of policy which disturbs me is the radical shift in the value base of welfare policy. It explains the first area of concern and supports my belief that Social Security Minister Brian Howe's responsibilities may not be matched by power to discharge them.

Social welfare policies (among others) are being determined according to economic values and not social values. Obviously, social objectives must be fixed having regard to national resources. However, it now seems that social welfare is seen as a sterile incident of expenditure instead of a series of needs to be met. Such conceptions are the unarticulated orthodoxy of the expanding empire of economic 'rationalism', which has entered into an unholy alliance with political pragmatism. The outcomes of that alliance include the following:

. a series of legislative amendments to facilitate recovery of overpayments, which flies in the face of progressive law reform for private-sector debtors;

. the legislative enshrinement of administrative requirements (e.g. lodgment of SU19B's)with the apparent purpose of legitimising con-