

visas, as decisive against Van having the children's custody, care and control.

On appeal to the Federal Court, Davies J. held that this approach had not involved an error of law.

The legislation

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

Section 96(5) provided that family allowance could be paid to a person for a child living outside Australia, if the Secretary was satisfied that the claimant intended to bring the child to Australia 'as soon as it is reasonably practicable to do so'.

An error of law

The Federal Court said that the AAT had correctly said that the 'custody, care and control' necessary to establish entitlement to family allowance required that the person have responsibility for the welfare of the

child and undertake the child's care and control. But the AAT had treated the inability of Van's children to leave Vietnam as conclusive against him having their 'custody, care and control'; and this involved an error of law. It was, Morling J. said, plain from the former s.96(5) -

'that family allowance may be payable to a claimant in respect of children who are living overseas and who are experiencing difficulty in obtaining exit permits permitting them to travel to Australia.'

(Reasons, p.7)

Burchett J. also referred to the former s.96(5), which required that the 'custody, care and control' referred to in s.95(1) be adapted to the situation where a child was in another country and it was 'not reasonably practicable for the parent to bring the child to Australia', the chief examples of which would relate to migrants:

'The Act should be construed against the background of the various and complex problems created by mass migration, often of people with very limited resources, and often

of political refugees and fugitives from civil war, persecution or invasion. It cannot be supposed that Parliament used the general language found in s.96(5) with the intention that it should apply to a multiplicity of reasons for the delay of reunion of a family, but not to one of the most tragic and most common.'

(Reasons, p.12)

The Federal Court conceded that the AAT, as an administrative body, should not have its decisions 'too closely scrutinised for the purpose of searching for errors of law, in what may be imprecise language': Morling J., at p.9. But the Tribunal had erred in law in treating the inability of Van's children to obtain exit visas as conclusively demonstrating that he did not have their custody, care and control.

Formal decision

The Federal Court set aside the judgment of Davies J. and the decision of the AAT and remitted the matter to the AAT to be heard and decided again.

[P.H.]



Update

DSS Field Officer Investigations

A report prepared by the Victorian Federation of Community Legal Centres and the Welfare Rights Unit has strongly criticised the activities of DSS field officers.

The report, *Investigations by Social Security Field Officers: Myths and Realities* (June 1988) is based on 26 detailed case studies of the experience of social security clients. It emphasises the particular problems caused by unclear definitions and guidelines in relation to de facto relationships, and recent negative government propaganda about social security fraud. These factors have resulted in many social security clients living in fear of interrogation by DSS field officers.

A further problem lies in the extraordinary powers to obtain information, now set out in the *Social Security Act*: see (1988) 41 SSR 528. A year after the introduction of those powers, guidelines for their administration have still not been developed by the DSS.

The report's case studies highlight the imbalance of power and access to information between field officers and social security clients; and makes the point that field officers regularly contravene DSS guidelines, particularly those set out in the *National Field Officers Handbook*.

Amongst the report's recommendations are:

- introduce legislative guidelines for field officer activities;
- limit the DSS cohabitation rule by placing it within more precise boundaries;
- require DSS to obtain more substantial proof of the existence of cohabitation;
- introduce disciplinary action against DSS field officers who breach the investigation guidelines;
- narrow the DSS's power to demand information to more precise circumstances;
- grant equal rights to beneficiaries

and pensioners when responding to requests for information; and

- provide information, in the appropriate community language, to clients about their rights when being investigated.

Copies of the report are available (for \$2) from -

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193 Smith Street,
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