

prospect of the pension moneys ever being transferred to Australia was so remote as to make the entitlement to them either nugatory or of no relevant benefit. The Indian pensions were not 'moneys earned' nor 'moneys derived' as they were now of no 'use or benefit' to the Hoogewerfs. This was enough to distinguish the present case from the Federal Court decision in *Inguanti* (1988) 44 SSR 568.

[B.W.]

Recovery of overpayment: double punishment

COLMER and SECRETARY TO DSS

(No. S87/253 and 254)

Decided: 2 August 1988 by J.A. Kiosoglous.

The applicants appealed against decisions to recover overpayments of invalid and wife's pension pursuant to s.140 of the *Social Security Act*. Both had worked under false names and had failed to advise the DSS of their employment. As a result Mr Colmer was overpaid \$8463 and Mrs Colmer \$5528. Each was convicted of fraud and sentenced to 12 months' imprisonment with a non-parole period of 9 months.

At the time of their imprisonment the financial affairs of the Colmers were 'in a very poor state' brought about by mortgage arrears on their home and arrears of outstanding domestic accounts. Both were in ill health.

Mr and Mrs Colmer were in gaol from 27 March 1986 until 9 September 1986. On 4 August 1986 their adopted son committed suicide. This and the ill-health of another son led to the Colmers being released from gaol for 'compassionate' reasons.

Following their release, the DSS again sought to recover the overpayments from on-going pension entitlements. An appeal to the SSAT succeeded on the grounds of financial hardship and that in sentencing them to imprisonment the magistrate meant this to be a 'once-only punishment'.

The AAT was given details of the Colmers' financial circumstances. The DSS argued that the only issue for determination was whether it was appropriate for the decision-maker to

exercise his discretion to waive or write-off or defer the debt to some future date. It disputed argument for the Colmers that, if they were obliged to repay the overpayments, this would amount to a further punishment in addition to the term of imprisonment. The AAT felt it appropriate to consider the issue of double punishment.

In so doing it approved the case of *Letts* (1984) 23 SSR 269 in which Davies J considered the concept of 'double punishment'. The failure on the part of the prosecution to ask for reparation did not bind the Secretary to the DSS. There was no evidence that the trial judge imposed a sentence upon the view that Letts would not have to repay the moneys which he improperly received.

The AAT agreed. There was no evidence that, when the magistrate imposed the sentence, she did so with the view that the Colmers would not have to repay the overpayment. The fact that the prosecution had omitted to ask for an order seeking reparation did not restrain the DSS from exercising its powers under s.140(2).

'Accordingly, in this Tribunal's view the respondent has every right to pursue recovery action in this matter, provided only that the applicants' financial circumstances are such that recovery does not cause them undue hardship.'

The AAT went on to consider the financial circumstances of the appellants. It found that they had received public moneys to which they were not entitled; the overpayments arose as a result of dishonesty; though their financial circumstances were 'strained' they were not in 'extreme hardship'. But their financial circumstances did indicate that recovery should be delayed. The AAT rejected the DSS argument that the Colmers' home could be used to secure a further debt to repay the overpayment as 'this would only increase the debts already outstanding'. However, the AAT saw no reason why the house should not be used as equity at a future date after the mortgage had been fully repaid.

The Tribunal said the case was one in which there was a clear case of fraud and dishonesty, yet it was inconsistent with social welfare principles to impose an undesirably heavy burden on the applicants. The AAT decided against the exercise of the discretion in s.146 but recommended the Colmers make an acceptable offer to the DSS to repay half the overpayments and that the Secretary exercise the discretion under s.146 to accept part repayment.

[B.W.]

Recovery of overpayment

GIDDENS and SECRETARY TO DSS

(No. W87/178)

Decided: 29 April 1988 by R.D. Nicholson.

The AAT varied a DSS decision to recover an overpayment of widow's pension, amounting to \$1325, from Maureen Giddens.

The overpayment had occurred because of changes in Giddens' earnings from part-time employment, and her failure promptly to inform the DSS of these changes.

Giddens was now earning about \$190 a week, net, and had regular outgoings of about \$170. Her only assets were an old car, furniture and personal effects. She had offered to pay off the overpayment at the rate of \$5 a week.

The AAT said that the debt should not be waived or written off, under s.186(1) of the Social Security Act, because of Giddens' offer to pay it off.

However, bearing in mind Giddens' marginal finances, the presence of negligence, rather than fraud, on her part and the fact that public money was involved, the overpayment should be recovered by instalments, 'in amounts and for periods determined by the Respondent': Reasons, p.7.

[P.H.]

Supporting parent benefit: custody, care, and control

LEAHY AND SECRETARY TO DSS

(No. D87/2)

Decided: 4 August 1988 by R.C. Jennings.

Mary Leahy was receiving invalid pension on the ground of schizophrenia. She was refused additional pension for her 16-year-old daughter Loanne, as the delegate considered Mary did not have 'custody, care and control' of Loanne. Leahy asked the AAT to review this refusal.