

On these facts, it was open to the Tribunal to find that Mr Harradine was engaged in his course of education on a fulltime basis. In brief, as Mr Harradine's progress in his course was consistent with his enrollment, it was unnecessary for the Tribunal to do more in the concluding passages of its reasons than to refer to the nature of the enrollment. No error of law was expressed in or should be implied from those reasons.'

(Judgment, P.10)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]



Income test: war restitution payment

KELLENNERS v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 15 November 1988

by Ryan J.

This was an appeal against the decision of the AAT in *Kellenners* (1987) 38 SSR 479. The AAT had decided that a pension paid to Kellenners under Netherlands legislation as compensation for war-time persecution at the hands of Japanese military forces was 'income' within s.6(1) of the *Social Security Act*; and that the amount of that pension should be taken into account in calculating the rate of widow's pension payable to Kellenners.

The legislation

At the time of the decision under review, s.6(1) of the *Social Security Act* defined 'income' as meaning -

'personal earnings, moneys, valuable consideration or profits earned, derived or

received by that person for the person's own use or benefit by any means from any source whatsoever within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance. . . .'

The definition went on to exempt several specific types of payment including the following:

'(h) insurance or compensation payments made by reason of the loss of, or damage to, buildings, plant or personal effects;

(u) a periodical payment or benefit by way of gift or allowance from the father, mother, son, daughter, brother or sister of the person;'

The Netherlands legislation provided for the payment of a pension to a person who was unable to earn an income through work, as a result of war-time persecution.

'Payment or benefit by way of . . . allowance'

The Federal Court referred to several previous decisions of the AAT: *Kellenners* (above), *Zolotenki* (1987) 38 SSR 479 and *Teller* (1985) 25 SSR 298 - in which payments of this type had been held to amount to 'income'; and *Artwinska* (1985) 24 SSR 287 and *Kolodziej* (1985) 26 SSR 315 - in which payments of this type had been held to fall outside the definition of 'income'.

The Federal Court noted that the payments being made to Kellenners under the Netherlands legislation were paid to her because of her status as a 'persecuted person' unable to earn an average income as a consequence of an illness or disability caused or aggravated by persecution. The Court pointed out that the payments were periodical and went on to conclude that they were 'by way of . . . allowance'.

The Court said that the phrase 'payment or benefit by way of gift or allowance' covered receipts of money or other benefits 'advanced ex gratia'. The Court pointed to the specific exemption from the definition of 'income' in paragraph (u) of that definition:

'Paragraph (u), in particular, by repeating precisely from the body of the definition the

words "a periodical payment or benefit by way of gift or allowance" is a cogent indication that the legislature regarded periodical payments or benefits received ex gratia from any source as being within the definition, and was concerned to exclude only payments or benefits received from a donor within the specified degrees of family relationship to the recipient.'

(Reasons, pp.15-16.)

The Court noted that there was no suggestion that the payments received by Kellenners were made by reason of any loss of or damage to property, so that paragraph (h) of the definition of 'income' did not exempt the payments from that definition.

Discretion to recover overpayment

Another issue raised in this appeal was whether the AAT had properly exercised the discretion conferred by the former s.146 of the *Social Security Act* by recommending that the overpayment which had been made to Kellenners would be recovered from her at the rate of \$20 per week.

The Federal Court said that it had a limited function in reviewing the AAT's exercise of its discretion. Only if the Tribunal had made some error in exercising the discretion (for example, by taking into account irrelevant matters or ignoring some material consideration) that the Court could interfere with the AAT's exercise of its discretion.

In the present case, the Court said, it appeared that the AAT had taken account of all the relevant information, including Kellenners' inability to earn an income. It did not appear that the AAT's decision that the overpayment paid to Kellenners should be recovered at the rate of \$20 a week until Kellenners reached the age of 65 was unreasonable or plainly unjust.

Formal decision

The Federal Court dismissed the appeal.

[P.H.]