Family allowance: likely to remain permanently in Australia?

GUPTA and SECRETARY TO DSS (No. 4707)

Decided: 26 October 1988

by R.A. Balmford.

Vijay Gupta came to Australia with her husband and two children in April 1986. They had been granted temporary entry permits under the *Migration Act* 1958, Gupta's husband having been appointed to a 3-year research position at an Australian university.

Gupta applied for family allowance for her children but the DSS rejected that application. Eventually the DSS granted Gupta family allowance from April 1987, following the grant (by the Department of Immigration Affairs) of resident status to her and her family from 31 March 1987.

Gupta asked the AAT to review the DSS decision not to pay her family allowance until April 1987.

The legislation

In April 1986, s.96(1) of the *Social Security Act* provided the family allowance was not payable to a person born outside Australia for a child born outside Australia unless each of them had been resident in Australia for 12 months. However, this restriction did not apply where the Secretary was satisfied that the claimant and the child 'were likely to remain permanently in Australia': s.96(2) and (2a).

From 1 July 1986, s.96(2) was amended so as to prevent payment of family allowance to a person for a child unless they were Australian citizens, persons granted non-temporary entry permits under the *Migration Act*, persons covered by temporary entry permits who had been in Australia for 12 months, or persons listed in one of the categories in s.8(1) of the *Migration Act*. (Neither Gupta or her children fell into those categories.)

The first period

The AAT first considered whether Gupta could qualify for family allowance during the period from April to June 1986 inclusive. This depended upon whether it was, at that time, likely that Gupta and her children would remain permanently in Australia.

Referring to the decision of the Federal Court in *McDonald* (1984) 18 *SSR* 188, the AAT said that Gupta had to -

> 'satisfy the Tribunal that it was, during the relevant period, likely that she and her children would remain in Australia for a long and indeterminate time, although not necessarily forever.'

(Reasons, para.14)

The Tribunal said that the term 'likely' should be read as meaning 'seeming as if it would happen', one of the alternative meanings in the *Shorter Oxford Dictionary*.

The AAT accepted evidence given by Gupta and her husband that they had, from the time they decided to come to Australia, always intended to stay here permanently. The AAT also took into account evidence from an experienced officer of the Department of Immigration and Ethnic Affairs, who said that in April 1986 there would have been a 'reasonable likelihood' that Gupta and her family would be granted permanent residence in Australia; and that there was no Government policy which would have interfered with the grant of permanent residence.

The AAT also noted that s.6A(1)(d) and (b) made provision for the Guptas to be granted entry permits allowing them to remain in Australia after their arrival here. The AAT concluded as follows:

> 'Thus, in the period immediately after their arrival in Australia, the Gupta family wished to remain permanently in Australia; they were eligible to be permitted to do so; and there was "a reasonable likelihood" of their being so permitted . . . I am satisfied on the balance of probabilities that during the period from 17 April to 30 June 1986, Mrs Gupta and her children, were in terms of s.96(2) and (2A) respectively of the Act as it then stood, "likely to remain permanently in Australia", and accordingly Mrs Gupta was . . . entitled to a grant of family allowance throughout that period.'

(Reasons, paras 20-21)

The second period

So far as the period from 1 July 1986 to 31 March 1987 was concerned, s.96(2) prevented Gupta from qualifying for family allowance, the AAT said.

They were not Australian citizens, their entry permits were temporary entry permits, they had not been in Australia for 12 months, and they fell within none of the categories in s.8(1) of the *Migration Act*.

However, the granting of resident status to the Guptas from the beginning of April 1987 brought them within s.96(2)(b) of the *Social Security Act* - they were persons who had been granted a non-temporary entry permit under the *Migration Act*. Accordingly, Gupta was eligible for family allowance for her children from April 1987 (as the DSS had decided).

Formal decision

The AAT set aside that part of the decision under review which related to the period between April and June 1986 inclusive and remitted it to the Secretary with a direction that Gupta and her 2 children were, throughout that period, likely to remain permanently in Australia.

The AAT affirmed the other aspects of the decision under review.

[P.H.]

Recovery of sickness benefits: can AAT look behind compensation award?

COCKS and SECRETARY TO DSS (No. 4915)

Decided: 7 February 1989

by T.R. Hartigan, R. C. Jennings and J. A. Kiosoglous.

Cocks applied to the AAT for review of a decision to recover from his worker's compensation award a sum of $3011 which was the full amount that had been paid to him as sickness benefits.

Cocks had been injured at work in October 1984 and ceased work soon after. He received sickness benefit from 9 November 1984 to 14 March 1985. On 6 August 1985 Cocks received a lump sum award of $9117 (plus medical costs). The DSS then decided to recover the sickness benefit under the then s.115B(3) of the Social Security Act, which authorised recovery where a person had received sickness benefit and a compensation payment for the same incapacity.

Compensation award not conclusive

The Tribunal noted that the relevant section (s.69) of the *Workers Compensation Act* (SA), did not allow payments for past incapacity, that is payments in the period when Cocks