Administrative Appeals Tribunal decisions

Sole parent's pension: residence outside Australia

FUENTES and SECRETARY TO DSS
(No. 5348)
Decided: 1 September 1989 by R.C. Jennings.

The AAT *affirmed* a DSS decision to cancel a sole parent's pension being paid to a woman who had left Australia on 15 April 1988 and was now resident in Chile.

It appeared that Fuentes had come to Australia around 1973 and had lived here for some 15 years. A daughter had been born in 1976 and Fuentes was granted a supporting parent's benefit in 1984. After her divorce, she was transferred to a widow's pension in 1986, which was converted into a sole parent's pension in March 1989. Fuentes left Australia in April 1988, returning to live in Chile.

Section 60B of the *Social Security Act* provides that where a person receiving a sole parent's pension was outside Australia on 1 July 1988 and continued to be absent from Australia for a further 12 months,

> 'the person is not qualified to receive sole parent's pension at any time after the first 12 months of the absence while the person remains absent from Australia.'

Section 60B(2) provided that the 12-month rule would not apply to a woman receiving a sole parent's pension if the woman became a single person because of the death of a man, to whom she had been legally married and she and the man had been Australian residents immediately before his death.

This section was inserted into the *Social Security Act* following a Government policy announcement in May 1987.

Fuentes made a written submission to the Tribunal, in which she said that she wanted her daughter to continue her education in Chile, that her health and lack of finances made it very difficult for her to return to Australia and that she 'desperately' needed her sole parent's pension to maintain herself, her mother, and her daughter.

The AAT said that none of the arguments raised by Fuentes could be relevant to its decision because s.60B gave only a very limited discretion and that discretion was not relevant in this case.

[P.H.]

Income test: investment linked deferred annuity

TRUSCOTT and SECRETARY TO DSS
(No. 5462)
Decided: 24 October 1989 by G.L. McDonald

Truscott appealed against an SSAT decision, which affirmed the decision of the DSS that he had received income of a capital nature and that it should be amortised according to s.12L [formerly s.3A(4)] of the *Social Security Act*.

Truscott, who was caring for his wife, was receiving a carer's pension. In June 1986, Truscott had invested in an AMP Investment Linked Deferred Annuity.

The legislation

At the time Truscott took out this annuity, profits from such investments would have fallen within the definition of 'income' in s.3(1) of the *Social Security Act*. However, these profits were treated by the DSS as 'capital' and not 'income', because the DSS was unable to calculate the income actually generated from the investments.

In December 1987, s.3A(4) [now s.12L] was inserted into the Act. It provided that a capital receipt, to which a person became entitled before or after December 1987, was to be treated as income over the next 12 months following the person becoming entitled to receive the amount. Two exceptions to this rule were provided for 'income from remunerative work' and 'a return from an accruing return investment'.

The date of entitlement

Truscott argued that he was entitled to receive income from the policy at any time after the policy commenced. The Tribunal disagreed. The terms of the policy were that it could be surrendered at any time, but until it was surrendered Truscott had only the expectation of an income but no entitlement.

Truscott surrendered his policy on 11 November 1988, and he received a net profit of $7975 which was then correctly divided by 52, as required by the then s.3A(4). He thereby had his pension substantially reduced, lost his health care card and was forced to draw on capital to look after his wife.

'A false sense of security'

A DSS officer told the Tribunal that DSS records did not allow people such as Truscott to be identified and notified of the change in the legislation. This, the Tribunal noted, meant that Truscott was unable to rearrange his investments prior to the legislation commencing and effectively gave the legislation a retrospective effect.

The AAT said that the former policy adopted by the DSS, of treating the returns investments such as Truscott's as 'capital' had 'reinterpreted' the legislation and given Truscott 'a false sense of security'. It was unfortunate that there had been no means of notifying people misled by the DSS policy that the approach was being changed, so that they could reorganise their affairs.

However, the AAT said, the amending legislation clearly covered Truscott's investment and there was no discretion which could be used to ameliorate his position.

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]