Sole parent pension: reverse burden of proof

BAGY and SECRETARY TO DSS
(No. 8994)

Decided: 17 September 1993 by J.R. Dwyer.

Elizabeth Bagy was granted supporting parent's benefit on 13 February 1989, following the birth of her child on 28 December 1988.

When the *Social Security Act* 1991 was introduced on 1 July 1991, Bagy began to receive sole parent pension.

On 11 December 1992, the DSS decided to cancel Bagy's pension on the ground that she was living in a marriage-like relationship with K, the father of her child. The SSAT affirmed that decision and Bagy appealed to the AAT.

The legislation

Section 249(1)(a)(i) of the *Social Security Act* 1991 prescribes, as one of the qualifications for sole parent pension, that the claimant is not a 'member of a couple'.

The phrase 'member of a couple' is defined in s. 4(2) to include a person living with a person of the opposite sex in a relationship which, in the Secretary's opinion, is a marriage-like relationship.

Section 4(3) lists the factors which the Secretary is to take into account in forming the opinion required under s. 4(2).

Section 4(4) imposes what is, in effect, a reverse burden of proof for certain claimants: if a claimant or recipient has been living in the same residence as a person of the opposite sex for at least 8 weeks and one of several pre-conditions is met, then:

> 'the secretary must not form the opinion that the claimant or recipient is not living with the other person in a marriage-like relationship unless, having regard to all of the matters referred to in subsection (3), the weight of the evidence supports the formation of an opinion that the claimant or recipient is not living in a marriage-like relationship with the other person'.

Two of the pre-conditions referred to in s.4(4) are that a child of both people lives in the residence: s.4(4)(d)(i); or that the people have at any time shared another residence with each other: s.4(4)(d)(vii).

The Section 4(3) factors

Bagy had lived in 5 residences over a period of almost 3 years — from March 1990 to January 1993. Her child and the child's father, K, had lived in the same residences as Bagy over that period.

Bagy claimed that she and K lived as independent adults and had no sexual, social or financial relationship.

The AAT considered the various factors listed in s.4(3) and made the following findings:

- Bagy did not regard herself as married; that she and K had no assets or liabilities in common;
- Bagy and K shared household expenses;
- some aspects of the household in which they lived, but not others, were marriage-like;
- the social aspects of their relationship were ambiguous;
- there had been a long-standing commitment between Bagy and K similar to that of a married couple; and
- the relationship between Bagy and K would probably have continued indefinitely if the DSS had not cancelled Bagy's pension.

The AAT commented on the uncertainties surrounding this case:

> 'In deciding what weight to give to the various factors, I consider it is appropriate to give weight to the fact that the two matters which I regard as most significant as tending to negate the existence of a marriage-like relationship, were both matters where Ms Bagy's evidence was uncorroborated and hardly capable of contradiction by other evidence. That is particularly relevant in a case such as this where Ms Bagy's evidence on many other points has been shown to be not entirely reliable. As was pointed out in *Smith and Secretary to DSS* (1985) 7 ALN 371; 26 SSR 314, in such matters corroboration though not essential, is an aid to proof and also influences the weight to be given to particular findings.'

(Reasons, para. 54)

The AAT also said that it did not give much significance to Mrs Bagy's evidence that she did not use K's surname. It was 'even more common now than in 1981', when the AAT decided RC (1981) 3 ALD 334; 4 SSR 36 and referred to the practice of married women keeping their own surname, 'that people live together in a marriage-like relationship, whether married or not, without the woman using the man's surname': Reasons, para. 56.

It was also still the case, as it had been in 1981, that attempts by DSS officers to investigate sexual or social aspects of relationships were criticised as an invasion of privacy:

> 'Thus evidence on those issues is frequently restricted to the evidence of the applicant and maybe his or her partner. In matters such as this where there are some problems of credibility, that evidence is not altogether satisfactory.'

(Reasons, para. 56)

The AAT noted that Bagy and K had lived in their most recent residence for more than 8 weeks, that their child also lived there, and they had previously shared a number of residences.

In those circumstances, s.4(4) applied and the AAT, standing in the shoes of the Secretary, must not form the opinion that the claimant is not living in a marriage-like relationship unless the weight of the evidence would support that conclusion.

The AAT said that its findings on the s.4(3) factors, its concerns about the credibility of some of Bagy's evidence and the lesser weight given to some factors because of the absence of independent corroboration:

> 'mean that I cannot find that the weight of the evidence supports the formation of an opinion that Ms Bagy was not living in a marriage-like relationship with [K] at the relevant date.'

(Reasons, para. 57)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Extension of time to apply to the AAT: relevant considerations

KNEZEVIK and SECRETARY TO DSS
(No. 8711)

Decided: 18 May 1993 by J.R. Dwyer, D. Elsum and E.A. Shanahan.

The application raised two aspects. The first concerned review of a decision of the SSAT made 8 June 1992. The second concerned an application for extension of time in which to lodge an appli-