Disability support pension: residence requirement

OCAK and SECRETARY TO DSS (No. 9664)
Decided: 11 August 1994 by M.T. Lewis.

The SSAT affirmed the decision of the DSS to cancel payment of disability support pension (DSP), to Ocak because he was not residentially qualified.

Ocak left Australia in July 1988 and returned shortly before he applied for a DSP in December 1992. DSP was granted in March 1993, and 3 days later Ocak advised the DSS that he intended returning to Turkey. He applied for a departure certificate which was issued, and Ocak was advised that DSP would only be paid for 12 months after he left Australia. Ocak left Australia in April 1993 and had not returned.

After he left Australia Ocak was sent a questionnaire by the DSS asking him if he had left Australia for an unforseen reason. Ocak replied that he had not thought about residing in Australia. The DSS cancelled Ocak's DSP, because Ocak had not intended to reside in Australia when he applied for the DSP.

Ocak was represented at the hearing by his son who tendered in evidence a submission written by his father. Ocak stated that he had been disadvantaged by the actions of the DSS. The DSS had isssued a departure certificate and had told him that he would be paid DSP for 12 months. If he had been told that he would not be paid overseas, he would not have left Australia, and his wife would have returned to Australia. Ocak stated that he had returned to Australia in 1992 to apply for DSP. He did not intend to stay in Australia at that time because his children were still attending school in Turkey.

Ocak had requested that he be paid either an *ex gratia* payment or a payment pursuant to a Finance Direction. The DSS acknowledged that an error had been made.

The law

Section 110 of the *Social Security Act 1991* requires a person who claims DSP to be an Australian resident and in Australia. An Australian resident is defined in s.7 of the Act as:

'a person who:
(a) resides in Australia; and
(b) is one of the following:
(i) an Australian citizen . . .

To decide whether a person resides in Australia, the AAT must have regard to the requirements set out in s.7(3). These are: the nature of the person's accomodation in Australia, family relationships, employment and business ties, assets, the frequency and duration of the person's travel outside Australia and any other relevant matters.

The AAT found that Ocak did not intend to stay in Australia when he applied for the DSP. The misleading advice provided by the DSS reinforced this intention. However in spite of the error by the DSS, Ocak did not intend to reside in Australia when he applied for DSP, and thus he did not satisfy the requirement that he be an Australian resident. The decision to cancel Ocak's DSP was correct.

The AAT considered Ocak's evidence that if he had been correctly advised by the DSS, he might have decided to stay in Australia and arranged for his wife to return as well. The AAT decided that it could not take into account the probability of Ocak changing his mind if he had received correct advice from the DSS. It would be appropriate for Ocak to be compensated by way of a Finance Direction or an *ex gratia* payment. However it was not up to the AAT to make any recommendation.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

Family payment: apportionment of payments

ELLIOT and SECRETARY TO DSS (No. 9545)
Decided: 15 June 1994 by M.T.Lewis, M.E.C.Thorpe and M.M.McGovern.

Mark Elliot asked the AAT to review a decision of the SSAT which set aside a DSS decision and determined that Christine Elliot was entitled to family payment in proportion to the time for which the children were in her care. Christine Elliot was the second respondent in this appeal.

Background

In June 1992 Mr Elliot was granted custody of his 3 children and his ex-wife was given ongoing access in the following sequence: 3 consecutive weekends, one full week and then no access for a full fortnight. The DSS cancelled Ms Elliot's family payment as her access represented only 26% of a 6-week period and departmental guidelines relating to shared custody provided that unless one parent has at least 35% custody then the person with the 'major share' will be paid the full rate.

The DSS argued in the AAT that Ms Elliot should be paid 26% of the rate of family payment even though the Department's guidelines precluded her from receiving such payment. (It was noted that the guidelines had subsequently reduced the required 'share' to 30%). The DSS told the AAT that the policy guidelines were not binding on the AAT.

The legislation

Section 869 of the *Social Security Act 1991* provides:

'if the Secretary is satisfied that 2 people are each qualified for family payment for the same child, the Secretary is to make a declaration:
(a) stating that the Secretary is satisfied that the 2 people are each qualified for family payment for the child; and
(b) specifying the share of the family payment for the child that each of the 2 people is to receive.'

A person is eligible to receive family payment if they have at least one FP child (s.838) A FP child is defined to mean a dependent child (s.6(1)). Section 5(2) defines 'dependent child' as a young person who has not turned 16 and who is a child of another person (the adult) if:

'(a) the adult has the right (whether alone or jointly with another person):
(i) to have the daily care and control of the young person; and
(ii) to make decisions about the daily care and control of the young person;
and the young person is in the adult's care and control; or
(b) the young person:
(i) is not a dependent child of someone else under paragraph (a); and
(ii) is wholly or substantially in the adult's care and control.'

Care and control of the children

The AAT said the issue was who had care and control of the children after the Family Court order in July 1992. Mr Elliot said that he paid 'all ongoing expenses' such as school fees and excursions, lunch bags, school bags, pencils, pens, shoes, hats, food,