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,

clothing, medical, dental and optical expenses. He acknowledged that Ms Elliot recently paid $80 towards a major school excursion. Mr Elliot had the children on his Health Care Card and he was responsible for taking them for medical and dental treatment. When the children were with Ms Elliot she provided their food.

Ms Elliot told the AAT that when she had the children she made decisions regarding their school attendance and their after school activities. She did not consult Mr Elliot on these matters. She signed school forms for them and in the previous year paid for toiletries and clothes associated with a school excursion. She paid a quarter of the excursion fees as this was in proportion to the time she had the children. Ms Elliot also supervised the children's homework when the children were with her. She also addressed their other needs as required, such as the purchase of clothing or medicine.

Was the mother entitled to family payment?

The AAT considered the relevance of the father's formal custody of the children. In *Van Huc Lo* (1987) 40 *SSR* 510 the Federal Court held that whether a person had 'custody, care and control' of a child was primarily a question of fact. In *Field* (1989) 52 *SSR* 694 the Federal Court had concluded that a Family Court order for access gave the person a right to make decisions about the daily care and control of the child. The Court in *Field* did not want to lay down strict rules about the length of access required because of the variation from case to case. But the Court stated that:

(a) Factual custody, care and control was not in itself sufficient for a child to be considered a dependent child. There also had to be a legal right to make decisions concerning the daily care and control of the child;

(b) A person's rights of access to a child under a Family Court order could give that person a right to make decisions concerning the daily care and control of the child. This would depend on the facts and the way in which the order was framed;

(c) The length of access appears relevant: intermittency of access days might prevent a conclusion that the person has the right to daily care and control of the child, but access for a long period (in the case of *Field* 14 days, the period for which supporting parent's benefit was paid) of consecutive days suggests that for practical reasons such access would ordinarily be regarded as carrying with it the right to make decisions concerning the daily care and control of the child.

The AAT then commented:

> 'The Tribunal notes that although Ms Elliot has significant costs associated with her period of access for 26% of the time, it is probable that her proportion of costs are less than 26% of the total costs of maintaining the children. However, entitlement to Family Payment arises from a parent having "care and control" of a "dependent child". Entitlement does not arise out of the proportion of the costs of maintenance borne by each parent.
>
> Subsection 5(2) of the Act does not refer to the concept of "custody". The legal issue of "custody" is not something about which we are concerned in this matter. The Act now refers only to the "daily care and control" of the children. Nonetheless, within these restrictions the decision in Re Field gives direction and guidance to the Tribunal in the matter before us. Furthermore, insofar as the issues before the Tribunal are consistent with Re Field we are required to apply the law as it is interpreted by the Full Court in that case. Whether or not Ms Elliot has the right to make decisions regarding school excursions and medical treatment is not the issue before us. It is necessary for us to consider whether she has "the daily care and control"d of the children, albeit for 26% of each six week period'.

(Reasons, paras 26-27)

The Tribunal then concluded that the children were in the care and control of Ms Elliot during the periods of access under the terms of the Family Court order. While the pattern of access was in one sense intermittent given the 6-week cycle over which access occurred, the AAT thought it could be distinguished from *Field* in that the nature of the intermittency was different and Ms Elliot could be characterised as having the daily care and control of the children during the periods of access. Thus the AAT found that as Ms Elliot exercised actual daily care and control of the children during 26% of the time she met the requirements for family payment.

Was she entitled to 26% of family payment?

There was nothing in s.869(2) of the Act which specifies the proportion of time a person must spend providing daily care and control of children before the Secretary can be satisfied that the person is qualified for the payment. While this clearly requires departmental guidelines for the sake of consistency, the DSS had indicated to the AAT that it was prepared to accept the SSAT decision and waive its own guidelines. The Tribunal considered that it was not its role to bind the Department to its own administrative policy when there was no actual percentage written into the Act.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Debts: recipient notification notice

ANDERSON and SECRETARY TO DSS
(No. 9586)
Decided: 7 July 1994 by R.D. Fayle.

Anderson asked the AAT to review a decision of the delegate, affirmed by the Social Security Appeals Tribunal (SSAT) that he had been overpaid $11,205.60 which was a debt to the Commonwealth pursuant to s.1224 of the Act. The appeal was made on two grounds: first, whether the debt should be waived, and second, if not, then whether any of the overpayment was void because the notices sent to Anderson by the DSS did not bear the inscription that they were 'recipient notification notices'.

The waiver issue

Anderson's submission concerning waiver focused on one fact in issue: whether he delivered his tax return for the year ended 30 June 1991 to the Midland branch office of the DSS as he claimed that he did. The department's records indicate that the first occasion on which the tax return was received was 4 December 1992. However, Anderson claimed that he delivered it on 15 August 1991. If his evidence on this matter was accepted, then, subject to the Tribunal being satisfied that the amounts he received were received in good faith, the overpayment must be waived under s.1237(2) of the Act.

The AAT canvassed in some considerable detail the history of Anderson's receipt of age pension, and his part-time earnings from employment at Muresk Agricultural College where he lectured in farm