Wife pension, additional family payment: accrued rights and overseas portability

EL BAYEH and SECRETARY TO DSS
(No. 10513)

Decided: 3 November 1995 by M.T. E. Shotter.

Background

The facts were not in dispute. Mr and Mrs El Bayeh were born in Lebanon. Mr El Bayeh arrived in Australia in 1969 and Mrs El Bayeh arrived in 1976. They left Australia with their, then, 3 children in January 1987 and have not returned. They reside in Lebanon and now have 5 children who attend school. Mrs El Bayeh's working life residence in Australia is calculated at 132 months and Mr El Bayeh's at 208 months. Mr El Bayeh was granted invalid pension from July 1985 and now receives disability support pension. Mrs El Bayeh received wife pension from July 1985.

Before 31 December 1992, additional family payment for 3 children was included in Mr El Bayeh's pension rate.

In January 1993, DSS decided to include additional payments for the children in Mrs El Bayeh's rate of wife pension, effective from 7 January 1993. This lead to a reduction in the rate as it was based on her working life residence in Australia.

The AAT decided the matter in the absence of either party. Two letters were received from the El Bayeh's in 1994. The thrust of their appeal was that before leaving Australia, they were assured that their pension would not be affected, and they travelled to Lebanon on this basis. They argued they should not be penalised by legislation introduced subsequent to their departure.

The issues

The first issue addressed by the AAT was whether Mr and Mrs El Bayeh had accrued rights to be excepted from the effect of changes to the legislation since their departure. The other issues concerned the rate at which the wife pension and the additional family payment should be paid to Mrs El Bayeh.

The legislation

In relation to the wife pension, Part 4.2 of the *Social Security Act 1991* deals with overseas portability of pensions. Sections 1220A and 1221 provide that when a person is receiving a wife pension, is an 'entitled person' as described in s.1216B(2)(a), and has left Australia and remained absent for more than 12 months, then the rate of pension paid outside Australia is to be calculated 'using the Pension Portability Rate Calculator at the end of section 1221'. The rate is calculated in direct proportion to the person's working life residence compared to a notional working life residence of 25 years or more.

In relation to the issue of the rate of additional family payments, the AAT looked in detail at a number of definitions. It also referred to the Second Reading Speech of the *Social Security (Family Payment) Amendment Bill 1992*.

Subsections 5(2) to 5(7) define 'dependent child'. Section 6 clarifies further some terms used in s.5.

Section 831 'establishes that, subject to certain provisos, a dependent child is the dependent child of the female of a couple for *family payment purposes*' (emphasis added): Reasons, para. 13. Section 833 addresses the eligibility of children over 16.

Section 840 provides that a person is not qualified for family payment after 3 years absence from Australia. The savings and transitional clauses contained in Schedule 1A of the Act are relevant. In particular, clause 54(5) says

> 'If:
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> (a) a person was, at 1 January 1993, overseas and receiving payments of a pension or allowance calculated under the Pension Portability Rate Calculator at point 1221-A1; and
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> (b) the person's pension or allowance includes amounts that, immediately before 1 January 1993, were known as dependent child add-ons; and
>
> (c) the person's pension or allowance are proportionalised
>
> sections 1220B and 1221 apply to the person until the person returns to Australia as if the Method statement in point 1221-A1 were omitted and the following Method statement were substituted . . .'

Clause 61(1) says,

> 'If a determination granting a claim for family allowance was in force immediately before 1 January 1993, the determination has effect from that day as if it were a determination under this Act as in force on 1 January 1993 granting a claim for family payment.'

In interpreting these clauses the AAT referred to s.8 of the *Acts Interpretation Act 1991*.

Accrued rights

The AAT noted that 'the issue of accrued rights and retrospectivity of decisions made under current but different legislation has been addressed in great detail since the introduction of the present Act': Reasons, para. 6. The AAT referred to *Secretary, Department of Social Security and Hodzic* (1992) 69 *SSR* 994 and concluded that El Bayeh had no accrued rights under previous legislation and that the AAT's decision was to be 'given under the provisions of the Act as it stands today': Reasons, para. 6.

Rate of wife pension

The AAT found that the provisions of s.1221(1) applied to Mrs El Bayeh. Her working life residence factor for wife pension was correctly calculated at 132/300 and accordingly her wife pension was to be paid at a proportional rate.

Rate of additional family payment

After considering the Second Reading Speech relevant to the introduction of s.831, the AAT proposed 3 principles in relation to family payment. They included that family payments are generally paid to the female of the couple because she is the primary care giver and that the changes to family payment introduced in 1992 were not designed to reduce financial support for eligible families.

After examining the documentation available, the AAT concluded that at 1 January 1993, Mrs El Bayeh was not in receipt of an allowance that included amounts known as dependent child add-ons. Mr El Bayeh had been receiving these payments and the change to Mrs El Bayeh receiving them occurred on 14 January 1993. This seemed to suggest that clause 54(5) could not apply to Mrs El Bayeh. But the AAT concluded that clause 61(1) preserved Mr El Bayeh's right to additional family payment and was the only saving and transitional provision pertinent. The AAT referred to s.8 of the *Acts Interpretation Act 1901* and concluded that there was not a 'contrary intention' in the 'present Act, or the Amending Act, to affect payment of additional family payment to the El Bayeh Family at the rate being paid prior to 1 January 1993': Reasons, para. 29.

The AAT concluded that the El Bayehs were not entitled to basic family payment as they had been absent from Australia for more than 3 years (s.840).

> 'However, they are entitled to the continued payment of additional family payment due to the savings and transitional provisions contained within Schedule 1A of the Act, based on Mr El Bayeh's earlier qualification as saved by sub-clause 61(1) of that Schedule and confirmed by section 8 of the *Acts Interpretation Act 1901*. The appropriate amounts are to be paid to Mrs El Bayeh in accordance with subsection 831(2) of the Act . . . I note that additional family payments were not transferred to

Mrs El Bayeh until after 1 January 1993 and that I have interpreted clause 54 of Schedule 1A to indicate that there are no savings and transitional provisions available to Mrs El Bayeh for continued payment of AFP: thus sub-sections 831(3) of the Act would be relevant if not for the intent of the Minister's Second Reading Speech.'

(Reasons, para. 31)

Formal decision

The AAT (a) affirmed the decision to pay Mrs El Bayeh wife pension at a proportional rate based on her Australian working life residence; and (b) remitted the matter of payment of additional family payments to the DSS for reconsideration in accordance with the following directions: (i) the amount of additional family payment to be paid to the El Bayeh family from 1 January 1993 was to be based on Mr El Bayeh being the qualifying partner of the couple; and (ii) additional family payments due to the El Bayeh family were to be paid to Mrs El Bayeh.

[M.A.N.]

Family payment: 'income free area'

SECRETARY TO DSS and ALLEN (No. 10458)

Decided: 9 October 1995 by K.L. Beddoe.

Mrs Allen's claim for family payment on 16 August 1994 was rejected because the combined taxable income of $71,608 received by her and her husband for the financial year ending 30 June 1993 was above the taxable income ceiling from 1 January 1994 of $66,000 for 3 children. A request was made by Allen to change the appropriate tax year for the purposes of entitlement to family payment, on the basis that the combined taxable income would be reduced to $60,000 for the financial year ending 30 June 1995. This claim was also rejected. On review the SSAT substituted a new decision that Allen was qualified for family payment from 1 July 1994. The DSS requested review of this decision.

The legislation

Sections 1069-H11 and 1069-H12 of the *Social Security Act 1991* provide that the appropriate tax year for a family payment payday is ordinarily the tax year that ended on 30 June in the calendar year immediately preceding that in which the payday occurs. In Allen's case the appropriate tax year was the financial year ending 30 June 1993, as at the date of claim. However a claimant may make a request to change the appropriate tax year, in accordance with s.1069-H19 where their income for the tax year in which the request is made is likely to be not more than 75% of the person's income for the appropriate tax year at the time when the request is made, or less than the person's income free area. Once either condition is satisfied the Secretary must determine that the appropriate tax year is the tax year in which the request is made.

As the estimated taxable income for the year ending June 1995 was more than 75% for the 1993 financial year, the remaining issue was whether the estimated income was less than the income free area.

Income free area

Allen submitted that 'income free area' was defined by reference to a note to s.1069-H14 which deals with a change to the appropriate tax year because of an assumed notifiable event. That note reads 'for "income free area" see Table H'. By using Table H the relevant income ceiling in Allen's case would have been $66,000, and the estimated taxable income for the 1995 financial year would have been less than this amount.

The AAT noted that there was no assumed notifiable event and s.1069-H14 did not apply on the facts. The Tribunal regarded the note to s.1069-H14 as an unfortunate drafting error, and stated that there was nothing in the Act or any principle of statutory interpretation which required the note to be applied to the operation of s.1069-H19.

The relevant section to be applied in determining the meaning of 'income free area' under s.1069-H19 was s.1069-H31 which provides that a person's income free area is worked out in accordance with Table HA, giving an income free area of only $22,598 in Allen's case.

Formal decision

The AAT set aside the decision under review. As a result Mrs Allen was not qualified for family payment.

[A.T.]

Family payment: definition of dependent child

DRAKE and SECRETARY TO DSS (No. 10437)

Decided: 3 October 1995 by A.M. Blow, C.P. Webster, B. Davis.

Background

Drake's former wife had custody of the 3 children of their marriage under a court order. Drake had access for periods totalling 29% of the year. In December 1994, the wife took the children to Queensland and Drake had not seen them since.

Drake had been receiving family allowance at a percentage of the full rate until the DSS cancelled payment of family payment to Drake on 17 December 1992. Between December 1992 and December 1994, he had access for 14 days or more on four separate occasions. Those 14-day periods commenced on or about 31 December 1992, 29 January 1993, 31 December 1993 and 29 January 1994.

The issues

Was Drake entitled to family payment from 17 December 1992 until December 1994? Also, was Drake entitled to family payment after December 1994, even though he was not able to have access to the children because of his financial situation?

The legislation

Section 838(1) governs qualifications for family payment. Section 838(1)(a) says that 'a person is qualified for family payment . . . if the person has at least one FP child'. Section 831(1) says that 'each dependent child of a person is also an FP child of that person'.

'Dependent child' is defined in s.5(2) and s.5(2)(a) provides:

> '. . . a young person who has not turned 16 is a dependent child of another person (in this subsection called the "adult") if:
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> (a) the adult has the right, whether alone or jointly with another person:
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> (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.'

Access for 14 days or more

In interpreting s.5(2)(a), the AAT considered that it was bound by two Federal Court decisions: *Secretary, Department*