

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:

(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.'

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*