

Administrative Appeals Tribunal decisions

Disability support pension: special reasons for treating as not a member of a couple, saved single rate of pension

SINANAJ and SECRETARY TO THE DSS
(No. 11685)

Decided: 10 March 1997 by T.E. Barnett.

Sinanaj migrated from the former Yugoslavia to Australia in 1970. In June 1987 he applied for and was granted DSP. On 1 September 1989, Sinanaj, his wife and his young son returned to the former Yugoslavia to visit his mother-in-law who was seriously ill. Sinanaj successfully applied to the DSS to have the DSP and wife pension paid overseas.

While in the former Yugoslavia, Mrs Sinanaj gave birth to two daughters. Sinanaj, after encountering some difficulties was able to return to Australia on 23 July 1991. His wife and children were unable to leave the former Yugoslavia due to the war, and their inability to obtain a passport, visas and tickets. The DSS cancelled Mrs Sinanaj's wife's pension. The DSS began paying Sinanaj DSP at the single rate because, although married, he was living separately from his wife on an indefinite basis, and she was not receiving a pension.

On 22 September 1993, Sinanaj advised the DSS that he and his wife were still married, that they had not separated and that the only reason they were living apart was because of the war in the former Yugoslavia. The DSS then decided to pay Sinanaj at half the married rate. Sinanaj applied to the DSS for his DSP rate to be reviewed as he continued to be married to and to support his wife and their 3 children. As a result, the DSS reviewed his file and decided to pay him at the saved single rate rather than the higher single rate. Sinanaj requested that an ARO review his case as he wished to receive the higher single rate. The ARO affirmed the decision that he was only entitled to the lower pension rate. Sinanaj

appealed to the SSAT which affirmed the decision under review

The DSP

The DSS admitted it had made a number of errors when calculating Sinanaj's pension rate and that his pension had varied erratically. It was admitted by the DSS that Sinanaj had at times been paid:

- half the married rate,
- the full single rate, and
- an incorrect amount of rent assistance.

The legislation

Section 4(2)(a) of the *Social Security Act 1991* provides that a person is a member of a couple if that person is legally married and is not, in the Secretary's opinion, living separately and apart on a permanent or indefinite basis.

Section 24(1) of the Act provides that a person may be treated as not being a member of a couple where:

- a person is legally married; and
- the person is not living separately and apart on a permanent and indefinite basis; and
- the Secretary is satisfied that there exists a special reason why that person should not be treated as a member of a couple.

The savings provisions

On 12 March 1992, the Act was changed and certain 'savings provisions' were inserted in it. The effect of these changes was that after 12 March 1992 if a person was regarded as a member of a couple, and that person's partner was not receiving a pension, then their basic pension rate would no longer be the higher single rate. Instead, they would be paid half the married rate. However, people who were regarded as being a member of a couple, who were already receiving pensions at the higher single rate (as was Sinanaj), would continue to receive the single rate, frozen as it was at 12 March 1992.

The DSS submitted that up until 12 March 1992, Sinanaj was entitled to the single rate as his wife was not receiving any pension or benefits, but that after that date, he was only entitled to the saved single rate with no increments for increases in the cost of living.

Special reasons

The AAT decided special reasons existed why Sinanaj should be treated as not being a member of a couple in accordance

with s.24(1) of the Act. The following factors constituted special reasons:

- his wife was held captive in the former Yugoslavia;
- the government of Yugoslavia refused to issue her and her children with a passport; and
- the inability of Sinanaj to raise funds to pay for the return of his wife and family to Australia.

Accordingly, the AAT decided that special reasons did exist why Sinanaj should be treated as not a member of a couple. Sinanaj should be paid at the higher single rate, not the saved single rate.

Payments backdated?

The DSS submitted that Sinanaj did not query his payment rate until 28 November 1995 and was thus precluded by s.146D(3) of the Act from obtaining arrears of payments prior to this date. The AAT rejected this submission and found that Sinanaj had queried his payments on 22 September 1993 in a written statement to the DSS that he believed he was entitled to more arrears, because his wife no longer qualified for a pension, they were still married, and that the only reason they were not together was because of the trouble in Yugoslavia.

Family payment

Sinanaj had applied for family payment in respect of his daughter Liridona who was born in the former Yugoslavia on 10 July 1993. Section 835 of the *Social Security Act 1991* provides that family payment cannot be paid for a dependent child unless:

- the child lives in Australia, or
- the child is a dependant of and lives with an inhabitant of Australia.

The AAT decided that Liridona was not a dependent child as she was neither an Australian resident nor a dependent child living with an Australian inhabitant.

Formal decision

- The AAT set aside the decision under review and remitted the matter back to the DSS with the direction that Sinanaj should be considered as not being a member of a couple from 22 September 1993.
- The AAT affirmed the decision not to pay family payment.

[H.B.]