Sole parent pension: member of a couple; husband overseas

BEGUM and SECRETARY TO DSS (No. 12798)

Decided: 15 April 1998 by R. P. Handley.

The applicant told the AAT she prefers to be known as Mrs Rahman, not Mrs Begum. On 11 July 1997, Rahman applied for sole parent pension (SPP). Her application was rejected. The SSAT decided Rahman was eligible for SPP.

The issue

The AAT had to determine whether there existed special circumstances which warranted treating Rahman as not a member of a couple for the purposes of the *Social Security Act 1991*. Section 24(1) provides that where a person is legally married to another and they are not permanently separated, the Secretary to the DSS can treat that person as not being a member of a couple, if satisfied that special circumstances exist. If she was regarded as not a member of a couple, Rahman would be eligible for SPP.

The facts

Rahman, her husband and her 2 children migrated to Australia from Bangladesh arriving on 9 November 1995. On 6 January 1996, her husband left Australia to take up a scholarship in Japan. It was not a permanent separation. From 31 July 1996, the DSS took into account her husband's scholarship income in determining Rahman's family payment and parenting allowance. Rahman had ongoing problems with money after her husband left for Japan and regularly borrowed money to meet her expenses. Her husband promised to send monthly payments of $300 but, at best, these payments only arrived intermittently. Her fortnightly income from parenting allowance and family payment was $360.70. Her weekly expenses were $339. Even when she received the monthly payment of $300 from her absent husband there was still a fortnightly shortfall of approximately $260. She has difficulty coping on her own in Australia as she has little English skills and no familiarity with Australian culture and customs. Her son was diagnosed with a heart condition and suffers from asthma. Her husband has not been sympathetic to her financial and social difficulties in Australia. Rahman told the AAT his sole concern was completing his studies. He has returned to Australia three times since leaving to live in Japan. When he last left Australia on 23 May 1997, Rahman understood that he was visiting Bangladesh to see his parents before returning to Australia. He later telephoned her from Japan to inform her that he was staying there to do a PhD. Rahman told the AAT that she did not want her husband to stay in Japan but that it is beyond her control.

Submissions

The DSS argued that Mr Rahman's actions in electing to live and study in Japan could not be considered a 'special reason' for the purposes of s.24. His actions were willful and without regard to the welfare of his family, with an unreasonable expectation that the Australian Government would support them. The DSS submitted that matters which were within the control of the parties could not constitute special circumstances for the purposes of the Act. Rahman argued that the risk of harm to the children together with the serious shortfall of income to meet her expenses warranted the exercise of the discretion conferred by s.24. She submitted that her husband's decision to live in Japan was against her wishes and beyond her control.

Special Circumstances

Citing *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, the AAT said that the best interests of children were a primary consideration for Commonwealth officers who made discretionary decisions. The AAT indicated that it took into account the fact that her husband's decision to live abroad was beyond the influence or control of Rahman. Rahman should not be punished for the recalcitrant behaviour of her husband. Having primary regard to the adverse impact on the welfare of Rahman and her children, the AAT considered there did exist special circumstances for Rahman to be treated as not being a member of a couple for the purposes of the Act.

Decision

The AAT affirmed the SSAT decision.

[H.B.]

Partner allowance: recent workforce experience

FEYER and SECRETARY TO THE DSS (No. 12688)

Decided: 9 March 1998 by J. A. Kiosoglous.

The DSS rejected Feyer's claim for partner allowance, and this decision was affirmed by the SSAT.

The issue was the meaning of 'no recent workforce experience' for the purposes of s.771HA of the *Social Security Act 1991*; and the impact of misleading advice to Feyer about the qualifications for partner allowance.

The facts

In March 1996, in anticipation of her husband's 65th birthday on 29 April 1997, Feyer asked an officer of the DSS what she needed to do in order to qualify for partner allowance from the date of her husband's receipt of pension. The officer advised her that if she worked 'no more than 20 hours a week' for the year immediately prior to her applying for partner allowance, she would qualify. Accordingly Feyer reduced her hours at the Casino from 30 to 20 hours a week.

On 18 March 1997 Feyer applied for partner allowance, and was told by a second officer that if she had worked more than 13 weeks in the previous year at more than 20 hours a week, she would not qualify. She was asked to bring her payslips, and given a copy of the Guide to the Administration of the *Social Security Act*. Feyer, in anticipation of the acceptance of her claim, resigned from her job. Later that day, she was told by the second officer that her claim had been rejected, on the ground that she had 'recent workforce experience'. Fortunately she was able to retract her resignation and retain her job.

The AAT found that Feyer did have recent workforce experience, as defined in s.771HA(1C).

Compensation for misleading advice

According to the AAT the claim form for partner allowance was misleading and incorrect, as was the Guide to the Administration of the Act. The present edition of the Guide has been amended.

A recommendation of compensation under Finance Direction 21/3 (as it then was) was considered by the AAT, be-