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-

cause the retirement plans of Feyer and her husband had been delayed by nine months. The Tribunal noted that while the economic loss may have been notional, Feyer suffered considerable inconvenience and distress as a result of the negligence of the DSS.

The AAT also considered the application of 'compensation for detriment caused by defective administration' (CDDA). The guidelines include the following:

> 'The Secretary may approve a compensation for detriment caused by defective administration (CDDA) payment subject to the limitations below after an application for compensation under Finance Direction 21/3 has been refused.'

In fact, paragraph 4.3200 of the Guide suggests that where a payment under Finance Direction 21/3 has been refused, alternative entitlements to compensation (CDDA or act of grace payments) should, as a matter of course, be considered by the delegate.

The AAT strongly recommended that the DSS consider favourably the making of a CDDA payment to Feyer.

Formal decision

The Tribunal affirmed the decision under review.

[A.B.]

Disability support pension: qualification not within 3 months of application

SECRETARY TO THE DSS and ANCIN-FERNANDEZ (No. 12704)

Decided: 12 March 1998 by D.W. Muller.

Background.

Ancin-Fernandez arrived in Australia in 1988 at the age of 33 years, had limited English and no qualifications. She undertook some house cleaning and child care work, and in February 1996 applied for disability support pension (DSP), claiming lumbar disc degeneration, headaches and pelvic adhesions. She was assessed as having a 10% impairment in respect of her back, but her other conditions were not rated and on 25 March 1998 her claim was rejected. On appeal to the SSAT, this decision was set aside.

Meanwhile, in May 1996 Ms Ancin-Fernandez underwent a laminectomy, which was not successful, and her back pain continued. She re-applied for the DSP on 8 January 1997 and was subsequently rated as having an impairment of 35%. Her health conditions at that time included back and neck pain since 1991, depression, a left wrist ganglion operated on in 1995, constant lumbar pain, right sciatica and pain in her left arm. Ancin-Fernandez was granted DSP with effect from 8 January 1997.

The law

It was not disputed that Ancin-Fernandez was qualified to receive DSP from January 1997 — the issue was whether she was qualified to receive payment with effect from the date of her first application in February 1996.

The relevant legislation is contained in s.100(3) of the *Social Security Act 1991*, which provides:

> 'If:
>
> (a) a person lodges a claim for a disability support pension; and
>
> (b) the person is not, on the day on which the claim is lodged, qualified for a disability support pension; and
>
> the person becomes qualified for a disability support pension sometime during the period of three months that starts immediately after the day on which the claim is lodged;
>
> the person's provisional commencement day is the first day on which the person is qualified for the pension . . . '

The provisional commencement day

The AAT accepted that Ancin-Fernandez' health had deteriorated during 1996 to the point where she qualified for the DSP by the time the SSAT heard her application in December of that year. However, to be qualified on her original application of 9 February 1996, the AAT held she would have to qualify within 3 months of that date — that is, on or before 9 May 1996. There being no evidence that she qualified between 9 February and 9 May 1996, the AAT set aside the decision of the SSAT.

Formal decision

The decision of the SSAT was set aside and, in lieu, the AAT determined that Ancin-Fernandez did not qualify for DSP on her application dated 9 February 1996.

[P.A.S.]

Student Assistance Decisions

AUSTUDY: actual means test

IARIA and SECRETARY TO THE DEETYA (No. 12679)

Decided: 5 March 1998 by S.M. Bullock.

Background

Caterina and Concetta Iaria applied for AUSTUDY for 1996. They were both studying at the University of Western Sydney but at different campuses. The DEETYA assessed a benchmark, for both Caterina and Concetta, for the notional family of the same size as the Iaria family to be $34,049. The DEETYA review officer assessed the Iarias' actual means to be $83,256. As a result Caterina and Concetta were not eligible for AUSTUDY in 1996. The family's actual means was reassessed in August 1997 to be $68,081.40.

The issues

Did the actual means test preclude Caterina and Concetta from being eligible to receive AUSTUDY in 1996? In particular, should certain expenditure be classified as business or investment related?

The legislation

The relevant regulations under the *Student and Youth Assistance Act 1973* are 12K, 12L, 12M and 12N. These regulations provide for an 'actual means test'. Regulation 12K provides that if a student has a parent who is a 'designated parent' he or she will not be entitled to receive living allowance unless the Secretary is satisfied that the 'actual means of the designated parent are less than, or equal