Federal Court

Age pension: married rate

COCKS v CENTRELINK
(Federal Court of Australia)

Decided: 5 September 2000 by O'Loughlin J.

Cocks appealed against part of an AAT decision that while he resided with his wife in the Philippines his age pension be paid at the married rate (*Cocks and SDFaCS* 4(3) *SSR* 39).

Background

Cocks, now 70 years old, had been receiving disability support and age pension since 1992. He had a heart condition and diabetes for which he took medication and had special dietary requirements. He met his wife, now 34 years old, in the Philippines in 1992, they had a child in 1996, and they married in 1997. Since the child was born, Mrs Cocks had lived in rented accommodation near her home province in the Philippines. As a non-resident Cocks could stay a maximum of six months each year in the Philippines. The rest of the time he stayed, free of board, with his sister in Australia.

Section 24 of the *Social Security Act 1991* (the Act) provides:

> **24.(1)** Where:
>
> (a) a person is legally married to another person; and
>
> (b) the person is not living separately and apart from the other person on a permanent or indefinite basis; and
>
> (c) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple;
>
> the Secretary may determine, in writing, that the person is not to be treated as a member of a couple for the purposes of this Act.

Centrelink treated Cocks as a member of a couple and reduced his pension from the single to the married rate. Cocks asked for a review by the AAT.

Cocks told the AAT they married so their child would have legitimacy; and although he wanted the child and his wife to come to Australia to give the child a chance in life, he had made inquiries but not lodged the necessary forms. He had sold all his assets to pay the airfares to the Philippines, and had borrowed at least $2500 from his sister to assist in payment of the airfares. He simply could not afford the $3500 to bring his family to Australia and to provide accommodation. Mrs Cocks was willing to come to Australia, but she realised that financially that was not possible and was resigned to the continuation of the current arrangements. With payment of pension at the single rate Cocks could 'make ends meet' but on the married rate he was in dire financial straits.

Cocks submitted that although he was the creator of his own situation, he could not extricate himself. It had been his honest belief that as he was not marrying an Australian girl who would be entitled to benefits, the fact that his wife and child remained in the Philippines would mean that payment of pension would continue at the single rate, and the family could survive. He argued also that while he was in the Philippines he was not getting any of the benefits available in Australia, and he should be entitled to the single rate while overseas and in Australia.

The AAT decision

The AAT decided that while Cocks resided in Australia he was to be treated as not being a member of a couple and his pension paid at the single rate, but while he was living with his wife in the Philippines he was to be treated as a member of a couple and paid at the married rate.

The Court's decision

O'Loughlin J rejected the DFaCS submission that the absence of Mrs Cocks and the child was not beyond Cock's control but was a lifestyle choice, as it was contrary to the facts as found by the AAT. Furthermore, Mrs Cocks was not entitled to receive any social welfare benefits from Australia while she remained a Filipino national, living in the Philippines. If she and the child were to migrate to Australia an immediate benefit would be payable for the child and, after 104 weeks, Mrs Cocks might be entitled to the married rate of benefit. Both amounts are higher than the difference between the single and married rates of pension for Cocks, a positive saving to the Australian taxpayer while Mrs Cocks and the child remain in the Philippines. This is a material consideration that was not taken into account by the AAT.

The Court considered that the marriage of a man and a woman is taken to mean, in ordinary circumstances, that they will pool their resources, share their expenses, and thereby live more cheaply than if they were two single people who were living apart. In this case it would seem to be the case that Mrs Cocks had nothing to pool and Cocks, as a result, had nothing to gain from any supposed pooling. That predicament existed whether or not they are residing together or living apart. However, the AAT did not address the financial circumstances of Mrs Cocks. While it could be inferred from the decision of an authorised review officer that she was impecunious and without employment, there were no such findings made by the AAT.

O'Loughlin J was of the opinion that the AAT had erred in law in failing to examine Cock's personal circumstances when he was residing in the Philippines with his wife who was not entitled to any social welfare benefits from the Australian community. In *SDSS and Tsimpidaris* (1995) AAT 10292, *Hawkins and SDSS* (1996) 2(8) *SSR* 109, and *Galewski and SDSS* (1998) 54 ALD 569, the AAT had identifed a lack of opportunity to enjoy the pooling of resources that usually occurred in a marital relationship because there were no joint resources to pool as one of the unusual circumstances to which s24 of the Act should apply. Similarly, French J in *Boscolo v SDSS* (1999) 3(8) *SSR* 125 had held that an enforced separation borne out of necessity was suficient to constitute a special circumstance.

Formal decision

The Federal Court allowed the appeal and remitted the matter to the AAT to determine it according to law.

[K.de.H]