Administrative Appeals Tribunal decisions

Residence: sole parent pension and family allowance

DIMITRIEVSKI and SECRETARY TO DSS

(No. 8759)

Decided: 4 June 1993 by R.A. Balmford, G.F. Brewer and L.S. Rodopoulos.

Dimitrievski lodged two separate applications for review, both of which related to a period when he was absent from Australia. The applications were heard together.

Sole parent pension

The first application concerned the payment of sole parent pension. This ceased by virtue of s.60B(1) of the 1947 Act, which came into effect from 1 March 1989. That provision limited the payment of sole parent pension to a person absent from Australia to a period of 12 months. However, by s.60B(2), the 12-month limit did not apply to a woman receiving the pension if she became a single person because of the death of a man to whom she was married and they were both Australian residents.

The facts

Mr Dimitrievski was married and had 4 daughters when on 7 September 1980, his wife was murdered in a local park. Two years later, he gave up his job and claimed supporting parent's benefit (later known as sole parent pension). On 23 May 1984, he left Australia and took the children back to Macedonia, where his mother and sister helped him to care for them. He continued to receive the pension.

He was advised on 29 June 1988 that from 1 July 1989 he would cease to be qualified for sole parent pension if he remained absent from Australia. He returned on 14 May 1989, reclaimed the pension and left again on 4 June 1989, and did not return again until 20 June 1990. Shortly thereafter he once again returned to Macedonia where he remarried on 5 February 1991, and the whole family returned to Australia on 10 February 1991 and has remained here since.

Automatic termination

The AAT pointed out a number of errors in the text of the SSAT decision in relation to the cancellation of sole parent pension. However, the Tribunal's main point was that the cancellation occurred by virtue of s.60B(1). That section operated automatically to terminate qualification for sole parent pension. The letter advising Mr Dimitrievski of the effect of that provision on his pension was, according to the Tribunal:

> 'presumably generated automatically by the computer on the basis of facts which had been supplied to it. That letter is not a decision, because it does not need to be a decision. It is merely a notification. It is not a "decision of an officer" and thus, for the reasons set out in Bowron (1990) 58 SSR 782 it is not reviewable by the SSAT'.

(Reasons, para. 15).

The Tribunal then noted that from 1 January 1993, s.292A deems an automatic termination given effect to by the operation by a computer programme to be a decision by the Secretary, and it is therefore reviewable. However, the AAT decided that here, as had been the case in *Bowron*, the SSAT had no jurisdiction to review the termination of Dimitrievski's pension and therefore the AAT did not have any decision before it which it could review. Accordingly, the AAT directed that the matter should be removed from the list of applications before the Tribunal.

It also expressed a view on the argument made by Mr Dimitrievski that had he been a woman, s.60B(1) would not have applied to him, by virtue of s.60B(2). He was a man who became a single person because of the death of a woman, and immediately before her death he and she were legally married and were Australian residents. A woman in the analogous situation would have continued to qualify for sole parent pension.

The AAT commented 'there does not appear to us to be any logical basis for this discrimination against men. There would be relatively few men in the position of Mr Dimitrievski: and the cost of extending these payments to men would not, we imagine, be great'. It was also noted that s.1214 of the 1991 Act in effect re-enacts s.60B, so that the 'discrimination' continues under the 1991 Act.

Second Application: Family Allowance

Mr Dimitrievski also asked the Department to pay him family allowance for the period 23 May 1984 to 10 February 1991. He had been receiving family allowance in respect of his four children prior to his departure from Australia on 23 May 1984. He received his last payment on 14 May 1984. On his return to Australia, he claimed family allowance on 12 February 1991 and the allowance was granted in respect of the three younger children (the eldest was by then in receipt of AUSTUDY). He then sought payment of arrears and, in effect, this request was for review of the decision cancelling his family allowance in May 1984. On 20 May 1991 a decision was made rejecting his claim for arrears. He requested reconsideration by an authorised review officer, and the decision was affirmed on 9 January 1992. That decision was further affirmed by the SSAT on 3 June 1992 and it was the SSAT decision that the AAT was reviewing. The AAT pointed out that the decision under review was a decision affirming the cancellation of Mr Dimitrievski's family allowance on his departure from Australia in May 1984.

The AAT noted that the effect of the transitional provisions of the 1991 Act is that the substantive issue before it was to be determined according to the 1947 Act which was in force throughout the period under review. However, the family allowance provisions were amended several times during the period, and the AAT set out those various provisions in full. After pointing out that it was not at issue that Mr Dimitrievski was entitled to family allowance at the time it was granted to him, nor that during his absence from Australia he had the custody, care and control of his 4 children, the AAT summarised the effect of the different forms of the legislation during the various periods.

The AAT explained the reasons for Mr Dimitrievski's return to Macedonia (the murder of his wife, the desire of her family to have her body returned there, his difficulty in looking after the children, and the help that his mother and sister in Macedonia provided in that regard). His intention was to stay only for a short time, but it turned out otherwise. However, as the children grew older, they decided that they wanted to return to Australia.

When he left Australia he left a bank account with about $1500 in it, and all his belongings and household goods with his brother and sister. Those possessions were returned to him when the family returned, and he still had them. He sold his house here to finance his fares, and lived on the balance of the proceeds. He still owns a flat in Macedonia, because he has been unable to sell it, and had to borrow from his brother to pay the fares back to Australia.

While in Macedonia he made special arrangements for his children to be taught English.

Domicile

After quoting from the *Domicile Act* 1982 (Cth), the AAT decided that Mr Dimitrievski acquired a domicile of choice after he came to Australia in 1968. Moreover, it decided that Mr Dimitrievski did not acquire a domicile of choice in Macedonia. His intention at all times during his absence was to return to Australia and not to remain indefinitely in Macedonia. Therefore, the AAT found that he retained his Australian domicile during his absence from this country. Further, under the *Domicile Act*, the children were, throughout the period, domiciled in Australia.

After consideration of the decisions in *Hafza v DGSS* (1985) 26 *SSR* 321 and *Issa* (1985) 27 *SSR* 331, the AAT stated that it was satisfied that during their absence from Australia, Mr Dimitrievski and his children's usual place of residence was Australia and their absence was temporary only. Thus his permanent place of abode was not outside Australia. This was because they left Australia for the fulfilment of two 'specific passing purposes' (using the language of Issa). The first was the return to Macedonia of his wife's body, and the second was the need to have help with the care of his children while they were young, and for them to get over their shock and fear. As time passed, this purpose was fulfilled, and he returned to Australia bringing with him his new wife who could help care for the children and who was clearly prepared to join her husband in this country, in which he had made his home.

The AAT pointed out that the matter was governed by the intention of Mr Dimitrievski, whose intention it found 'never wavered'.

In respect of the period 1 October 1987 to 18 May 1989, the AAT had no direct evidence as to whether Mr Dimitrievski was an Australian citizen or complied otherwise with the definition of Australian resident, but considered that that was manifest from the account of his movements into Australia.

The AAT also considered some conflicting statements in forms signed by him but pointed out that they had been completed by another person, due to his lack of English. They found his evidence at the hearing credible, and were reluctant to place reliance on apparently inconsistent statements contained in documents not written by him. Moreover, they noted that in another Entitlement Review form completed in Macedonia in July 1989, Mr Dimitrievski had said that he expected to return to Australia when the children became adult, which is consistent with his evidence to the AAT.

Finally, the AAT pointed out that as of 18 May 1989, family allowance ceased to be payable if the children had been outside Australia for more than three years. Therefore, the AAT decided that throughout the period Mr Dimitrievski and his four children met the requirements of the 1947 Act so that, apart from the operation of s.83, family allowance was payable to him in respect of those children. Accordingly, the decision under review was varied by deciding that the allowance was payable from 24 May 1984 to 18 May 1989 inclusive.

[R.G.]

Invalid pension: no decision to cancel

WILKS and SECRETARY TO DSS

(No. 8758)

Decided: 4 June 1993 by M.D. Allen.

Gregory Wilks was granted invalid pension in 1986. In November 1989, Wilks sold his house and placed the proceeds in a bank account while waiting to buy a new house.

The DSS ceased to pay invalid pension to Wilks in January 1986, on the ground that the interest on his bank account was income and, as such, was too high to permit payment of pension.

After purchasing a new house, Wilks re-applied for pension, which was granted by the DSS in September 1990. However, the DSS decided that Wilks' 'new' pension was subject to a preclusion period under s.1165 of the *Social Security Act* 1991, because of a lump sum payment of compensation received by Wilks.

Wilks appealed to the SSAT; and, when the SSAT affirmed the decision of the SSAT, he appealed to AAT.

The legislation

Section 1165(2) of the *Social Security Act* provided that invalid pension was not payable during a lump sum preclusion period. However, s.1163(5)(b) excludes pensions claimed before 1 May 1987 from the effect of s.1165.

No cancellation

The AAT examined the DSS records. The original document which purported to evidence the cancellation did no more than suggest that the pension be cancelled – the document did not recommend that course nor did it record any decision. Further, there was no evidence that the person who had signed the document as 'determining officer' was a delegate of the Secretary.

The AAT noted that, in January 1990, a delegate could have chosen between cancelling and suspending Wilks' pension while his income was above the prescribed level. After noting that Wilks had remained qualified on medical grounds, the AAT said that, even if there had been a cancellation, Wilks could have challenged the cancellation on the basis that suspension was the correct or preferable decision.

In any event, Wilks' invalid pension having been claimed before 1 May 1987 and not cancelled in January 1990, was protected from preclusion under s.1165 by s.1163(5)(b) of the 1991 Act.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions that:

(a) Wilks' pension had not been cancelled in January 1990; and

(b) the Secretary was to assess Wilks' entitlement to pension on the basis that he was in receipt of pension before 1 May 1987.

[P.H.]