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I~ Admin Reports

IN THE MATTER of the Social Security Act 1964 and its amendments

A N D

IN THE MATTER of an appeal from a determination of the Social Security Appeal Authority

BETWEEN DORIS ELIZABETH FURMAGE of Hamilton, Married Woman

APPELLANT

A N D THE SOCIAL SECURITY COMMISSION

RESPONDENT

Hearing : 26 and 27 April, 1978

Counsel : S.P. Williams for Appellant
R.J.M. Shaw for Respondent

Judgment: 12 May 1978

JUDGMENT OF BARKER, J.

This is an appeal by way of Case Stated from a decision of the Social Security Appeal Authority, pursuant to s.12Q of the Social Security Act 1964 (hereinafter called "the Act"). The Appeal Authority, on 26th and 27th May, 1977, heard an appeal by the appellant (pursuant to s.12J of the Act) from a decision of the respondent Commission which had cancelled the appellant's domestic purposes benefit. The grounds of the respondent's decision was that the respondent was of the opinion that the appellant and a certain man were living together on a domestic basis as husband and wife. I shall refer to the man as "Mr X" as did the Appeal Authority in its judgment.

The appellant had applied to the Hamilton office of the Social Welfare Department in February, 1975, for an emergency unemployment benefit. Such a benefit was approved as from 24th February, 1975; maintenance orders were made against the appellant's husband; she was transferred to a domestic purposes benefit as from 17th November, 1976.

On or about 1st March, 1977, the Commission upheld the decision of the Hamilton branch of the Social Welfare Department to suspend and/or terminate her Domestic Purposes benefit on the grounds that she was living with Mr X on a domestic basis as husband and wife.

The Appeal Authority conducted a full hearing at which viva voce evidence was called by both parties to the appeal. The extensive evidence and submissions resulted in the Appeal Authority's decision dated 5th August, 1977. The Appeal Authority was satisfied that the relationship between the appellant and Mr X fell within the provisions of s.63(b) of that Act.

On an appeal by way of Case Stated, I proceed on the basis of the facts as found by the Appeal Authority and as recorded in the Case Stated. The question asked in the Case stated isas follows:-

> "Whether or not the relationship contemplated by the provisions of s.63(b) of the Act is a relationship in which there must be all the elements of marriage or consortium except for the existence of a formal marriage ceremony."

I have some reservations as to the form of this question.

The relevant part of s.63(b) of the Act reads as follows:-

> "For the purposes of determining any application for any benefit or of reviewing any benefit already granted ... the Commission may in its discretion ... (b) regard as husband and wife, any man and woman who, not being legally married, are in the opinion of the Commission living together on a domestic basis as husband and wife and may in its discretion ... terminate or reduce ... any benefit already granted accordingly."

This section was substituted for the original s.63 by s.21 of the Social Security Amendment Act, 1972. In the 1973 Act, the Commission was given the power to make such a determination only when considering an application for any benefit and could not use the section to terminate or reduce a benefit. There was no provision in the Social Security Act, 1938 of a comparable nature.

The 1972 amendment revoked s.74(b) of the 1964 Act which empowered the Commission to refuse, terminate or reduce a benefit in any case where the Commission was satisfied:

> "that the applicant is not of good moral character and sober habits or is living on a domestic basis as husband or wife with a person to whom he or she is not married."

The effect of the removal from the statute of the so-called "morals clause" is not clear.

However, when domestic purposes benefits were introduced into the legislation in 1973, the amending statutes includedfor the first time a number of definitions which, broadly speaking, supply definitions appropriate to what are called "de facto" situations, e.g. in s.27A(1) of the Act the word "husband" is defined for the purpose of the domestic purposes benefit sections as including "a man with whom a woman has entered into a relationship in the nature of marriage although not legally married to him." The word "wife" is given a corresponding meaning. In s.27C(1) the word "marriage" is defined for that section as including "a relationship in the nature of marriage, although the two parties to the relationship are not legally married." Whether the same concept was sought to be covered by this definition as is covered by s.63(b) is unclear. I comment in passing that it is a pity that, if the

same concept were sought to be covered, the same Act did not have consistent definitions.

The essential facts, as found by the Appeal Authority, are as follows. At the time when the Commission decided to withhold payment of the appellant's benefit, she was a married woman, separated from her husband, and living in the former matrimonial home owned by her and her husband as tenants in common. A maintenance order had been mae in her favour against her husband. She has custody of 3 children of her marriage. In September, 1975, she met Mr X. At that time, her son was seriously ill and Mr X assisted her with transport and offered emotional support. He, a married man with 3 children, was then living with his wife in their matrimonial home, but claimed that his marriage was not happy. After some 6 weeks, he left this home and went to live in a rented flat with one bedroom. After September, 1975, the appellant acknowledged that a relationship had developed between her and this man and that such relationship was different from that which she had with other men friends. They would shop on a co-operative basis, with the appellant paying Mr X some money and also making gifts to him of clothing and records. They shared mutal interests and mutual friends, but had, in additio n, separate invidivual interests. He stayed overnight at the appellant's home on several occasions during the week and also had meals with her. On other occasions, sometimes with, somethings wihout her children, the appellant stayed at his flat overnight and had meals there. Sexual intercourse took place at least 2 or 3 times a week in the early stage of the relationship, but after January, 1977, is said to have taken place less frequently The appellant acknowledged that she was basically a monogmous woman and Mr X acknowledged that, while he had a relationship with appellant, he would not have a similar relationship with another woman.

Both placesof residence were used by both parties for the purpose of continuing their relationship.

Mrs X displayed a hostile attitude to the appellant. It is said that she eventually formed an attachment with a younger man; although her harrassment was an annoyance to the appellant, she allowed her association with Mr X to continue. There was some publicity in her home City. Mr X chose publicly to say that he was the man involved. Despite the strain and the harrassment, their association did not founder.

The appellant looked after Mr X on two occasions when hewas ill; they attended a conference held in connection with his employment, staying in the same room in the hotel; they spent 6 days together in Sydney after the appellant had attended a conference in Adelaide for the Epilepsy Association, with which she was concerned. They took holidays together in May, 1976, and after Christmas, 1976. Joint purchases of groceries and gifts ceased after Mr X learned that such actions might be prejudicial to the receipt of the benefit by the appellant.

The Appeal Authority stated that after seeing and hearingboth parties and considering the evidence and submissions of counsel, it was satisfied that the relationship fell within the provisions of s.63(b). This finding means that theAppeal Authority must have accepted either in whole or in part the submissions made to it by counsel for the respondent these are recorded in the Case Stated as follows:-

(a) That the Section provided for the Commission to determine whether there was a functioning state of marriage between two persons if it concluded that they were living on a domestic basis as husband and wife;

(b) That the wording of the Section implied that the Commission was required to look at the manner of living of the parties on a domestic basis rather than on a sexual basis;

(c) That in looking at such a relationship regard should be had to certain elements, one subjective i.e. some form of commitment between the parties, and two objective, i.e. (i) the sharing of interests, time and resources, and (ii) the sexual element;

(d) That all the various elements of consortium as between husband and wife did not need to be present in their fullest extent before a relationship resembling that of marriage could be inferred.

The Appeal Authority noted correctly that it is a question of fact in each case whether there is or is not a relationship falling within the subsection. Once the Commissior has formed its opinion on the facts, it then has a discretion to cancel or reduce a benefit. In this case, what is being attacked is the validity of the Commission's opinion; the real question for determination in this appeal is whether the Commission could in law have come to the opinion it did on the facts. The resolution of this question involves a consideratic of the wording of the subsection.

The proper approach to the interpretation of any statute is to take the words in their ordinary meaning. Statutes on cognate topics in which the same words are used, can also be a guide. In statutes providing for separation and divorce, the words "living apart" have been considered by the Courts quite frequently. "Living together" is the reciprocal of "living apart". The cases on these expressions are assembled and discussed in the decision of the English Court of Appeal in <u>Santos v. Santos</u> (1972) Fam. 247. Included in the <u>Santos</u> decision, are approving references to the New Zealand Court of Appeal's decision in <u>Sullivan v. Sullivan</u> (1958) N.Z.L.R. 912, dealing with the words "living apart" in theNew Zealand divorce legislation. The English Court of Appeal held that proper construction of the phrase "living apart" in the English divorce statute, meant that physical separation is not sufficient to constitute "living apart". A petitioner for divorce on the groundof living apart for 2 years, has to prove not only the fact of physical separation, but also that he or she had cea sed to recognise the marriage as subsisting and intended never to return to the other spouse, although the petitioner's state of mind did not have to be communicated to the other spouse. Sachs, L.J. at p.256F, giving the judgment of the Court, noted that there can be all kinds of involuntary separations of spouses. He instanced one spouse being a diplomat "en poste in insalubrious foreign capitals" or a prisoner, as examples of involuntary separations and a spouse away on a business posting or a voyage of exploration or a recuperation trip as examples of voluntary separations.

The Court expressly approved the decision of the Court of Criminal Appeal in <u>R. v. Creamer</u>, (1919) 1 K.B. 564, where, on a charge of receiving, the prosecution had to prove that a husband and wife were not "living together". Darling, J., delivering the judgment of what was described in the <u>Santos</u> decision as a "strong Court", said:-

> "In determining whether a husband and wife are living together the law has regard to what is called "consortium of husband and wife" which is a kind of association only possible between husband and wife. The husband and wife are living together not only when they are residing together in the same house, but also when they are living in different places, even if they are separated by the high seas, provided the consortium has not been determined."

Another case cited with approval in the Santos case was Tulk v. Tulk (1907) V.L.R. 64, which emphasised that a separation brought about by the pressure of external circumstances such as absence on business pursuits, or in search of health or pleasure, did not bring to an end the relationship between the spouses. Cussen, J. in Tulk's case emphasised that many things went to make up as a whole the "consortium vitae". The learned Judge instanced "marital intercourse, dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation". He said that the presence or absence of various of these elements, "go to showmore or less conclusively that the marriage relationship does or does not exist. The weight of each element varies with the health, position in life and all the other circumstance of the parties."

In Millett v. Millett, (1924) N.Z.L.R. 381, the parties who were legally married, lived in different houses a few miles away from one another. They did not reside together in a common home, although they had intercourse at the house of either one or the other. The parties were on comparatively friendly terms. The husband frequently visited the wife, having meals at herhouse and occasionally sleeping there. Likewise the wife visited his home on occasions, spending the night, attending to his clothing and occasional cooking. Salmond, J. at p.384 posedthe problem he faced thus:

> "If on the one hand, mere sexual intercourse is not enough, and if, on the other hand, residence together in a common matrimonial home is not necessary, what is the true test of cohabitation?"

Salmond, J. held that there had been supervening "cohabitation" within the meaning of the Destitute Persons Act, 1910.

It may be that these authorities (particularly Millett's case) could have sufficient to sustain legally the opinion of the Commission that the appellant and Mr X were livingtogether as husband and wife. However, I cannot ignore the additional words of the statute "on a domestic basis". I consider that these words require a living together under the same roof on a basis of some permanence. These parties did not do that, on the facts as found; clearly both maintained separate establishments.

I consider that on the facts as found by the Appeal Authority, there is no justification in law for the Commission to hold the opinion that these people were living together "on a domestic basis" although there may have been grounds for holding that they were living as husband and wife. The word "domestic" is variously defined in dictionary definitions placed before me by counsel as "having the character or position of an inmate of a house", "intimate, familiar, at home", or "of belonging to the home, house or household", "pertaining to one's place of residence", "concerning or relating to home or family".

Had s.63(d) contained a similar reference to that in s.27C(1) to "a relationship in the nature of marriage although the two parties to the relationship are not legally married", then the Commission's opinion of the appellant's situation could well have been justified in law. However, I

cannot treat as otiose the words in s.63(b) "on a domestic basis". They may well restrict de facto relationships for the purposes of that section only, to those de facto relationships where the parties live under the same roof. If that is not what Parliament intended, then a statutory amendment will be needed to fulfil that intention. I am bound by the clear wording of the section.

The question is answered, not in its exact terms, but in the following way:-

> "The relationship contemplated by s.63(b) of the Act is a relationship which need not necessarily contain all the elements of consortium but in which one element of consortium - i.e. living under the one roof is stressed by the words "on a domestic basis".

Obviously all the elements of consortium need not appear in every relationship under s.63(b) just as they need not necessarily appear in every marriage. However, the Legislature has chosen to emphasise one element of consortium i.e. the "living together under one roof" aspect by its use of the words "on a domestic basis". The section requires more than the "cohabitation" found in the Millett situation more than just "living together" as defined in Creamer's case and more than not "living apart" as defined in Santos' and Sullivan's cases. It has gone out of its way to add these limiting words to an otherwise fairly broad and flexible concept.

I doubt whether the question as asked adequately covers the question of law which I think should have been asked. However, pursuant to r. 39(2)(b) of the Supreme Court (Administrative Division) Rules 1969, I hereby give directions to the Appeal Authority to reconsider the matter in the light of my decision. The reasons for my so directing the Appeal Authority are that I consider that it has not correctly interpreted the section. It will not be necessary for it to re-hear the evidence, since it has already heard the evidence extensively and has made findings of fact which cannot be challenged. It may well be that in the light of my opinion, the Appeal Authority will come to a different decision.

The appellant has succeeded and, although on Legal Aid, is entitled to an award of costs which I fix in the sum of $200 plus disbursements.

R. S. Barker, J.

Solicitors:

S.P. Williams Esq, Hamilton, for Appellant

Crown Law Office, Wellington, for Respondent