IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 255/95

UNDER the Social Security Act 1964

IN THE MATTER of an appeal from the decision of the Social Security Appeal Authority under S.12Q of the Social Security Act 1964

BETWEEN **THE DIRECTOR-GENERAL OF SOCIAL SECURITY**

Appellant

A N D [redacted] K[redacted] & S[redacted] J[redacted] M[redacted]

Respondents

NAMES NOT TO BE PUBLISHED - REFERRED TO AS: DIRECTOR-GENERAL OF SOCIAL SECURITY v K & M

Hearing: 8 November 1996

Counsel: C C Inglis for Appellant
P D McKenzie for Respondent

Judgment: - 7 FEB 1997

RESERVED JUDGMENT OF HERON J

Solicitors:
Crown Law Office, Wellington for Appellant
P D McKenzie, Wellington for Respondent

This is an appeal case stated by the Social Security Appeal Authority pursuant to S.12Q of the Social Security Act 1964 ("the Act") on a question of law only and lodged by the Director-General.

The circumstances were that the respondents, a married couple with three dependent children, were respectively granted a disability allowance from 25 July 1990 and 9 December 1991. In March 1993 the wife commenced a full time course of study at the local university and received a student allowance and a student loan. The respondents advised the department of this change in financial circumstances on a declaration of renewal on 3 May 1993. On 9 May 1994 the increase to the respondents income by the student allowance and the student loan was noted. Their disability allowances were cancelled and overpayments claimed for the periods 1 March 1993 to 14 November 1993 and 28 February 1994 to 8 May 1994. It was said that the total income of the respondents exceeded the maximum allowed for the grant of a disability allowance.

The student loan comprised an amount for living costs. The Christchurch City District Review Committee in July 1994, considered that as being income in accordance with S.3 of the Act. The appeal authority allowed the appeal and indicated that the disability allowances should not have been cancelled and accordingly no overpayment occurred. The authority decided the case on a construction of S.3 and in its decision said:

> 1. The issue in this case is whether a student loan which has a living component should be regarded as income for the purposes of s.3 Social Security Act 1964. The disability allowance is only payable to those "whose income .... is such that it would not prevent the payment of any of the [basic] benefits [in the Social Security Act 1964" pursuant to s.69C(c) Social Security Act 1964.
>
> 2. Monies which are advanced on the condition that they must be repaid (generally with interest, or a payment for the borrowing) have not traditionally been regarded as 'income'. Monies so advanced provide a temporary or conditional benefit. As such they can be contrasted to payments for goods or services (or earnings) which generally confer reward which is unconditional or permanent. The latter are generally regarded as income.

3. It is our view that the definition of income in s.3 Social Security Act 1964 is based on the distinction described above. If it were not then there would be no need to refer to the distinction between the acquisition of an interest subject to income tax and capital. There would be no need to specify that capital advanced in the form of periodical payments for income related purposes is income and there would be no need to specify that the value of goods and services in some circumstances will also be regarded as income. The tenor of the definition seems to us also based on the unconditional nature of monies or benefits advanced.

4. The approach taken by the Department (*"the student loan is a periodical payment, therefore it is income for benefit purposes"*) illustrates, in our view, the danger of lifting a phrase or two from a lengthier definition and fitting it to a purpose for which the full definition was never intended. In this case periodical payments from a variety of sources could be regarded as income, in the same way as the living component of the student loan has been regarded, if the wider definition of the word 'income' is ignored. This could encompass the regular use of overdraft facilities or credit card advances. We do not accept that these transactions were intended to be covered by the definition of income in the Social Security Act 1964 and for the same reasons also do not accept that a student loan can be regarded as income for the purposes of the Social Security Act 1964. For these purposes there is no difference between a student loan and a loan obtained from any other source. Loans are advances of money which must be repaid. They are not income.

5. Accordingly, the Department is directed to reinstate the disability allowance from the date it was cancelled."

The appellant contended on appeal, that as a matter of statutory interpretation within the context of the Act, the living component of the student loan constitutes income in terms of the wording of S.3(1). Support for the submission was said to exist in both overriding policy considerations and on a proper interpretation of the scheme and purpose of the Act.

It was accepted by the parties that the living allowance received by the wife was an ingredient of her student loan. So far as it is relevant to this case no security has to be provided for such a loan, and apart from bankruptcy considerations which might otherwise be relevant matters such as family or spousal income or future earnings, are not relevant factors in obtaining a grant. Repayments are not required unless assessable income exceeds a specified threshold but thereafter the repayment is mandatory. Certain "write offs" of interest apply but the capital or core sum advanced is otherwise repayable once the threshold is reached. In 1994 that threshold was reached at $13,104 of assessable income.

S.3(1) at the relevant time provided that income in relation to any persons:

> "(a) Means any money received or the value in money's worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out); and
>
> (b) Includes, whether capital or not and as calculated before the deduction (where applicable) of income tax, any periodical payments of money made, and the value of any credits or services supplied periodically, from any source, -
>
> (i) For the purpose of, and used by the person for, the maintenance of or the provision of services for that person and his family (if any), being services of a kind which are commonly paid for from income; or
>
> (ii) For the purpose of replacing any lost or diminished income of the person ...."

It was submitted for the appellant that the meaning to be given to income for benefit purposes is wider than the meaning normally ascribed to income for income tax purposes. Plainly that is so. See *Blackledge v SSC* 17 February 1992, Hamilton, CP 81/87, Tompkins J.

Paragraph (d) of S.3(1) it was agreed could have contained an exception for the living allowance comprised in the student allowance and its omission is support for the view that it is caught by the definition. In the end it must depend on the definition and the context and purpose of the legislation.

The Authority in paragraph 4 (supra) tends to suggest that the periodical nature of the payment has been made out, a position not accepted by the respondent. In my view the case has to be determined, on the only satisfactory basis it seems to me, as to whether the payment is caught by the definition. There can be no doubt that if it meets the periodical criteria it also meets the further requirement of purpose and use because it is a living allowance. The real question is whether loan moneys are to be regarded as income in the wide ranging definition designed to capture all forms of money or kind used for maintenance of person or family.

The starting point must be the conventional definition of income. In *Reid v Commissioner of Inland Revenue* [1983] 6 NZTC 61624, Quilliam J had to consider whether a standard allowance was income for the purposes of S.65(2)(1) of the Income Tax Act 1976. In what has become a frequently applied definition of income for tax purposes the Judge adopted counsels submissions as follows:

> " ... there were three principal features of income which had become recognised in the cases. The first was that income is something which comes in *(Tennant v Smith* [1892] AC 150). The second was that income imports the notion of periodicity, recurrence and regularity (see *FC of T v Dixon* (1952) 86 CLR 540 at pp 567-568). And the third was that whether or not a particular receipt is income depends upon its quality in the hands of the recipient. Mr Simcock acknowledged that the first and second of those features were present in this case, but of course neither is to be regarded as necessarily decisive, and it was on the third feature that Mr Simcock relied. His argument was that the purpose of the allowances and the basis on which they were paid and received took them out of the concept of income. In particular he drew support from the observations of *Windeyer J* in *Scott v FC of T* (1966) 117 CLR 514 at p 526:
>
> > "Whether or not a particular receipt is income depends upon its quality in the hands of the recipient. It does not depend upon whether it was a payment or provision that the payer or provider was lawfully obliged to make. The ordinary illustrations of this are gratuities regularly received as an incident of a particular employment. On the other hand, gifts of an exceptional kind, not such as are a common incident of a man's calling or occupation, do not ordinarily form part of his income. Whether or not a gratuitous payment is income in the hands of the recipient is thus a question of mixed law and fact."

However, an enlarged meaning of income has to be considered by virtue of S.3 of the Act but in my view with due regard to the underlying principles applicable to income per se. Clearly no distinction between capital and income alone is enough to render the revenue here income. Incidence of tax is rendered irrelevant and reliance is placed on the fact that loan monies are advanced periodically and used by the recipient for maintenance or living expenses generally paid for from income.

The respondent argues that loan monies is not something that "comes in" because it creates an obligation to repay which "goes out". The analogies discussed in the extract from Quilliam J's judgment are also not met in that the quality of income as fruit or crop or addition to the reservoir does not occur. The respondent suggests that very plain language would be required to bring loan monies into the definition of income. I agree.

However, it is said that in one case loan advances have been effectively treated as income. In *McElroy v Director-General of Social Welfare* [1992] 9 FRNZ 366, the Family Court held money credit and services advanced to a farmer by the farmer's bank and stock agents amounted to income under S.3(1). The facts of that case were summarised in this way:

> "To return from the general to the particular: it is not disputed that in general terms the living expenses shown in the objector's capital accounts for the years involved have been met either by (a) an increase in the indebtedness of the objector to his bank or to his stock and station agent, (b) from the sale of parts of his farm, or (c) from the sale of capital livestock (that is, the sale of stock which is not replaced). The proceeds of the sale of land or stock have simply gone to reduce the objector's indebtedness to the bank, the stock and station agent (that indebtedness being secured by mortgage over the farm land), and others. The bank has allowed the objector to draw on his current account for necessary expenses, and the stock and station agent has allowed credit for the purchase of equipment and supplies, each on a basis that the objector's credit limits have been defined and controlled."

That fact situation is distinguishable from the present. Here no recourse to her own capital is being made by the respondent. She is simply receiving an advance to be repaid. There is no question of capital being dissipated or reduced in return for advances made. Furthermore the current account run by the farmer with the bank or stock and station agent was being periodically affected by proceeds of farming including the sale of capital assets. In a sense the funds made available in that case may be truly seen as liquidation of capital items by virtue of and against the security held. The moneys advanced, if not otherwise repaid, would be recouped out of the individual's existing assets. In effect a receipt of capital albeit used for living expenses.

The critical feature of *McElroy's* case is the use of capital in a manner that is generally served by income. The fact that the monies were advanced and were required to be repaid is not the critical consideration. What is important for present purposes was the resort in that case to an individual's assets to provide and serve the purposes of income, that resort facilitated by advances against the capital rather than a piecemeal and likely impossible disposal of parts of the same capital. I do not see

McElroy's case as assisting the appellant's case here. As the Judge in *McElroy* said (370):

> "…. the farm is the objector's business base. In a broad sense his drawings for personal use are his income, whether deprived from trading profit or capital."

The respondent is correct is seems to me in submitting that the definition requires the essential quality of income to be retained and monies being capital in origin or nature are income only where they truly add to the resources of the person receiving them.

I do not need to decide the second point raised by the respondent which was that in the present case insufficient elements of periodicity have been made out. Mr McKenzie accepted the definition of periodicity as suggested by Tompkins J in *Blackledge* (26); namely supplied regularly over a period and not on only isolated occasions. The respondent argues further that on the terms on the student loan in this case it is possible for the living cost component to be less than $1,000 and the course to run less than 18 weeks in which case the full amount of the loan is drawn at the outset. This the respondent says eliminates any periodicity. The fact that the loan would not be categorised as income in such circumstances lends weight to the argument that it should fairly be regarded as not caught by S.3(1) in whatever form but is not in my view conclusive of the matter. Its nature as a loan to be repaid deprives it of the essential quality as income.

Ms Inglis suggested that policy considerations should apply to assist in interpretation. The social welfare legislation she says provides a backstop of last resort and recourse must be had to all other resources before entitlement to a benefit arises. In general terms that is undoubtedly the purpose of the legislation in all its ramifications and amply demonstrated by S.3(1). However, that cannot affect the overriding consideration that the student loan scheme is government assistance by way of loan not cash grant. Ms Inglis argument would undoubtedly have considerable force if one was considering one form of grant on top of another. The complex scheme of funding for tertiary education cannot be necessarily put on the

same footing as the wider based system of social security benefits, differently structured and serving different ends. Further I see no unfairness in the fact that some student allowances are to be regarded as income but the living allowance component of student loans is not. Loans are available without regard to need in general terms and must be repaid.

If Government see the entitlement to take out a loan to assist with living expenses as disentitling a student to other needs based social welfare assistance then it should make that plain by clear legislative expression. I see no policy needs to require student loans to be treated as essentially social welfare expenditure as Ms Inglis suggested.

It follows from what I have said that the appeal must be dismissed.

I granted an interim name suppression but was concerned as to whether a final order should be made.

S.12N(4) provides that it shall not be lawful to publish any part of the proceedings before the appeal authority unless the authority so orders. The respondents did not of course initiate the appeal and have been brought to the High Court on a matter of some general importance to obtain a ruling likely to be applicable to a number of cases. There is no public interest in having the respondents identified and a specific application having being made for non publication, I will grant the same. The case is to be known as *Director-General of Social Security v K & M.*