IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-000705

IN THE MATTER OF	an Appeal by way of Case Stated from the determination of the Social Security Appeal Authority at Wellington under Section 12Q of the Social Security Act 1964
BETWEEN	TANIA DALE KING Appellant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Hearing: 8 July 2009

Counsel: Appellant in person (with Ms M Brown in support)
U Jagose and D Harris for Respondent

Judgment: 9 July 2009

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 3.30pm on the 9th day of July 2009.

JUDGMENT OF JOSEPH WILLIAMS J

Introduction

[1] The appellant appeals against a decision of the Social Security Appeal Authority. The appellant brings this appeal by way of case stated under s 12Q of the Social Security Act 1964 ("the Act") stated for the opinion of the Court on a question of law.

[2] The questions of law posed are:

(i) Did the Authority apply the correct test in determining whether the appellant was living apart from her husband?

(ii) Did the Authority err in law in its application of s 86(9A) of the Act?

Background

[3] The appeal concerns payments by way of Domestic Purposes Benefit and supplementary assistance paid to the appellant between 12 November 2004 and 2 April 2005. During this time the appellant had one dependent child in her care.

[4] In April 2005 the Ministry became aware that the appellant had married Hiram James King-Sorenson on 13 November 2004. Mr King-Sorenson died on 2 April 2005. The Ministry had no reference prior to 2 April that the appellant had advised the Ministry that she had married. Following the receipt of this information the Ministry commenced an investigation into the appellant's benefit entitlement.

[5] The information gathered included:

a) The death notice from the Rotorua daily newspaper which described Mr King-Sorenson as the "*loved husband of Tania"* and noting that he would be "*lying at his home*" at 4 Walker Drive (the appellant's address) where the funeral would be held;

b) A death certificate in which Mr King-Sorenson's usual home address was described as 4 Walker Road, Rotorua.

[6] On the basis of this information the Ministry concluded that the appellant had failed to advise the Ministry that she was married whilst she was in receipt of Domestic Purposes Benefit and supplementary assistance. Her entitlement to a benefit was reviewed and an overpayment established.

[7] The appellant sought a review of that decision. A Benefits Review Committee considered the matter on 31 May 2006. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then appealed to the Authority.

[8] In a decision issued on 20 June 2008, the Authority allowed the appeal in part. The Chief Executive was directed to re-calculate the amount of the overpayment taking account of the appellant's entitlement to Accommodation Supplement and Student Allowance at married rates for the relevant period, and reconsideration of the couple's entitlement to Special Benefit.

[9] The Authority concluded however that:

a) At the relevant time the appellant and her husband were married. They had not formed an intention to separate and it could not therefore be said that they were "living apart". The Chief Executive was therefore obliged to consider them as married for benefit purposes; and

b) There was no error on the part of the Ministry which would have allowed the Authority to direct that the debt could not be recovered.

[10] Following the Chief Executive's recalculation, the amount of overpayment stands at $2,704.91.

[11] The appellant appeals against the Authority's decision, and poses the questions of law outlined above for this Court to consider.

[12] The appellant insists that she advised her case manager of her marriage and of the reason that the appellant and her husband were not cohabiting. She says that she accepted the payments in good faith and should not be required to repay any of the amounts alleged to be overpaid.

Appeals on a question of law

[13] This being an appeal on a question of law, my task is limited. The role of the High Court, on an appeal from the Authority, has been addressed in previous decisions. In *Chhima v Chief Executive of the Department of Work and Income New Zealand* CIV 2004-485-1761 HC AK 24 February 2006, Frater J said at [75]:

> [75] On an appeal by way of case stated the Authority's decision must stand unless the Court is satisfied that, in exercising its discretion, it either applied the wrong legal test or erred in its application of the law to the facts. It is not open to this Court to reconsider the facts under the guise of an error of law. To amount to an error of law the facts must be such that, no person, acting judicially and properly instructed as to the law, could have come to the determination reached on the facts. Questions of credibility are the sole domain of the Authority. If there are reasonable grounds for a finding of fact, the Court is not to be called upon for a "second opinion": *Edwards v Bairstow* [1955] 3 All ER 48.

[14] I agree with the respondent that the appellant's submissions ask the High Court to go beyond the proper scope of its function in an appeal under s 12Q. The appellant questions:

- the admissibility of certain evidence which the Authority relied upon in reaching its conclusion that the couple were not "living apart";

- the credibility findings of the Authority. The Authority rejected the evidence of the appellant that she had told her case manager three times of her marriage and accepted the evidence of the case manager that she was unaware of the appellant's marriage until the appellant sought a food grant at the time of Mr King's funeral.

Neither of these issues are relevant to the appeal on a question of law by way of case stated. Although credibility findings can be overturned on an error of law if it can be demonstrated that plainly relevant evidence was disregarded or account was taken of plainly irrelevant evidence – neither of these arguments was available to the appellant in this case.

Discussion

(i) Did the Authority apply the correct test in determining whether the appellant was living apart from her husband?

[15] One of the key points which the appellant made in her evidence before the Authority was that throughout the period of her marriage, was that she and Mr Sorenson-King had been living at different addresses. The appellant explained that Mr Sorenson-King was awaiting a hearing at the Rotorua District Court on criminal charges. She said that he had been bailed to live at an address on Grayson Avenue and was subject to a curfew. She said that during the day Mr Sorenson-King was involved in a course and at the evenings was at Grayson Avenue in accordance with his curfew. The appellant said that the couple had been unable to live as husband and wife because of the criminal proceedings Mr Sorenson-King was facing. She fully accepted, however, that the emotional commitment between herself and Mr King remained strong from the day they married and the time of his death.

Relevant Legislation

[16] As a married woman, the appellant could have been entitled to a Domestic Purposes Benefit under s 27B of the Act. At the relevant time for this appeal that section provided:

> **27B Domestic purposes benefits for solo parents**
>
> (1) In this section the term applicant means—
>
> (a) a woman who is the mother of one or more dependent children and who is living apart from, and has lost the support of or is being inadequately maintained by, her husband;
> (b) an unmarried woman who is the mother of one or more dependent children:
> (c) a woman whose marriage has been dissolved, and who is the mother of one or more dependent children:
> (d) *Repealed.*
> (e) a woman who is the mother of one or more dependent children and who has lost the regular support of her husband because he is subject to a sentence of imprisonment and is—
>
> (i) serving the sentence in a penal institution; or
> (ii) subject to release conditions (as that term is defined in section 4(1) of the Parole Act 2002) that prevent him or her undertaking employment:

(f) a man who is the father of 1 or more dependent children whose mother is dead or who for any other reason are not being cared for by their mother.

(2) Subject to the provisions of [this Act], an applicant shall be entitled to receive a domestic purposes benefit if the [chief executive] is satisfied that—

(a) the applicant either—
(i) is or has been legally married; or
(ii) has attained the age of 18 years; and
(b) the applicant is caring for a dependent child or children; and
(c) the applicant is not living together with her husband or his wife or with the other parent of the child, as the case may be.

[17] Under section 27B(1)(a), one of the requirements that a married woman had to meet was that she was "living apart" from her husband.

[18] Under the Act, in certain circumstances a married person can be treated as an unmarried person. At the relevant time, s 63 of the Act provided:

64 Conjugal status for benefit purposes

For the purposes of determining any application for any benefit, or of reviewing any benefit already granted, or of determining the rate of any benefit, [or of the granting of any payment of a funeral grant under section 61DB of this Act or of any welfare programme approved by the Minister under section 124(1)(d) of this Act,] [or of assessing the financial means of any person under section 69F or section 69FA] the [chief executive] may [in the [[chief executive's]] discretion]—

(a) regard as an unmarried person any married applicant or beneficiary who is living apart from his wife or her husband, as the case may be:

(b) regard as husband and wife any man and woman who, not being legally married, have entered into a relationship in the nature of marriage—

and may determine a date on which they shall be regarded as having commenced to live apart or a date on which they shall be regarded as having entered into such a relationship, as the case may be, and may then [in the [[chief executive's]] discretion] grant a benefit, refuse to grant a benefit, or terminate, reduce, or increase any benefit already granted, from that date accordingly.

[19] Again, the test is whether the couple are "living apart".

Living Apart

[20] The term "living apart" is not defined in the Act. However, the term has been the subject of judicial consideration and the meaning of the term, including in the context of the Social Security Act, is well established.

[21] The Authority discussed the meaning of "living apart" at paragraphs [20] and following. The Authority referred to the cases of *Sullivan v Sullivan* [1958] NZLR 912, *Excell v Department of Social Welfare* [1991] NZFLR 241 and *Director-General of Social Welfare v W* [1997] NZAR 139. The relevant sections of these judgments in respect of the meaning of "living apart" are as follows.

[22] In *Sullivan v Sullivan* Henry J observed at 933:

> Physical separation has never been held to be decisive of the fact that the spouses are living apart or separate; nor on the other hand, has some degree of marital separation been held to be conclusive that the spouses are living together.

[23] The issue was discussed by Fisher J in *Excell*. The Court found at 242:

> A distinction is to be drawn between legal and de facto marriage. A legally married husband and wife have a legal duty to cohabit. Cohabitation ceases only while there is an intention by either spouse to repudiate the obligations inherent in the matrimonial relationship and a manifestation of that intention by conduct. In a legal marriage it is therefore a very short step from physical proximity to an assumption of continued or renewed cohabitation, especially if the alleged cohabitation has not been preceded by any lengthy separation and where there are other ties such as children in common. The position is different where the couple in question are not legally married, especially if they have not cohabited previously or in recent times. In those circumstances the duration of the relationship to date, and signs of permanence for the future, will assume special importance.

[24] Finally, in *Director-General of Social Welfare v W,* McGechan J noted at 142:

> To say of a couple "they are living apart" means, in common parlance, that although the marriage still exists in name the couple dwell separately and the marriage relationship is regarded at least on one side as at an end….It is a term of art involving a mental acceptance of the marriage, as an emotional bond is over.

> It is, of course, an indicator that parties are "living apart" in a s 63(a) sense also if finances have become separate, in as much as that is some evidence of disappearance of mental commitment to marriage; but – both before and after Ruka's case – that indicator is no more than an evidential consideration in assessing the s 63(a) criterion.
>
> The parties to a marriage are not "living apart" unless they not only are physically separated, but at least one side regards the marriage tie as dead. The spouse in need must look to other emergency benefits.

[25] Applying these principles, the Authority in this case held that:

> [30] In any event the appellant told the Authority quite clearly that the emotional commitment between herself and Mr King did not change from the time of their marriage. This is a critical factor in determining whether a married couple are living apart. As was noted in the *Director of Social Welfare v W* before a married couple can be regarded as living apart one party must regard the marriage as being at an end. That was clearly not the case here. The fact that Mr King spent nights at a different address from the appellant for the purposes of meeting his bail obligation does not alter the fact that he and the appellant remained committed to their marriage.
>
> [31] We are satisfied that at the time relevant to this appeal the appellant was married, she and her husband had not formed an intention to separate and it could not therefore be said that they were living apart. The Chief Executive was therefore obliged to consider them as married for benefit purposes.

[26] The appellant suggested that because they had never lived together, they were in fact living apart as a result of Mr King's bail conditions. I do not accept this argument.

[27] It is my view that the Authority correctly directed itself to the statutory test and the relevant case law. In answer to the first question, the Authority applied the correct test in determining whether the appellant was living apart from her husband. By the appellant's own admission the relationship was far from ended even if they could not live together.

(ii) Did the Authority err in law in its application of s 86(9A) of the Act?

[28] Section 86(9A) provides a limited exception to the rule that overpayments of benefits debts due to the Crown and must be repaid. The subsection provides:

86 Recovery of payments made in excess of authorised rates

…

[(9A) The chief executive may not recover any sum comprising that part of a debt that was caused wholly or partly by an error to which the debtor did not intentionally contribute if—

(a) the debtor –

(i) received that sum in good faith; and

(ii) changed his or her position in the belief that he or she was entitled to that sum and would not have to pay or repay that sum to the chief executive; and

(b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.]]

[[(9B) In subsection (9A), **error**—

(a) means—

(i) the provision of incorrect information by an officer of the department:

(ii) any erroneous act or omission of an officer of the department that occurs during an investigation under section 12:

(iii) any other erroneous act or omission of an officer of the department; but

(b) does not include the simple act of making a payment to which the recipient is not entitled if that act is not caused, wholly or partly, by any erroneous act or omission of an officer of the department.

[29] As to this, the Authority said:

[35] …Before we direct that the overpayment not be recovered we must first be satisfied that each of the criteria of s.85(9A) of the Social Security Act 1964 has been made out. If one of the criteria cannot be satisfied then it is not necessary for us to proceed to consider the subsequent criteria.

[36] We are first required to consider whether or not the debt arose as a result of any error on the part of the Ministry. In this regard we accept the case manger's evidence that she was unaware of the appellant's marriage until the appellant sought a food grant at the time of Mr King's funeral. We did not believe the appellant's claim to have told her case manager on three occasions of her marriage. We think that had she done so that would have

> immediately have resulted in action being taken in relation to the appellant's Domestic Purposes Benefit…We are of the view that the debt that has arisen in this case is a result of the appellant's failure to inform the Ministry of her marriage.
>
> [37] As we are not satisfied that there was any error on the part of the Ministry in relation to this case we cannot direct that the debt not be recovered.

[30] As indicated the appellant's submissions on this second question of law are concerned with the Authority's conclusion that it preferred the evidence of the case manager that she was unaware that the appellant was married during the relevant period. On an appeal on a question of law, this Court cannot be asked to re-visit the Authority's findings as to credibility unless the finding was irrational in some way. In this case the documentary evidence is consistent with the case manager's evidence and inconsistent with the appellant's perspective. It is quite possible that there was an honest mistake on the appellant's part and that she thought the case manager did know of the marriage but in the end that is by the by. The Authority was entitled to reach the credibility finding that it did and it is not for me to re-visit that conclusion.

[31] The question for the Court to consider is whether the Authority erred in its application of s 86(9A) of the Act. The Authority concluded that the overpayment was not caused wholly or partly by an error to which the debtor (the appellant) did not intentionally contribute. Rather, the Authority concluded that the debt was caused by the appellant's failure to inform the Ministry of her marriage. On the basis of this conclusion, the Authority was right to conclude that it could not make a direction under s 86.

[32] I do not consider therefore that there was any error in the Authority's approach.

Conclusion

[33] The two questions of law are answered:

(i) Yes

(ii) No

Therefore the appeal is dismissed.

"**Joseph Williams J"**

Solicitors:
Crown Law Office, Wellington for Respondent

Copy to: Mrs Tania King, 4 Walker Road, Rotorua 3015