



Précis Paper

Abdelrahim; Secretary, Department of Social Services and (Social services second review) [2020] AATA 5140

Abstract – This paper critically analyses the complexities and contentious legal areas that are encompassed within the 'Abdelrahim' case; offering unique insight into the interpretation of thresholds, evidence, cultural/religious factors, sexual relations, safety concerns, marriage and social aspects.

Discussion Includes

- Facts
- The Legal Test
- Relevant Period
- Review
- Evidence
- Cultural and Religious Factors
- The Overseas Trip
- The Paternity Dispute
- The Reconciliation Phase
- Senior Member Involvement
- Social Aspects
- Tribunal Determinations
- CJWT Case 2012

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1. In this edition of BenchTV, Angelina Torrisi (Director), and Ahmed Rizk (Barrister), discuss the legal lessons learnt from the 'Abdelrahim' case, and its impact on family and social security-related law. Discussion topics include the objective test, reviews, oral evidence, paternity issues and the fundamental need to take cultural/religious contexts into consideration.

Facts

2. In this case, Ahmed was acting for the wife who was one of the key figures in this case. Her name is Ms Abdelrahim; respondent. She made an application to the Tribunal for a review. However, within a short period of time, the role of parties were actually reversed.
3. When this case was recorded, the appropriate counsels/barristers were listed in the wrong order.

The Legal Test

4. The test outlined in Section 4 (2) of the Social Security Act 2002 (Cth) formed the crux of this case.
5. A person who is legally married is classified as a member of a couple, unless they are living separately on a permanent and indefinite basis.
6. Subsection 3 of the SSA sets out the criteria for how courts are allowed to inform itself on whether the threshold has been met or not. This is not an exhaustive criteria by any means, but it does provide the key indicators that the Tribunal looks into.
7. In the case, the respondent married Mr Hassan in April of 1999. The separation occurred in 2006. Centrelink and various government departments only became aware of the separation in 2008. From this point onwards, the respondent has been receiving single parent payments.
8. It ultimately comes down to what is the test of the Tribunal. The Tribunal's criteria; financial aspects of the relationship, the nature of the commitment between the parties (social aspects) and the level of emotional support. These are just some of numerous factors of assessment. Ahmed mainly looked into Subsection 3; it contained the aspects.
9. Ultimately, it's an objective test where the Administrative Appeals Tribunal (AAT) have to weigh up all the objective circumstances

Relevant Period

1. The determination made by the Department was for 2010-2018. The respondent has been receiving single parent payments for a period that is longer than 8 years.
2. During that relevant period, the respondent and the husband had 3 additional children. Inevitably, this became a legally contentious matter. By 2010, there were 4 children altogether.
3. When the first child was born in 2012, a review was launched by the Department. There could have potentially been a further review at some other point of time. According to records, the next review was conducted in late 2017 for the payments. The decision of the reviews was passed in 2018. It took the 'full relevant period' (beyond the 8 year period) into careful consideration.
4. Ahmed took on this case in 2020.

Review

5. There are 2 stages of review; internal and further review with the Administrative Appeals Tribunal (AAT). Ahmed participated in the final review which was conducted at the end of November. The judgment was passed before Christmas.
6. The review in its entirety took place remotely. All the parties dialled in and there was an Arabic interpreter. This was reasonably efficient and effective, in light of the COVID-19 circumstances. Mr Hassan appeared through video link. All the parties were able to see each other during the review.
7. The applicant was the Secretary of the Department of Social Services. As mentioned earlier the respondent was Ms Abdelrahim.

Evidence

8. One the eldest daughters gave evidence and so did Mr Hassan; oral evidence via phone.
9. In 2006, the whole family lived together. They were supported by the Housing Commission. At one stage, Mr Hassan bought a property adjacent to the family home.
10. The living arrangements were one of the key matters that the Tribunal had to consider in this instance.
11. In this case, the uncontested oral evidence from all 3 witnesses primarily supported that Mr Hassan did not live with his wife or his children within that relevant period.

12. The case became increasingly complex when Mr Hassan's address (according to documents) was cross checked with the respondent's address; the eldest daughter's evidence helped in this regard.
13. It was found that during the relevant period, Mr Hassan moved around from one accommodation to another frequently. He did not have a fixed place of residence. He listed his family home address so that his mail would arrive at a secure and reliable location.
14. Mr Hassan expected his children to inform him when the mail arrived. His documents (e.g. licence with RMS) were compared with the official documents, and that caused great tension. There was a degree of ambiguity at this point, in relation to the relevant period.
15. In 2012, Mr Hassan began to reside in his newly purchased property (the one that is adjacent to the family home) for minor periods of time throughout the relevant period. The idea of living next door raised questions regarding what is a household (Is it a 1 family home or how far can the nuclear structure be spread?).
16. None of the facets of this case must be viewed in isolation. Fundamentally, the fact that the respondent and Mr Hassan had 3 children during the relevant period was placed against all the other key facts.
17. The successful submission looked into the totality of the relationship and found that it was practically non-existent. It was held that having children is not a strong indicator that the relationship was intact.
18. When the Tribunal was putting their decision together they did refer to some cases. A large number of these cases were raised between the parties. The applicant's statement of facts included a lengthy list of authorities.
19. The Tribunal does not use a formulaic approach.
20. What the tribunal really needs to do is to look at the totality of the relationship.
21. The submission that was put forward by the respondent requested the Tribunal to look into the cultural backgrounds of the individuals involved. It was put forward through arguing how the actions and decisions of the parties should be viewed from a cultural standpoint. It recommends the Tribunal to make findings in support of that rationale.

Cultural and Religious Factors

22. Both, the respondent and Mr Hassan disclosed that they delayed applying for a divorce due to religious reasons. At the moment, they are still formally married.
23. The cultural background was something that the Tribunal picked up on.
24. Ahmed's side made a number of submissions in regards to the cultural and religious context of the case. Both parties came from a conservative cultural background. They were immigrants, but they still strongly adhered to their native culture.

25. In that culture, divorce was not even seen as an option. There were also constraints in the manner that they publicly presented themselves.
26. Looking at these facts in isolation made it a little bit tricky but when you looked at the totality of the relationship, there were complicating factors.
27. Both parties were focused on demonstrating that they were married to satisfy the cultural and religious framework that was imposed by their families. They did not want to be perceived as emotionally damaged or not put together in any sense. In reality however, they were not in good terms.

The Overseas Trip

28. The couple also went overseas together once with the children, during the relevant period. Once they arrived at their destination, they parted ways. They visited their own families separately as though they were not related.
29. In that situation, the husband wished to go overseas as he was concerned about the safety and wellbeing of his children. That is why the children travelled with him. It was not a typical family holiday.

The Paternity Dispute

30. The court even considered the nature of the sexual relationship between both parties and what led to the children being born. There is specific detail in the submission.
31. The husband had disputed paternity over the first child. DNA tests were carried out. He disclosed that the nature of the sexual relation with his wife was infrequent and was not common during the relevant period; the overall situation. Sex was not a regular feature of their mundane lives. He even submitted claims that the first child was not a result of his sexual activity.

The Reconciliation Phase

32. However, there was a brief 3 week phase where the couple tried to re console but it was short lived and unsuccessful. The intention was to do it for the children.
33. The evidence given by the children was a testament to the fact that the relationship between the parents was progressively worsening, hence there was no room for reconciliation.
34. The possibility of reconciliation does not preclude the finding that both have been living separately on a permanent and indefinite basis.

Senior Member Involvement

35. In this case, the senior member was quite actively involved. It is common in these types of matters. Some members are more interventionist than others but they do try to get involved in remote hearings and ask questions. At times, these questions can be pointed during cross-examination.
36. The senior member did commonly ask such questions.

Social Aspects

37. In terms of the social aspects of the relationship, it is important to know that the general public does not know that the couple is separated. Occasionally, they would go to religious events as a family. In this sense, they actively tried to conceal family problems. But the following question remains - How much significance can the Tribunal draw from the public portrayal.

Tribunal Determinations

38. It's really about trying to place each individual piece of evidence into the context that allows the Tribunal to make that final determination.
39. Ultimately, the decision was that there was no debt that needs to be paid back. During the relevant period, the respondent was not a member of the couple. Therefore, no money was owed to the Commonwealth. It came down to weighing up the documentary evidence about 3 main points ; the address, children and the social aspect of the relationship.
40. The Tribunal found that there was no real substantive relationship between the respondent and her husband outside of the parenting context.
41. The outcomes of Section 4 (3) of the SSA were mixed due to the complicated nature of the relationship. Many of the bills (e.g. school fees) were paid for, by the husband. Both parties also borrowed sums of money from each other at various points of time.
42. There were no joint bank accounts or any equivalent of financial dependency. Both parties were financially independent. When Mr Hassan purchased the adjacent property, his wife was not aware. He did not consult with her about the purchase.

43. There was a clear level of separation in terms of how each person approached their finances.
44. The Tribunal accepted that there were some indicators that supported a financial relationship between a couple, but it was cancelled out by the above mentioned factors. Overall, it was a neutral finding; did not lean towards one particular direction.
45. When it comes to the nature of the household, the key issue was where the parties were living. The Tribunal found that the respondent's husband did not reside at the family home (where she resided with children). Basically, they did not reside together during the relevant period. The 3 week reconciliation period in 2015 is an exception.
46. This informed the rest of the Subsection. The nature of the household suggested that the Mr Hassan and his wife were not members of a couple.

CWJT v Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 910

47. That case had factual and conceptual similarities to the 'Abdelrahim' case.
48. The Tribunal said it was quite remarkably similar.
49. It involved 2 people who were legally married. It was a question of whether they were a couple. There were issues about the cultural background and how that informed their decisions and public display of the relationship.
50. This case extensively looked into why neither party considered divorce and uncovered private detail to a great extent.
51. It was held that both parties were not members of a couple; a clear parallel with the 'Abdelrahim' case.

BIOGRAPHY

Angelina Torrisi

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Angelina practices primarily within Family Law, where she has extensive experience and knowledge in all family law related matters. Angelina regularly appears before the Family Court of Australia and the Federal Circuit Court of Australia in often complex Family Law litigation including Parenting and Property matters. Prior to her opening her law firm, Angelina has been an Associate at Aitken Lawyers and Senior Associate at Taylor & Preston Lawyers.

Ahmed Rizk

Barrister, 8 Wentworth Chambers, Sydney

Ahmed was admitted as a lawyer in 2015 and called to the Bar in 2020. Prior to coming to the Bar, Ahmed worked as a solicitor at Gilbert + Tobin, Mills Oakley and ASIC.

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Focus Case

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Cases

CWJT v Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 910

Legislation

Social Security Act (2002) (Cth), s 4.