Child endowment: absence from Australia

KEHAGIAS and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. V81/62)

Decided: 8 October 1981 by R.K. Todd

Anthia Kehagias was born in Greece in 1955. She migrated to Australia with her family in 1970. In 1975 she married and also became a naturalised Australian citizen. In February 1976 she gave birth to a child, for whom she was granted child endowment by the DSS.

At about that time, she and her husband decided to travel to Greece with her husband's parents. She notified the DSS of this intention (saying she expected to return in December 1976). The DSS suspended her child endowment payments on the basis that s.104(5) of the *Social Services Act* prevented payment because her absence was to be less than 12 months. (This was, as the AAT later held, a mistaken reading of s.104(5).)

In the event, Kehagias did not return to Australia until March 1980, with her husband and her two children (the second child was born in May 1977). She was then granted endowment for both children from 15 April 1980. She claimed payment of endowment for her first child during their absence from Australia; the DSS rejected that claim and Kehagias applied to the AAT for review of that decision.

The legislation

The legislation which deals with entitlement to child endowment during absence from Australia is complex or, as the AAT said, 'not without difficulty'.

Section 96 of the *Social Services Act* deals with initial entitlement to endowment and requires the claimant to be 'in Australia'. As there was no argument over the Kehagias' initial entitlement, s.96 posed no problem.

Section 103(1) provides that endowment (for which a person has already qualified) ceases to be payable if –

> (d) the endowee ceases to have his usual place of residence in Australia, unless his absence from Australia is temporary only; [or]
>
> (e) the child ceases to be in Australia, unless his absence from Australia is temporary only . . .

It was this provision which was critical to Kehagias' claim for payment of endowment while she was overseas.

Section 104 provides for the payment of endowment during temporary absence from Australia: its effect, said the AAT, was to overcome problems in meeting the initial entitlement provisions of s.96, and to overcome any bar to continued payment caused by s.103. Accordingly, s.104 could only be relevant to Kehagias' claim if her payments had been properly suspended under s.103. Section 104(1) reads:

> 104(1) Where –
>
> . . .
>
> (e) a man or woman whose usual place of residence is in Australia is temporarily absent from Australia,
>
> and that man or woman has the custody, care and control of one or more children, this Part shall have effect as if that man or woman and each of those children were in Australia.

(Section 104 goes on to limit the effect of s.104(1) – see, in particular, sub-ss.(2) and (5). But these sub-sections were not relevant to this case.)

The AAT then focussed on the real questions to be decided:

> The real issue therefore becomes whether there was any event which pursuant to s.103 would result in the endowment ceasing to be payable. If there was no such event then there is no room for the operation of s.104, for it would be patently unnecessary to seek to bring the applicant within a statutory fiction to establish continuing entitlement when in reality she has not been disentitled to receive the benefit. Thus the critical questions are first, whether pursuant to s.103(1)(d) the applicant ceased to have her usual place of residence in Australia, and secondly, whether her absence from Australia was temporary only. If Australia did not cease to be the usual place of residence of the applicant the characterisation of the absence as temporary or otherwise is not necessary. In truth of course the facts that determine the question of the retention or loss of Australia as a usual place of residence will usually also determine the question whether an absence should be chaacterized as temporary. 'Absence' is relatec logically to the loss of the presence that s a major factor in determining what is the uua place of residence.
>
> (Reasons for Decision, para.9.)

(After pointing out that th *Social Services Act* used a confusing variety of terms to describe the same thing ('s in'; 'usual place of residence in'; 'living in'; 'resident of'), the AAT suggestedthat the Act 'would benefit from an across the board rationalisation and standadisation of terms': Reasons for Decision, para.12.)

Reviewing the evidence, the AAT found that Kehagias and her husband had retained Australia as their usual place of residence for 12 months after leaving the country. During that time they lived off savings and helped restore an old family home in a village. But, after that 12 month period, they occupied a flat in the city of Salonika and the husband obtained a job. From that point, the AAT said, there was 'a fundamental break . . in the applicant's and her husband's ties with Australia . . . From that point, the holiday was over and she commenced to have her settled or usual abode in Greece': Reasons for Decision, paras.13–14.

Accordingly, s.103(1) prevened payment of endowment for the period April 1977–March 1980. Did s.104 operate so as to save Kehagias from the impact of s.103(1)?

> The only provision which could be relevant is s.104(1)(e) but the question posed by that provision answers itself given my finding, already made for the puposes of s.103(1)(d), that Australia was no longer the usual place of residence of the applicant after the end of her first year in Greece.
>
> (Reasons for Decision: para.15)

The AAT then remitted the matter to the DSS for reconsideration in accordance with its direction that Kehagias continued to have her usual place of residence in Australia and that her absence was temporary for 12 months after her departure; but that, from then on, her usual place of residence was in Greece until her return to Australia in March 1980.