VELLA and DIRECTOR-GENERAL OF SOCIAL SERVICES (No N81/71)

Decided: 19 March 1982 by A. N. Hall, M. Glick and M. McLelland.

Charles Vella was born in Malta in 1937 and, after five years of education, migrated to Australia in 1954. In Australia he worked as a labourer.

In 1956 he was seriously injured when he accidentally struck a stick of gelignite with a pick and it exploded. He did not work for three years and his return to work in 1959 was short-lived because he found the work too hard. In 1961 he was employed by BHP as a labourer and stayed in this job for nine years.

He then worked in a series of jobs as a labourer and cleaner until September 1978, when he stopped work, complaining of back pain and sore eyes. (These complaints had interfered with his work over the preceding four years: he had changed jobs several times; and had been unemployed for an extended period.)

On 15 April 1980, Vella (who was then living in Wagga) applied for an invalid pension. The DSS rejected this application and Vella applied to the AAT for review of the decision.

The assessment of incapacity

The AAT was presented with medical reports and evidence from six doctors, from Vella and his wife and from a CES officer. The medical evidence came from an opthalmic surgeon, a general practitioner, an orthopaedic surgeon, two psychiatrists, a psychologist and a specialist in rehabilitation medicine.

On the basis of the medical evidence, the AAT was satisfied that Vella suffered from heavy lumbar pain which prevented him from doing heavy manual work but he was still physically capable of undertaking light work which did not involve heavy lifting or bending. As a result of the 1956 accident, his eyes were affected by dust, smoke and glare and this incapacitated him for some types of work.

His psychiatric condition was more complex: one psychiatrist found an anxiety state, the psychologist said that his anxiety state was compounded by agoraphobia, which took the form of 'a fear of leaving the security of his home'. The AAT observed:

> Whether he be correctly diagnosed as suffering from an anxiety state or agoraphobia or both, the undeniable fact is that the applicant exhibits symptoms of a neurotic state of mind which all the experts agree to be genuine and which they all agree are contributing to a significant degree to the applicant's present incapacity for work. When the applicant's mental and physical impairments are viewed as a whole it is difficult to escape the conclusion that in his present frame of mind and with his physical disabilities, the applicant's capacity for work is very small indeed.

(Reasons for Decision, para. 33)

The Tribunal said that there was a significant hysterical element involved in his incapacity. If his back pain could be relieved and if he could undergo a rehabilitation programme, then his own view of himself, as a man whose life was finished, could be changed.

But left to his own resources, there was little prospect that his mental state would improve:

> While that mental state persists, we do not consider that the applicant has any residual capacity for work which he is capable of exploiting in the market place. He is limited to light work by his back condition; he is restricted in his avenues of light work by his propensity to eye irritation if he works in a poluted environment; his anxiety state and related conversion symptoms further diminish his ability to maintain a consistent work effort in any type of work. In his present state, the applicant is, in our view, unemployable whether one considers his opportunities for work in the Wagga district or in the wider employment market of one of the major coastal cities.

(Reasons for Decision, para. 35)

(The Wagga CES officer had said there was 'extreme competition for jobs in the Wagga Wagga area' and his office only referred people who were suitable or most qualified for a particular vacancy. Employers rarely hired a person suffering from any disability.)

Rehabilitation

But was this incapacity permanent? The prospects of rehabilitation were, according to the specialist evidence, poor. While Vella should, in theory, benefit from a programme 'aimed at relieving physical and psychological symptoms and embarking on a graduated programme of work conditioning', such a programme was not available in Wagga. Vella would need to spend several months in Sydney and his agoraphobia made him unwilling to leave his wife and home in Wagga. Further, his motivation was poor and the specialist in rehabilitation medicine concluded that he was not suitable for rehabilitation. The AAT said:

> In the circumstances, the question whether rehabilitation treatment at Commonwealth expense is warranted must remain a question for the Director-General having regard to the available resources and the prospects of success. As the matter stands we do not consider that we should defer the applicant's entitlement to an invalid pension until the outcome of any possible rehabilitation treatment is known. If such treatment is undertaken and is successful or if there is any other improvement in the applicant's condition in the future, his entitlement can be subject to review.

(Reasons for Decision, para. 36)

The formal decision

The AAT concluded that Vella was permanently incapacitated for work to the extent of not less than 85% and that he was, therefore, eligible for an invalid pension. It set aside the decision under review and returned the matter to the Director-General with a direction to grant invalid pension from the first pay day after 15 April 1980.

Invalid pension: applicant must be 'present in Australia'

HICKEY and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. A81/79)

Decided: 18 March 1982 by E. Smith.

Section 24(1)(b) of the *Social Services Act* requires that a claimant for invalid pension must be 'residing in, and physically present in, Australia on the date when he lodges his claim for a pension'.

In this decision, the AAT found that this requirement is absolute, and that other provisions of the Act (particularly s.145) provide little chance of avoiding its impact.

Background

Garry Hickey had been classified as a handicapped child and his parents had been paid a handicapped child's allowance until his 16th birthday in 1976. In November 1976 he lodged a claim with the DSS for an invalid pension.

This claim was rejected because Hickey was then living with his parents in Malaysia, where his father had been posted by the Department of Foreign Affairs (his employer).

In December 1978, Hickey returned to Australia with his parents and in January 1979 he again claimed an invalid pension which the DSS granted from 18 January 1979.

Hickey sought payment of invalid pension for the period from 1976 to 1979. The DSS maintained that the *Social Services Act* did not allow payment for that period and Hickey applied to the AAT for review of that decision.

1976 to 10 December 1978

The AAT found that, while in Malaysia, Hickey was 'residing in . . Australia'. This term is given an extended meaning by s.20(1) and (2) of the *Social Services Act*:

Hickey either had his 'home' in Australia or he fell into the definition of an Australian resident for income tax purposes.

But, while he was in Malaysia, he was not 'physically present in Australia' and so could not qualify for invalid pension. This was, said the AAT, 'a fundamental requirement of eligibility' even though the requirement (of presence) had not been placed in the Act to defeat a person such as Hickey: Reasons for Decision, para. 19.

10 December 1978 to 18 January 1979

In this period Hickey was both 'residing in, and physically present in, Australia'; but he had not lodged his claim for pension until 11 January 1979 and it was granted from the next pension pay day (as provided by s.39 of the *Social Services Act*.

Hickey argued that his earlier claim (of November 1976) could be treated as still 'alive' so that his pension could be granted from the date he returned to Australia (and so completed his eligibility). He referred to s.145 of the Act and to *Tiknaz*, 5 *SSR* 45.

The AAT said that s.145 (which allows the DSS to treat a claim for an inappropriate pension or benefit as a claim for the appropriate pension or benefit) was of no help: it was 'concerned with form and procedure, not basic qualifications'. It could not '"cure" the ineligibility resulting from the fact of physical absence from Australia' when the claim was lodged in 1976.

The AAT also rejected the argument based on *Tiknaz*. (In that case, the AAT had observed that the *Social Services Act* 'should be administered beneficially and with common sense', and that the DSS could grant a pension to a person whose entitlement had developed after lodging a claim, without insisting that the person lodge a further claim.) In this case the AAT said that it didn't believe that the earlier Tribunal had been talking about the type of problem in Hickey's case. The DSS could not treat the January 1979 claim as having been lodged on December 1978, or the November 1976 claim as still being alive in December 1978.

The formal decision

The AAT affirmed the decision under review. It also urged 'the strongest support' for approaches to the Department of Finance for an *ex gratia* payment to Hickey.

Widow's pension: portable?

PASINI and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/11)

Decided: 1 March 1982 by R. K. Todd, L. G. Oxby and M. S. McLelland.

This case involved the question of portability of a widow's pension, permitted by s.83AB of the *Social Services Act* and the exception to that portability stated in s.83AD.

The legislation

Section 83AB declares that a person's right to be paid a pension is not affected by her or his leaving Australia, 'except as provided by this Part'.

One of these exceptions is set out in s.83AD which states the general rule that a pension is not payable outside Australia to a former Australian resident who has returned to Australia, claimed a pension and left Australia less than 12 months after returning here: s.83AD(1).

However, the Director-General 'may determine' that the general rule in s.83AD(1) does not apply to a person whose reason for leaving before the end of the 12 month period 'arose from circumstances that could not reasonably have been foreseen at the time of his return to . . . Australia'.

The facts

Elia Pasini married in Italy in 1958 and, in the same year, came to Australia with her husband (who had already spent seven years here). She became an Australian citizen and bore five children. Her husand contracted throat cancer and was forced to give up work in 1972. He did not claim any social security (apparently ignorant of its availability) but returned to Italy with his family.

Mr Pasini died in 1977, leaving his widow with no pension rights in Italy—she had 'great difficulty' in supporting her children.

In 1979 a priest from Australia told Mrs Pasini that if she returned to Australia for two months she could qualify for the Australian widow's pension, payable in Italy. This advice was wrong, as s.83AD effectively requires 12 months residence.

However, Pasini left for Australia almost immediately and arrived on 7 February 1979 with her youngest daughter (aged 10). She left her other four children in Italy in the care of the eldest, who was 20.

She applied for a widow's pension which was granted in April 1979 from 15 February 1979. Before she was notified of this grant, she spoke with a welfare officer in the DSS, who told her that she would need to stay 12 months in Australia before her pension could be transferred to Italy. Pasini said she was worried about her 14-year-old son Phillip who was already distressed at her absence and told the welfare officer of a letter which said that her son's mental state had seriously declined.

It became clear to the welfare officer that Pasini was regularly receiving alarming letters from Italy about Phillip's health and about her 17-year-old daughter, Maria, who was allegedly 'on drugs'.

In June and July 1979, Pasini and her member of Parliament asked the Minister for Social Security to waive the requirement that she stay in Australia for 12 months. A departmental letter in reply said that, because Pasini had come to Australia intending to obtain the pension and immediately return to Italy, there was no discretion to waive the 12 month residence requirement.

In September and October 1979 Pasini consulted a general practitioner who told her she was mentally depressed because of her worry over her children in Italy.

On 8 October 1979 the Minister for Social Security wrote in response to another request from Pasini (who had said that she would try her best to stay another three months but begged to be allowed to leave before Christmas). The Minister said that Pasini's reason for leaving was regarded by the Department as foreseeable at the time she returned to Australia. Accordingly, if Pasini left Australia before 7 February 1980, 'it will be necessary to cancel your pension'.

It seems that Pasini then resigned herself to staying for the full 12 months. But, in late October, she was so depressed that her doctor referred her to the local DSS office where she saw a DSS social worker on 25 October. The social worker spoke with a pensions officer, to whom she gave a correct outline of Pasini's case. After this conversation, the social worker returned to Pasini and told her, quite unequivocally, that she could return to Italy to care for her children and that she would receive her Australian pension there. The social worker helped Pasini complete an application for pension to be paid overseas.

Pasini left Australia on 30 October 1979. The DSS then cancelled her pension and refused to apply s.83AD(2) in her favour.

Pasini applied to the AAT for review of these decisions.

Pasini did not attend the hearing, but was represented by a lawyer. The Tribunal dealt with the case on the basis of documents filed by the parties and oral evidence from the DSS welfare officer and the DSS social worker.

The AAT's decision

Pasini's lawyer argued that there were four reasons for Pasini leaving Australia inside 12 months and that none of these could reasonably have been foreseen when she returned to Australia:

(1) Maria's involvement with drugs;
(2) Phillip's mental situation;
(3) Pasini's illness, caused by worry over her children; and
(4) the wrong advice from the DSS on 25 October that she could leave Australia.

The AAT said that the last of these was not 'a reason for leaving within the meaning of s.83AD(2)'. Rather, it removed a bar to her leaving. However, the other reasons were reasons for leaving:

> Her real reason for leaving was that her ability to contemplate the situation of her children with any sort of equanimity had become stretched to breaking point having regard to her understanding of the state of their welfare. Before she left Italy she might reasonably have foreseen that there would be some stresses and strains placed upon her children. But in our opinion she could not reasonably have foreseen the degree and severity of the situation in which two of her children, and her own health, were imperilled. That situation arose chiefly because of the length of her absence, and this itself could not reasonably have been foreseen because she had been told and believed that she would