**TSAOUCIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/145)**

**Decided:** 21 September 1982 by J. B. K. Williams.

Peter Tsaoucis was born in Greece and migrated to Australia in 1965. He had little formal education, spoke little English, and worked in labouring jobs. He had hernia operations in 1974, 1978 and 1981.

In June 1981 he applied to the DSS for an invalid pension; this application was rejected. He applied to the AAT for review of this decision.

Tsaoucis' surgeon gave evidence that he had made a good recovery from the 1981 operation. There was a 90% chance of full recovery, so that he could do heavy labouring work within about three years. In the meantime, he could undertake light manual work. A surgeon consulted by the DSS confirmed this view.

The AAT found, on the basis of this evidence, 'that, whatever the applicant's present incapacity, expressed in the percentage terms may be, it is [not] an incapacity which is likely to last indefinitely': Reasons for Decision, para. 8. Accordingly, Tsaoucis was not at least 85% permanently incapacitated for work.

**Formal decision**

The AAT affirmed the decision under review.

# Child endowment: late application

**FLYNN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/575)**

**Decided:** 12 October 1982 by A. N. Hall.

Mrs V. J. Flynn was granted child endowment for her twin children in May 1964. Shortly after their 16th birthday (in April 1980), the DSS mailed to Flynn a claim form for 'student family allowance' (that is, child endowment for a full-time student aged 16 or more). But, according to the DSS, Flynn did not return this form; and the DSS cancelled the twins' endowment.

In August 1981, Flynn realised that she was receiving endowment only for her three younger children and not for the twins, who were full-time students. She applied for and was granted student family allowance (from September 1981); but the DSS refused to back-date this allowance.

Flynn applied to the AAT for review of this refusal.

**'Special circumstances' for back-dating payment?**

Where a person claims child endowment more than six months after becoming eligible, the endowment is payable from the date of the claim: *Social Security Act*, s.102(1)(b). However the Director-General may back-date payment (to the date of eligibility) 'in special circumstances': s.102(1)(a).

During the AAT hearing (conducted by conference telephone), Flynn had said that she was sure that she had returned the claim forms to the DSS in May 1980. However, Flynn subsequently wrote to the AAT saying that she was not certain of this and that she could not sign a statutory declaration in support of her statement during the hearing.

The Tribunal observed:

> [A]s the evidence does not enable me to find that the claims were posted to the Department, no question arises of there being 'special circumstances' for extending the date for lodgment of the claims until . . . August 1981 . . . The Applicant's case depended upon my finding as a fact that the claims were completed promptly and returned by post and that they must have gone astray in the post or within the Department. No other basis for a finding of 'special circumstances' was suggested.

(Reasons for Decision, para. 12)

**Formal decision**

The AAT affirmed the decision under review.

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**MICHAEL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/481)**

**Decided:** 21 October 1982 by R. K. Todd.

Leonidas Michael asked the AAT to review the Director-General's refusal to back-date payment of child endowment for his 'student child'.

Michael and his wife had received endowment for their son from July 1962 until shortly after his 16th birthday, when the endowment was cancelled because Mrs Michael had not done anything to satisfy the DSS that her son was a 'student child' or to claim student endowment for the son.

Early in 1981, Michael noticed that endowment was no longer being paid into his bank account. Mrs Michael lodged a claim for student endowment which the DSS granted. But the DSS refused to back-date payment.

**'Special circumstances' for back-dating payment?**

Michael claimed that there were 'special circumstances' to justify retrospective payment of the endowment. (Section 102(1)(a) gives the Director-General a discretion to back-date payment in 'special circumstances': see *Flynn*, in this issue of the *Reporter*.)

Michael said that endowment had been paid into his current account which was also used as the trading account for the shop which he operated. Because of the mixing of family and business money and because the reconciliation of bank statements was left to his accountat, the cancellation of the endowment had not been noticed for two-and-a-half years.

After referring the earlier decision in *Faa* (1981) 4 *SSR* 41, the Tribunal said that none of the 'circumstances disclosed in the present matter are "special" within the meaning of the Act': Reasons for Decision, para. 9.

**Formal decision**

The AAT affirmed the decision under review.

# Handicapped child's allowance: 'constant care'

**SCHRAMM and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/95)**

**Decided:** 1 October 1982 by R. K. Todd.

Janet Schramm had been granted a handicapped child's allowance in respect of her daughter Melanie, who suffered from cystic fibrosis. This had been granted under s.105 of the *Social Security Act*, that is, on the basis of 'severe handicap', in May 1977. In April 1979 this was cancelled. In September 1979, Schramm was granted a handicapped child's allowance under s.105JA, that is, on the basis that her child was 'handicapped'—one needing care and attention 'only marginally less than he would need if he were a severely handicapped child' (s.105H(1)); but, because of the income test which applied to an allowance under s.105JA, the rate payable to Schramm was 'nil'.

In September 1980 Schramm re-applied claiming that her child was severely handicapped. The DSS rejected this claim and Schramm applied to the AAT for review.

**The evidence**

The tribunal described the care and attention given to Melanie by Schramm or her husband. This included physiotherapy sessions three to five times a day, supervision of drug taking and diet, special swimming sessions and other physical exercise recommended by doctors. Medical evidence was given to the AAT on the need for constant physiotherapy and the Tribunal said that treatment could occupy three hours a day. A number of expenses had been incurred in relation to the child, including medication, physiotherapy equipment and medical insurance. Melanie had commenced preschool in 1981 for two-and-a-half hours a day and joined an ordinary primary school in 1982, a decision strongly supported by her doctor, who gave evidence. Schramm had recently begun part-time work, although she or her husband need to be within close reach of the school in order to

give drug and physiotherapy treatment if the child was in distress.

**Before starting pre-school: qualified for the allowance**

The Tribunal concluded that prior to Melanie attending pre-school, she had required constant care and attention and was a severely handicapped child under s.105J. The Tribunal adopted the definition of the term 'constant' from *Yousef* (1981) 5 *SSR* 55, that is, 'continually recurring'.

**After starting pre-school: not qualified for the allowance**

The Tribunal pointed out that, even if it was conceded that Melanie needed constant care and attention, under s.105J this must be provided by the person who had the custody care and control of the child and attention must be provided in a private home. Once Melanie commenced pre-school, the Tribunal stated, the constancy of the care was in question; the care was being provided by persons other than the parents; and the care was not being provided in a private home. (The Tribunal decided that s.105KA, dealing with entitlement during temporary absences from home, did not apply. The Tribunal stated that this section envisaged absences for a day or series of days, not absences during some portion of the day.)

**The need for reform**

Although the applicant had made no claim under s.105JA—where one has to be subject to severe financial hardship in the care of a 'handicapped', as opposed to a 'severely handicapped' child, the Tribunal, as in *Yousef*, called for a rethinking of the legislation.

**Formal decision**

The Tribunal set aside the decision under review and directed that the applicant was entitled to handicapped child's allowance under s.105J of the *Social Security Act* from September 1980, but only until the date the child commenced pre-school in 1981.

# Single parents: 'cohabitation rule'

## PETTY and DAVIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/182 and V81/183)

**Decided:** 23 July 1982 by A. N. Hall, W. B. Tickle and J. G. Billings.

This was an appeal against the DSS' refusal to grant Ms Petty a supporting parent's benefit, and the decision to cancel Mr Davis' supporting parent's benefit. The decisions were made because the DSS argued, the applicants were living together on a *bona fide* domestic basis though not legally married.

Mr Davis had two children by a former *de facto* wife who were living with the applicants, and Ms Petty had a daughter, and all three were living with the applicants.

**What constitutes cohabitation?**

The applicants argued that they were both entitled to be considered as sole parents even though they lived under one roof and each received some economic support from the association.

The Tribunal adopted the observations from the earlier decision of *Lambe* (1981) 1 *SSR* 5, that 'all facets of the interpersonal relationship of the woman and the man with whom she is allegedly living as his wife need to be taken into consideration'. Some degree of permanence and exclusiveness were essential; the inter-relationship of the parties and any children was relevant; so was the way the parties presented their relationship to the outside world; and financial support was an important, but not crucial, consideration. As the AAT said in *Lambe*:

> [I]t is surely a notorious fact that marriage, in present day society, allows considerable scope to the parties to develop their relationship as they see fit, without damaging the fundamental integrity of that relationship as a marriage.

**The Tribunal's assessment of relationship**

The Tribunal went on to consider the various elements in the relationship between Petty and Davis. They found that Davis and Petty had a sexual relationship; that each of them probably had sexual relations with others during the time they lived together; that Davis had signed the birth certificate of a child born to Petty as the child's father; that Petty had accepted some responsibility for Davis' children; and that Petty was known by her own name and not as Mrs Davis. On their financial relations the Tribunal said:

> Whilst a system of joint finances has to some extent been forced upon the parties by the refusal of the Department to pay them separate benefits in their own right, the very loosely defined financial arrangements that have subsisted since November 1980 do not suggest that the parties are concerned about maintaining financial independence from each other.

(Reasons for Decision, para. 28)

The Tribunal concluded that, at least since her birth, Petty's daughter had been accepted as a child of Davis and Petty, that Davis had assumed a father role and they jointly constituted a family unit; that Petty was involved in the care of Davis' boys and shared a concern for their welfare; that, if Petty and Davis were involved in other sexual relationships, these were by mutual consent and not seen as destructive of their relationship with each other. 'We therefore find that Mr Davis and Ms Petty are living together in a *bona fide* domestic basis as husband and wife although not legally married': Reasons for Decision, para. 38.

**Formal decision**

The Tribunal affirmed the decision under review.

## TOZER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/222)

**Decided:** 18 October 1982 by W. Prentice.

Coral Tozer (who had four children) was granted a widow's pension in September 1973. In December 1981, the DSS cancelled her pension on the grounds that she was no longer a 'widow' as defined in s.59(1) of the *Social Security Act* 1947. The DSS said that she was living with a man (Young) as his wife on a *bona fide* domestic basis. Tozer applied to the AAT for review of the cancellation. (In June 1982, Tozer moved away from Young and her pension was reinstated. This appeal concerned the non-payment of widow's pension from December 1981 to June 1982.)

**De facto relationships: difficult to identify**

The Tribunal pointed to the difficulty of applying s.59(1) of the Act to the circumstances of a particular couple. The two phrases, 'living with a man as his wife', and 'on a *bona fide* domestic basis', presented problems 'in these days of widespread rejection of long-established social and ethical ideas, in "western" countries at least, and of experiment in the permutations and combinations of all aspects of social relationships . . .' After mentioning the AAT decisions in *Lambe*, (1981) 1 *SSR* 5, *Ferguson*, (1982) 5 *SSR* 55, *Waterford*, (1981) 1 *SSR* 1, and *Tang*, (1981) 2 *SSR* 15, the Tribunal continued:

> A number of personal relationships have been held not to come within the exclusion from the definition of 'widow', in decisions that would no doubt be regarded as acceptable and understandable by some sections of society, but might appear strange perhaps to others. In a matter such as entitlement to pensions from public monies one imagines that there would be agreement however, that a decision must be made on objective indicia rather than on the subjective notions of the persons concerned as to their relationship (re *Tang* . . .). And a study of the decisions appears to indicate that to date, there has been no instance where a woman living under the same roof as, and enjoying a sexual relationship of a continuing nature with (to the apparent exclusion of others) a man, has been held *not* in the particular circumstances, to be 'living with a man as his wife', within the meaning of the excluding definition of 'widow' in s.59(1) of the Act. Nevertheless the task of interpretation and application must be attempted in each case such as this—on its own special facts, using many well-understood indicia as guides to the nature of the relationship, re *R.C.* (1981) 3 ALD 334, at 349 . . .

(Reasons for Decision, para. 4)

**The AAT's assessment: weighing the factors**

The Tribunal found that Young had provided the sole support (apart from child endowment) for Tozer and her three children from December 1981 until he became unemployed in May–June 1982. Young had then applied for unemployment benefit at the married rate. Tozer and Young had 'regularly enjoyed sexual intercourse to the apparent exclusion of any other person', and each contributed to the running of the joint household.