

Q/K1/5404

## SOCIAL SECURITY

## Reporter

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## Administrative Appeals Tribunal decisions

## Widow's pension: residence in Australia

## KOON LIN HO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/20)

**Decided:** 24 November 1982 by W. Prentice.

The applicant's husband had migrated to Australia in 1970, leaving his wife and daughters in China. Early in 1980, the applicant and her daughters were granted permanent resident status by the Commonwealth government and they left China on 2 March 1980, to travel to Australia via Hong Kong. Her husband was killed in a car accident (in Australia) on 23 March 1980; and the applicant and her daughters arrived in Australia on 4 April 1980.

The applicant applied for a widow's pension in June 1980, but the DSS refused to grant this pension because she was not 'residing permanently' in Australia when her husband died.

**The legislation**

Section 60(1) provides that a widow with the custody of a child is qualified to receive widow's pension if she is residing in, and is physically present in, Australia, when she lodges her claim and if

- (d) In the opinion of the Director-General, she and her husband . . . were, on the occurrence of the event by reason of which she became a widow, residing permanently in Australia . . .

Section 61 extends the scope of these residence requirements:

- (1) For the purposes of sub-section 1 of the last preceding section, a claimant shall be deemed to have been resident in Australia during a period of absence from Australia

if the Director-General is satisfied—

- (a) that during that period, the claimant's home remained in Australia; and  
 (b) in the case of a claimant who at the time of her absence from Australia was a widow—that, during her absence, she maintained such of her children as were under the age of 16 years: and were dependent on her immediately prior to her leaving Australia.
- (2) For the purposes of sub-section 1 of the last preceding section, a claimant shall be deemed to have been resident in Australia—
- ...  
 (b) during a period of absence from Australia during which the claimant was a resident of Australia within the meaning of any Act relating to the imposition, assessment and collection of a tax upon incomes . . .

Counsel for the applicant argued that she could be considered as 'residing permanently in Australia' within the meaning of s.60(1)(d). The applicant contrasted s.60(1)(d) with s.60(1)(c) which uses the phrase 'residing and is physically present in Australia', arguing that the word 'residing' meant an act of residency, without necessarily the element of physical presence. Counsel referred to the deeming provision under s.61(2), arguing that it applied to the applicant because either she had her husband's Australian domicile, or she had found herself a domicile in Australia once she had left China intending to join her husband here. Counsel argued that gaining such Australian domicile made her a resident of Australia by virtue of s.6 of the *Income Tax Assessment Act* which

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defines a resident of Australia as including 'a person . . . whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia'.

#### Physical presence an essential part of 'residence'

The Tribunal pointed to the many different phrases referring to 'residence' in the *Social Security Act*. It felt that the 1974 insertion in s.60(1)(c) of 'and is physically present in' (which controls the date of claim) was unlikely to have been intended to clarify the meaning of 'residing permanently in Australia'.

The Tribunal reasoned that 'the presence of the word "permanently" in association

with the conjunction of the spouses (in s.60(1)(d)), to my mind calls for the exclusion of the notion at the one time of residence "in" and residence "out" of Australia'; Reasons for Decision, para. 9. Thus the phrase 'residing permanently in Australia' required a physical presence, not just a residential status.

#### 'Absence' must follow initial presence

The Tribunal considered the meaning of s.61. Under s.61(1) the Tribunal stated, as the applicant had conceded, the phrase 'during a period of absence' required an initial presence. More importantly for the applicant here, the Tribunal decided that the phrase 'period of absence' in s.61(2), given

that it qualified both the phrases 'continuously resident in Australia' and 'residing permanently in Australia' (s.60(1)(e) and (f)) also required an initial presence.

The Tribunal concluded that the Director-General had been right in deciding that, before Koon Lin Ho 'had left Hong Kong, that being the time during which her husband died, it could not be said that "she and her husband were residing permanently in Australia"': Reasons for Decision, para. 10.

#### Formal decision

The AAT affirmed the decision under review.

## Widow's pension: bigamous marriage

### BARON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/173)

**Decided:** 18 November 1982 by D. G. McGregor J.

Baron applied for review of the Director-General's refusal to grant her a widow's pension.

The applicant had had a bigamous marriage annulled on 14 March 1975 and applied for the widow's pension on 14 July 1980. The Director-General refused to grant the pension. The applicant appealed to the AAT, contending that she was a widow within the meaning of the Act and entitled to a Class B widow's pension.

#### Legislation

Section 59(1) of the *Social Security Act* contains an expanded definition of the term 'widow' as used in s.60(1) of the Act (which defines the qualifications for widow's pension):

'widow' includes—

(a) a dependent female;

(b) a deserted wife;

(c) a woman whose marriage has been dissolved and who has not remarried; . . . and

(e) a woman whose husband has been convicted of an offence and is imprisoned and has been imprisoned for a period of not less than 6 months . . .

The terms used in paras (a) and (b) are further defined in s.59(1):

'dependent female' means a woman who, for not less than three years immediately prior to the death of a man (in this Part referred to as the man in respect of whom she was a dependent female), was wholly or mainly maintained by him and, although not legally married to him, lived with him as his wife on a permanent and bona fide domestic basis;

'deserted wife' means a wife who has been deserted by her husband without just cause for a period of not less than six months . . .

#### Are these categories exclusive?

The Tribunal considered the meaning of the word 'includes' in the above sections. It cited *Dilworth v Commissioner of Taxation* [1899] AC 99 at 105 where it was decided that 'include' could mean 'mean and include', that is, that it could be exclusive. The Tribunal decided this was not such a case, because if it were so the primary meaning of 'widow' would be taken away and one would have to imply the words 'means and' for no good reason. It went on

to consider whether the applicant was within the 'categories of persons' (see *Lambe* (1981) 4 SSR 43) entitled to receive a pension.

It stated that Baron clearly did not come within para. (a) as there was no relevant death; similarly she did not come within para. (b) as there was no desertion either in the legal sense or 'in a broader context of one party leaving his spouse of his own will and decision'. Nor was the applicant a wife as the word is commonly understood: Reasons for Decision, para. 5.

The Tribunal went on to consider para. (c). The Tribunal stated there had been no marriage. There had been participation in a ceremony of marriage but one party was not free to marry. Thus there was no valid marriage. The annulment merely declared the so-called marriage void and did not confer any status on it. Thus the Tribunal decided she was not a widow within para. (c). The Tribunal further decided that Baron was not a 'widow' within the natural meaning of the word, i.e. a woman whose husband is dead and who has not married again.

#### Formal decision

The Tribunal affirmed the decision under review.

## Supporting parent's benefit: cohabitation

### CN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/221)

**Decided:** 3 December 1982 by R.K. Todd.

This was an appeal against three decisions of the Department of Social Security: to cancel the applicant's supporting parent's benefit, to reject a subsequent claim for supporting parent's benefit and to seek recovery of overpayments of supporting parent's benefit and supplementary assistance totalling \$21 633.94. The Department alleged that at all relevant times the applicant had been 'living with a man on a bona fide domestic basis as his wife without being legally married to him' (s83AAA(1)), which disqualified her from the benefit.

#### Facts

CN arrived in Australia in 1969 with her

nine-year-old son. She commenced a relationship with K and gave birth to his son in April 1973. In March 1973, CN and K bought a house in Preston as tenants-in-common. CN moved into the house with her sons, but K at that stage did not. K did some renovation work on the house, paid the mortgage and paid the applicant \$5 a week, later increased to \$10 as maintenance for his son.

In September 1973, the applicant made a statement in support of a claim for supporting mother's benefit stating that she did not know where K was and that she paid rent of \$10 a week. Both of these statements were untrue. In a later statement (December 1973) she said she received no maintenance and claimed that she paid no rent. Supporting mother's benefit was granted on 7 December 1973.

The Tribunal found that K moved into the house early in 1975 and that the applicant and K had been living under one roof from the beginning of 1975 to March 1978, either in Preston or at a second house they bought in Greensborough. It further found that they recommenced sharing a house in August/September 1980.

It found that K did not give CN money for housekeeping but supported her by providing the bulk of the purchase money of the Preston property and by taking responsibility for its upkeep and paid a small amount of maintenance for their child.

According to CN and K, they did not share groceries or meals, they did not have sexual relations after the applicant became pregnant with their son, and had no social life together. These statements