

following medical advice her skin condition could improve and thereby reduce

her anxiety. This would increase her prospects of employment. For this rea-

son her incapacity could not be regarded as permanent.

Federal Court Decision

Widow's pension: bigamous marriage

BARON v DIRECTOR-GENERAL OF SOCIAL SECURITY

Federal Court of Australia

Decided: 5 July 1983 by Evatt, Fisher and Morling JJ

This was an appeal from the decision of the AAT in *Baron* (1983) 11 SSR 106 where the Tribunal had decided that the applicant who had had her bigamous marriage annulled did not come within the meaning of 'widow' within the meaning of the *Social Security Act* so as to entitle her to a widow's pension.

The narrow point to be decided was whether Baron fell within the definition of 'widow' in s.59(1)(c) 'a woman whose marriage has been dissolved and who has not been remarried'. It was conceded that she could not fall within any of the other categories of the definition.

Dissolution of valid marriage

The Court took the view that the expression 'dissolved' when used with reference to marriage referred to the termination of a validly contracted marriage. The decree of nullity made in relation to Baron's bigamous marriage did not dissolve the marriage, it merely declared a nullity which already existed.

There was nothing in the context of s.59 or elsewhere in the Act which could lead to the conclusion that an annulled invalid marriage fell within s.59(1)(c). The use of the term 'legally married' elsewhere in s.59 was to distinguish it from a *de facto* relationship, but such a distinction was not required to be made in s.59(1)(c) where 'marriage' was used by itself.

Object of the Act

The Court rejected an argument based on the purpose or object of the *Social Security Act*.

There is nothing in the language of the Act indicating expressly or by implication that it is part of its purpose or object to make provision for the payment of widow's pensions to women in the position of the applicant. The words used in s.59(1) point in the contrary direction namely, that pensions are only available to persons who qualify within the specified categories.

(Reasons for Judgment, p.9)

Reform

It was commented that this case demonstrated a need for amendment of the Act to remove the discrimination against women who, in good faith enter into a formal and apparently legal marriage but who are treated less favourably than other women whose marriages are not defective in law.

Order

The Federal Court dismissed the appellant's appeal, with costs.

Background

LATE CLAIMS FOR SOCIAL SECURITY BENEFITS

One of the problems facing claimants of social security benefits is they may not know they are entitled to a particular benefit and, as a consequence, fail to claim at all, or only put a claim in late. Failure to claim benefits on time may arise from a wide variety of reasons; the claimant may be ignorant of her rights; or she may have been misinformed, say by a DSS official, or a worker in an advice agency; claimants may have difficulty understanding official forms, either as a result of a low level of educational attainment, or because they have a poor command of English; publicity regarding new benefits may have been inadequate; official forms may be ambiguous or unclear. The range of possibilities is endless.

A HARSH RESPONSE

One response to this claim may be to say that, if a particular claimant fails to claim a benefit, she clearly does not need the financial support of the social security system. Financial need will only become manifest from the time the claim is made. On this basis, no back-dating of late claims would be permitted at all. It is submitted that such a view is simply too harsh. The social security system, whose object must be to promote the general welfare of the citizens of any given country, should be more flexible than that.

A 'WELFARE' RESPONSE

On the basis that a more flexible, or

'welfare-based' response is needed, social security systems usually incorporate a more flexible line:

Claims in the alternative: One way that a social security system may increase its flexibility of response to claimants is to allow a claim for one benefit (which turns out on the facts to be an inappropriate claim) to be regarded as a valid claim for a benefit that is appropriate. In Australian Social Security Law, this approach is incorporated in *Social Security Act* 1947, s.145 which provides that:

Where a person makes a claim . . . for [benefit]¹ . . . under an Act other than [the Social Security Act], or under a particular provision of this Act, and the circumstances are such that the claim might properly have been made under this Act, or under some other provision of this Act, as the case may be, the Director-General may, if he considers it reasonable to do so, . . . treat the first-mentioned claim, for the purpose of determining the date from which [a benefit] . . . is payable . . . as a claim for whichever [benefit] . . . is appropriate in the circumstances . . .

Thus, subject to the exercise of the Director-General's discretion — which I would argue, should be liberally exercised — a correct claim may be back-dated to the date on which a wrong claim was made.

Back-dating: Naturally, use of s.145 presupposes that an initial claim for benefit has been made. In many instances this will not have occurred. In such cases, what is needed is a power to back-date the claim from the date on which the claim was actually made, to the date on

which potential entitlement of benefit actually occurred. Australian social security law has developed only a partial response to this issue.

Statutory back-dating: In the case of certain social security benefits, back-dating of particular benefits in defined circumstances is allowed under the *Social Security Act* for example: widows' benefit — up to 3 months: s.68(2)(3); family allowance — up to 6 months: s.102(1),(2); double orphan's pension — up to 6 months: s.105D; handicapped child's allowance — up to 6 months: s.105R.

'Special circumstances': In a wider range of cases, back-dating of claims may be possible where the Director-General of Social Security is satisfied that 'special circumstances' exist for failure to claim in time. The benefits in relation to which this power to back-date exists are: family allowance: s.102, double orphan's pension: s.105D, handicapped child's allowance: s.105R, sickness benefit: s.83E, special benefit: s.127. However, these provisions have thrown up two further issues which have been considered before the AAT.

1. **No power to back-date:** The first is that there is no *general* power to back-date benefit. In relation to certain important social security benefits, for example age pension, invalid pension, wife's pension, and supporting parents' benefit, no power to back-date exists at all. Even if the reason for the late claim is an official, bureaucratic failure, the claimant cannot