following medical advice her skin condition could improve and thereby reduce her anxiety. This would increase her prospects of employment. For this reason 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

seek redress under the *Social Security Act*, but only by collateral proceedings (e.g. a complaint to the Commonwealth Ombudsman, or a court action for negligence)[2], remedies which are not really appropriate for this class of case.

2. **'Special circumstances'**: The second is what interpretation should be put on the statutory phrase 'special circumstances', which would justify the back-dating of a late claim. The AAT has not had much opportunity to consider the matter. In two early cases, the AAT appeared to be developing a rather flexible approach. Thus in *Wheeler* [3], the AAT considered whether a claimant who merely alleged he was ignorant of his entitlement (in the actual case, to sickness benefit) could argue that this amounted to 'special circumstances' justifying back-dating of the claim. Although, on the facts, the AAT held there were no special circumstances, the Tribunal did suggest there could be cases where such ignorance might amount to such special circumstances. Without laying down any firm guidelines, they suggested the following factors (*inter alia*) might need to be taken into account: the period of delay; whether or not the claimant had claimed any social security benefit before; her level of literacy, or age, or length of residence in Australia; the availability of information about the particular benefit; and attempts by the claimant to seek information and advice.

In *de Graaf* [4], this broad approach was followed and 'special circumstances' were found to exist, justifying back-dating a claim for family allowance (then child endowment) in the case of a claimant who had recently given birth to a second child. The AAT found as facts that the claimant honestly believed she had submitted a claim; her benefit had gone up, but only later did she discover that the rise in benefit was a result of a general increase in benefit levels (in the case in question, for her first child) and was not the result of her successful claim. The Depeartment of Social Security had no record of the claim having been made, and the AAT accepted that no claim was in fact made. Nonetheless, the claimant's honest belief that it had been made, together with the pressures of coping with a new baby and a three year old first child were such that could lead her to make mistakes as to the lodging of forms. On this basis, the AAT held that her late claim should be back-dated.

Other cases however suggest that the AAT may be adopting a rather less flexible approach. In *Wilson*,[5] the claimant became eligible for handicapped child's allowance when it was first introduced on 30 December 1974; but no claim was made until 23 September 1980. The claimant argued that she had not become aware of the benefit until 1979; no doctors or social workers had told her about the benefit; and the Department's initial publicity campaign, advertising the benefit, was inadequate.

Although the AAT agreed that the advertising campaign might have been more effective, nonetheless the steps taken to publicize the benefit were 'reasonable'. Doctors and social workers could not be regarded as under any obligation to inform people about social security benefits. On the contrary, the AAT held that the parents of a severely handicapped child (here, a child with a "hole in the heart") should have been put on inquiry as to the range of assistance available to them. Thus no 'special circumstances' were found to exist.

The cases of *Faa*,[6] *Flynn*,[7] and *Michael*[8] all raised the same broad issue. Family allowance for a child normally ceases when the child reaches the age of 16, unless the claimant can show that the child remains a full-time student. In order to do this, it is necessary for the claimant to submit a special claim form. In all three cases, the claim form had been submitted late. The claimants agreed that they had not noticed the amounts of family allowance (paid direct into their bank accounts) had been reduced; however, although claims were subsequently successfully made, no 'special circumstances' existed for back-dating. The AAT seems to have felt that the primary reason for the delays was carelessness on the part of the claimants. While this may be true, on the facts of the particular cases, it is somewhat disturbing to note that, in *Faa*, the AAT specifically remarked that the *de Graaf* case was to be regarded as a special one, and to be confined to its own peculiar facts. The one case that had utilised a rather flexible approach to the definition of 'special circumstances' thus appears to be in danger of being shunted into a siding.

THE CASE FOR REFORM

There is no publicly available information as to the actual effect of the time-limit rules on Australian social security claimants. We simply do not know whether large numbers are affected or only a few. Nonetheless, it is submitted that two legal reforms are desirable, to make the social security system more flexible in its treatment of potential claimants.

First, the *Social Security Act* should be further amended to incorporate a *general* power to back-date claims, where 'special circumstances' exist, so that back-dating of all claims to benefit would be possible in appropriate circumstances.

Secondly, the AAT may need to think further about the issue of late claims. Experience with the development of similar provisions in British social security law – where back-dating is permitted on grounds of 'good cause'[9] rather than 'special circumstances' – has resulted in the creation, by the Social Security Commissioners, of a pretty flexible set of principles whereby late claims may be allowed. It may be argued that the 'special circumstances' test is, and is intended to be, a stricter test than the British 'good cause' test; but I would argue that the AAT should reject such a legalistic approach. Rather, I would submit that the AAT should reflect a little further on the social realities and difficulties that may affect claimants – as they appeared to be doing in *Wheeler* and *de Graaf* – and use these cases as the basis for the development of a jurisprudence on the issue of 'special circumstances' instead of treating those cases as one-off special cases, with no or little precedent value, as appears to be the view expressed in the *Faa* case.

MARTIN PARTINGTON

REFERENCES

1. Including pensions and allowances.
2. See *O'Rourke* 3 SSR 331; *Boak* 9 SSR 90.
3. (1981) 1 SSR 26.
4. (1981) 3 SSR 26.
5. (1981) 3 SSR 27.
6. (1981) 4 SSR 41.
7. (1982) 10 SSR 98.
8. (1982) 10 SSR 98.
9. A full account is presented in my *Claim in Time* (Pinter, 1978). The details of the law may be further amended in the near future, since the issue is currently being reviewed by the Social Security Advisory Committee.

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