PARKER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N82/447)

Decided: 1 June 1984 by C.E. Backhouse.

The Tribunal *set aside* a DSS decision to refuse invalid pension to a 59-year-old former labourer who suffered from back problems.

Medical evidence suggested that, while he was incapacitated for work on a full-time basis, he may have been able to do certain work part-time. The AAT commented:

> 16 . . . I am satisfied that the physical impairment to his work capacity resulting from his medical disability would only permit him to engage in limited light duties on a part-time basis only. At best he would be restricted to a sedentary unskilled job and then he would need to have breaks and be able to get up and walk around at will. In these circumstances I find the prospect of his attracting an employer to engage him in paid work of the type open to him with his physical impairment and symptoms is so slight as not to justify the attempt. I have come to this view without regard to the general economic conditions in the community or the depressed conditions and unemployment on the Central Coast.
> 17. It is not without significance in the present case that the applicant is in receipt of a sickness benefit. Of course whilst he is on such benefit he is not required to make any effort to find work and the granting of such a benefit is tantamount to an acknowledgement by the respondent that the applicant is unemployable further. Whilst he is on such a benefit he cannot register for employment.

FLETCHER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/254)

Decided: 20 June 1984 by J.O. Ballard.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 56-year-old man who had worked in a variety of unskilled occupations.

The medical evidence before the Tribunal showed that Fletcher suffered from hypertension, bronchitis, kidney stones and deafness. A consulting physician had expressed the opinion that Fletcher was not incapacitated for work but this opinion had not taken account of Fletcher's ability to find and keep a job. (The physician told the AAT that 'in the classification or evaluation of the incapacity by the *Social Security Act* they require assessment irrespective of whether the job is available or not.')

Other medical evidence suggested that a change of medication would improve Fletcher's condition but that medication could produce negative side-effects. The AAT concluded:

> On these facts *McDonald's case* seems to me to provide a very clear precedent. At the very lowest the Tribunal must be in a state of indecision as to the situation after the applicant's medication was changed. On that basis the issue must be resolved in the applicant's favour.

(Reasons, para. 19)

The AAT also handed down Reasons for Decision in the following cases:

Set aside

Atkinson (Q83/6) 6.7.84
Ball (W83/87) 21.6.84
Browning (T83/35) 8.6.84
Cannata (V82/319) 13.6.84
Karagiannis (N82/285) 13.6.84
Kostopoulos (N83/82) 16.7.84
Lisica (N83/314) 6.7.84
Pappas (N82/352) 28.5.84
Peacocke (N82/522) 6.7.84
Pozega (N82/229) 29.5.84
Rached (N82/518) 21.6 84
Smith (N82/316) 16.5.84
Suvajac (N83/613) 1.6.84
Walker (N83/428) 29.6.84

Affirmed

El Mohamed (N82/331) 6.7.84
Stoddart (S83/114) 22.6.84
Young (N83/129) 19.6.84

Income test: 'deprivation of income'

BORTA and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/324)

Decided: 4 June 1984 by W.A.G. Enright.

Maria Borta was granted an age pension from December 1980. The rate of pension paid to her was substantially below the standard rate of pension because the DSS took account of her income from several investments. In January 1982, Borta made a gift of $41 000 from her savings account to her son.

Subsequently, the DSS decided that Borta had deprived herself of income in order to obtain an increase in her pension and, therefore, was not entitled to that increase. Borta applied to the AAT for review of that decision.

The legislation

Section 47(1) provides that the income of a pensioner 'shall be deemed' to include any income of which, in the opinion of the Director-General, 'a pensioner has directly or indirectly deprived himself . . . in order to . . . obtain a pension at a higher rate than that for which he would otherwise have been eligible . . .'

The evidence

Borta told the AAT that she had made the payment to her son in response to repeated requests from him for financial assistance in his purchase of a house; and that she had not known at the time when she had paid the money to her son that the payment could have any effect on the level of her pension. That evidence was confirmed by Borta's son-in-law, who had acted as her financial advisor.

The pensioner's motives are critical

The Tribunal commented:

> It is not simply sufficient to point to a transaction which results in deprivation. Even the fact that the result might have been foreseen does not in my view bring the transaction necessarily within the reach of s.47; there was no evidence that a resulting increase in Mrs Borta's investment income was foreseen by her. It must be established that the disposal was made by the pensioner who has deprived herself of income (in this case by means of depriving herself of income-earning capital) in order to obtain the pension at a higher rate than that for which she would have otherwise been eligible.

(Reasons, para. 17)

The AAT took the view that the applicant was not aware of the consequences which would follow from the disposal of her funds. Following the decision in *Ridley* (1983) 13 *SSR*127, the AAT said that it could not be assumed that her purpose was to obtain a pension at a higher rate.

Formal decision

The decision under review was set aside.

PARADISSIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/687)

Decided: 5 July 1984 by B.J. McMahon.

Sarandis Paradissis had been born in Greece in 1930 and, after migrating to Australia in 1956, he had worked as a labourer until he injured his back in June 1979. As a consequence of that injury, he was granted worker's compensation which was still being paid (at the rate of $318 a fortnight) at the time of the hearing of this application. In August 1982, Paradissis lodged a claim for invalid pension and the DSS rejected that claim in December 1982. He then sought review of that rejection by the AAT.

Permanent incapacity

The Tribunal concluded that, although Paradissis exaggerated his symptoms, his back condition had left him quite unfit for work involving heavy lifting, bending and stooping and that there was only a very remote prospect of him returning to the full-time workforce. In addition, he had suffered a loss of hearing which would add to his difficulties in attracting an employer.

There was evidence that some of his back problem could be alleviated through an operation but Paradissis had refused to undergo the operation because success could not be guaranteed. On this point, the AAT said:

> Since *Dragojlovic* v *Director-General of Social Security* (1984) 52 ALR 157 [18 *SSR* 187], it is clear that this could not be held against him, provided his refusal is objectively regarded as reasonable. In the circumstances of this application, one would have to regard that refusal in that light.

(Reasons, p. 5)

The Tribunal concluded that Paradissis was permanently incapacitated for work and, therefore, entitled to an invalid pension.

Deprivation of income

Paradissis had owned a block of 4 flats since 1959. In 1982, these flats were returning gross annual rents of $5454. One month before he applied for an invalid pension (that is in July 1982) he gave this property to his children.

Paradissis explained that he had given the building to his children because he was unable to maintain it himself. He also said that, because the property market was depressed, he had not wanted to sell the property but preferred to give it to his children.

The Tribunal said that neither of these reasons was a convincing explanation and that it was 'inconceivable that he could not have been influenced by his approaching application for the invalid pension, in deciding to give away this income producing asset': Reasons, p. 10.

Section 47(1) of the *Social Security Act* provides that the Director-General may treat, as income of a pensioner, any income of which the pensioner has deprived himself in order to obtain the pension at a higher rate than that for which he would otherwise have been eligible.

The Tribunal noted that, according to the earlier decision in *Ridley* (1983) 13 *SSR* 127, s.47(1) could only be invoked where deprivation of the income had been undertaken for the purpose of obtaining pension at a higher rate; it was not sufficient to prove only that the deprivation of income resulted in a higher rate of pension.

In the present case, the Tribunal concluded that Paradissis had –

> deliberately, purposely and intentionally (albeit with a belief in the permissiveness and possibly cleverness of his actions) deprived himself of an income bearing asset, without consideration, for the purpose of obtaining a pension at a higher rate than that for which he would otherwise have been eligible.
>
> In assessing the amount of the pension to be paid to the applicant, therefore, the respondent should take into account the amount of the deprived income.

(Reasons, p. 14)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that the invalid pension be granted to Paradissis, and that in assessing the amount of that pension account should be taken of the worker's compensation payments being paid to Paradissis and of the income of which Paradissis had deprived himself.

Overpayment: discretion to waive recovery

POURSANIDIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/256)

Decided: 15 June 1984 by I.R. Thompson.

Anastasia Poursanidis had been receiving a family allowance for one of her daughters, K. Shortly after K left school in November 1979, the DSS asked Poursanidis to complete an entitlement review form.

Another of Poursanidis' daughters, S (who usually acted for her parents in any matters where they needed to read or write English), completed this form but it was not received by the DSS. Nevertheless, the DSS cancelled payment of the family allowance for K in December 1979.

In April 1980, the DSS asked Poursanidis to complete another review form for her daughter K. This form was also completed by S and it was returned to the DSS. The form showed that K had ceased to be a full-time student at the end of 1979.

Despite the fact that the DSS received this form on 6 May 1980, the DSS wrote to Poursanidis on 20 May 1980 informing her that, as K was a full-time student, the family allowance would still be paid to K.

S then contacted the DSS and repeated that K had ceased to be a full-time student. An officer of the DSS made a note to cancel the family allowance for K but no action was taken to do this. Family allowance for two of Poursanidis' daughters, K and D, continued to be paid into the family's bank account.

In December 1980, the DSS forwarded another review form to Poursanidis. K completed this form and returned it promptly to the DSS, showing that K had ceased to be a full-time student in November 1979. The DSS then cancelled the family allowance for K.

Early in 1981, the DSS discovered that there had been an overpayment (of $260.40) of family allowance for K and decided to recover that overpayment by withholding family allowance payable to Poursanidis' other daughter, D.

Poursanidis appealed to an SSAT which recommended that her appeal be allowed. When the DSS affirmed its earlier decision, Poursanidis applied to the AAT for review.

Throughout the period of the SSAT appeal and while the AAT review was awaiting hearing, the DSS continued to withhold the payment of family allowance for D, making a full recovery of the overpayment.

The legislation

Section 140(2) gives the Director-General a discretion to recover an overpayment made 'for any reason' by deducting the overpayment from any current pension, allowance or benefit.

Section 140(3) provides as follows:

> (3) An amount referred to in sub-section (2) that has been paid otherwise than by way of family allowance under Part IV shall not be deducted from family allowance payable under Part IV.

Section 105 of the Act requires that a family allowance 'shall be applied, by the person . . . to whom it is payable, to the maintenance, training and advancement of the child in respect of whom it is granted'.

The discretion to recover

The AAT accepted that, throughout her dealings with the DSS, Poursanidis had acted honestly and with complete good faith. The AAT was satisfied that the overpayment was entirely due to error by the DSS, for which Poursanidis was not responsible, and that Poursanidis had not realised, throughout 1980, that the DSS was paying her family allowance for K.

However, the AAT said, the overpayment was recoverable under s.140(2) of the Act. The central question in this re-