Income test: deprivation of income

NADENBOUSCH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No.V83/424)
Decided: 23 July 1984 by R. Balmford.

In March 1981, following the death of her husband, Margaret Nadenbousch applied for an age pension. (She was then 68 years of age.) The DSS rejected her application on the ground that her income disqualified her. Her income came from superannuation payments for her late husband, part-time employment and investments.

In the latter half of 1981, one of Nadenbousch's sons consulted a solicitor who specialized in retirement planning and, after that consultation, a trust was established in December 1981. In May 1982, Nadenbousch paid $93 000 into the trust. (This payment was recorded as an interest-free loan, repayable to Nadenbousch on demand. Since the establishment of the trust she had recalled about $5000 to meet household expenses.)

According to the trust deed, the income from this money was to be applied for the benefit of Nadenbousch, her 4 children, their spouses and Nadenbousch's grandchildren, at the discretion of the trustees, who were Nadenbousch and her two sons. (Since the establishment of the trust, all the income of the trust had been 'distributed' amongst Nadenbousch's grandchildren, by making book entries in the records of the trust: but there had been no actual payment out of money.)

In July 1982, Nadenbousch lodged a second claim for age pension. The DSS granted Nadenbousch an age pension in January 1983 at the rate of $102.90 a fortnight – which was then the minimum rate of age pension (free of any income test) payable to a 70-year-old person. The DSS notified Nadenbousch that she did not qualify for a higher rate of age pension because of her income. Nadenbousch asked the AAT to review this decision.

The legislation

Section 47(1) of the *Social Security Act* allows the Director General to treat, as income of a pensioner, any income of which the pensioner has directly or indirectly deprived herself in order to qualify for a pension or a higher rate of pension.

Section 28(1) of the Act provides that the amount of pension paid to a pensioner is to be reduced at a rate which depends on the pensioner's income.

The Tribunal's assessment

The Tribunal said that Nadenbousch had deprived herself of income. It did not matter that some of the money had not been producing income before being paid into the trust:

> I consider that the expression 'has directly or indirectly deprived [herself] of income' is wide enough to describe a person who has made an interest-free loan of a sum of money and has thereby deprived [herself] of the income which might have been received by the normal investment of that sum . . . The fact that the loan is repayable on demand is immaterial in this context; the deprivation continues in respect of the potential income from any part of the loan which remains outstanding at any time.

(Reasons, para. 15)

The AAT emphasized that, before s.47(1) could be used against Nadenbousch, it had to be shown that the deprivation of income had been for the purpose of qualifying for a pension or a higher rate of pension. In the present case, Nadenbousch claimed that her purpose had been to reduce her liability for income tax and to benefit her grandchildren. But the Tribunal noted that the trust had been set up after Nadenbousch's son had read material prepared by the solicitor whom he had consulted on his mother's behalf. That material had included statements such as the following:

> [I]t would be quite easy to structure your affairs such as to maximise your income, minimise tax payable and qualify for the pension . . . On the present pension legislation should you establish this form of structure and resign from your employment then you would qualify for the full pension plus fringe benefits.

The Tribunal said that, in deciding whether Nadenbousch had deprived herself of income 'in order' to achieve a particular end, it should take account of the material which her advisers had before them:

> She cannot avoid the imputation of purpose by remaining uninformed. If this were not so, the operation of Section 47 could be readily avoided.

The AAT concluded that Nadenbousch had deprived herself of income in order to qualify for a higher rate of pension:

> That was one purpose of the deprivation, and the existence of other purposes does not affect the applicability of Section 47. It may be that there are situations in which it could be said that the obtaining of a pension or a higher rate of pension, while one of the purposes to be achieved by a particular deprivation, was a purpose so insignificant in comparison with other purposes thereof, that it could not be said that the deprivation was effected 'in order to' obtain the pension. If there are such situations, as to which I express no opinion, this is not one of them.

(Reasons, para.29)

Formal decision

The AAT affirmed the decision under review.

Residence in Australia

DOS SANTOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/811)
Decided: 13 August 1984 by B J McMahon.

The AAT *set aside* a DSS decision that Ana Dos Santos was not eligible for a widow's pension because she had not been continuously resident in Australia for 5 years at the time when she claimed that pension.

Dos Santos had come to Australia in April 1976 to join one of her sons who had migrated here. In 1978, she had undertaken a short trip to Uruguay to visit relatives but, because of illness and death in her family and a serious shortage of funds, she had been obliged to stay there for 2 years. Eventually, another of her sons had provided her return fare to Australia and she arrived back here in June 1981.

It was necessary for Dos Santos to establish that she was resident in Australia when she claimed her widow's pension in August 1982 because the event which had created her status of widow (her divorce from her husband) had occurred in 1962 when she was residing permanently in Uruguay and not in Australia.

Section 61(1) of the *Social Security Act* gives an extended meaning to the phrase 'resident in Australia'. In particular, by incorporating the provisions of the *Income Tax Assessment Act*, it includes, 'a person . . . whose domicile is in Australia . . . '

The AAT said that Dos Santos had acquired a domicile of choice in Australia when she first arrived here in 1976 – she had intended to live here permanently. She had not abandoned that domicile of choice when she left Australia for Uruguay in 1978, because she had intended to return to Australia. The AAT said that it was dealing with 'territorial domicile' and the fact that Dos Santos had moved from one address to another while in Australia could not alter her domicile.

Furthermore, the AAT said, Dos Santos' extended stay in Uruguay had been brought about by circumstances beyond her control and it did not prevent her retaining her Australian domicile of choice.

Accordingly, because of the combined effect of the *Income Tax Assessment Act* and s.61 of the *Social Security Act*, Dos Santos had remained resident in Australia during the period of her absence, that is, between December 1978 and June 1981; so that, by August 1982, Dos Santos had been continuously resident in Australia for more than the 5 years required by s.60(1).

TRIANTAFILLOPOULOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/297)
Decided: 13 July by J. Dwyer.

Ekaterina Triantafillopoulos had been granted family allowance for her children in 1967. In 1972, she, her husband and their children travelled to Greece where they stayed until 1982. During Triantafillopoulos's absence from Australia, the DSS suspended payment of the family allowance. On her return to Australia in 1982, she applied for payment of family allowance for the period of 10 years during which she and her children were living outside Australia.

When the DSS refused to make that payment, she sought review by the AAT.

The Legislation
Section 103(1) provides that a family allowance is not payable if the person granted the allowance ceases to have her usual place of residence in Australia, unless her absence is temporary only; or the child, for whom the allowance is granted, ceases to be in Australia, unless the child's absence is temporary only.

The Tribunal's Assessment
The AAT noted that the Triantafillopoulos family had sold their major assets in Australia (2 houses and a truck) before or shortly after travelling to Greece; that the husband had started a business in Greece and paid income tax and voted there; that the children had attended schooling in Greece; and that the family had lived, for 10 years, at one place in Greece. In the light of that evidence, the AAT concluded that the 'usual place of residence' of Triantafillopoulos had, for the 10 years of her stay in Greece, being in Greece and not in Australia.

Moreover, Triantafillopoulos's absence from Australia had not been, during that 10 year period, 'temporary only'. As the AAT had said in *Houchar* (1984) 18 *SSR* 184:

> For an absence to be temporary, not only must it be intended not to last indefinitely but the time for which it is intended to last must not be of great length.

Moreover, the question whether her absence was 'temporary only' was to be decided by examining a person's intention during her absence or rather at different stages of that absence. In the present case, it could not be said that, at the time when Triantafillopoulos had left Australia, there was a 'fixed time when the visit to Greece would finish or a fixed event which would determine the date of return to Australia': Reasons, para.16.

This case was different from *Kehagias* (1981) 4 *SSR* 42 and *Alam* (1982) 8 *SSR* 80: neither Triantafillopoulos nor her husband were Australian citizens when they left Australia, as the applicants had been in those cases; their absence from Australia was not 4½ or 5 years as in those cases, but over 10 years; no member of Triantafillopoulos' family had remained in Australia as had the parents of Mrs Kehagias; and Triantafillopoulos had not kept a bank account in Australia during her absence as had the applicants in those two cases.

It followed, the AAT said, that s.103(1) applied to Triantafillopoulos and that the child endowment granted to her in 1967 had ceased to be payable when she and her children left Australia.

Formal Decision
The AAT affirmed the decision under review.

Cohabitation rule: separation under one roof

JOHNSTONE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No.V83/47)
Decided: 6 August 1984 by R. Balmford.

The AAT *affirmed* a DSS decision that the applicant was not eligible for supporting parent's benefit between February 1981 and December 1981.

The critical question before the Tribunal was whether, during that period, Johnstone was 'living apart from her husband' and so within the definition of 'supporting mother' within s.83AAA(1) of the *Social Security Act*.

The Tribunal was told that Johnstone and her husband, who had married in 1967, had separated in December 1980 but that, after a period in a psychiatric hospital, Johnstone's husband had returned to the matrimonial home in February 1981.

Johnstone told the Tribunal that, over the period between February and December 1981, she and her husband had lived separately in the one house, with practically no communication between them and occupying separate rooms. She also told the Tribunal of an incident of domestic violence in April 1981 which had been attended by the local police.

On the other hand, Johnstone's husband told the Tribunal that, during 1981, he and Johnstone had lived as a married couple: they had slept together and had shared their meals, social lives and their financial affairs.

The Tribunal was also told that Johnstone had been employed in a regional office of the DSS for some 8 years and that, in December 1981, she had pleaded guilty to charges of lodging false claims on the DSS totalling some $50 000.

The AAT referred to an earlier decision in *Reid* (1981) 3 *SSR* 31, where it had been said that, in cases such as this, family law decisions were a good guide to deciding whether a married person was living apart from her spouse. The AAT noted that in *Pavey* (1976) 10 ALR 259, the Family Court had said that, in deciding whether a marriage had irretrievably broken down, it should be remembered that this was unlikely where the married couple continued to live in the same residence: although there was no inflexible rule, it was a good practice to require corroboration of evidence where the parties continued to live in the same house.

The AAT said that, given the circumstances this case (which involved conflicting evidence and an applicant who had pleaded guilty to charges of lodging false claims while in a position of trust, and who now stood to gain some thousands of dollars), it could not accept, without corroboration, her claim that she and her husband were living separately under the same roof for most of 1981.

Statistics

These tables (dealing with AAT reviews) are compiled from information supplied by the Department of Social Security.

	Apr. 84	May 84	Jun. 84	Jul. 83
Applications lodged*	48	55	73	43
Decided by AAT	25	31	29	53
Withdrawn	30	37	26	34
Conceded	29	83	35	40
No Jurisdiction	3	1	1	7
Awaiting decision at end of month	1082	985	967	876
*** Applications lodged: type of appeal**				
Unemployment B.	4	6	15	8
Sickness B.	2	9	0	6
Special B.	3	3	3	1
Age Pension	6	1	8	1
Invalid Pension	24	22	27	18
Widow's Pension	0	3	5	0
Supp. Parent's B.	3	1	3	1
H.C.A.	3	2	6	3
Family Allow.	2	4	6	2
F.O.I.	1	3	0	1
Other	0	1	0	2
State where application lodged				
ACT	0	0	5	4
NSW	16	25	31	8
NT	0	0	0	1
Qld	6	7	6	8
SA	4	4	4	7
Tas.	1	2	1	1
Vic.	16	12	19	8
WA	5	5	7	6