Handicapped child's allowance: 'constant care . . .'

BOSWORTH and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W83/84)

Decided: 2 October 1984 by G.D. Clarkson, I.A. Wilkins and J.G. Billings.

The AAT *set aside* a DSS decision to cancel a handicapped child's allowance held by Denise Bosworth.

Bosworth's child had been born in 1973 and suffered from enuresis (bedwetting up to four times a night) and urinary tract infection. The DSS decision to cancel Bosworth's allowance had been based on a medical report from a paediatrician, who had written '[the child] doesn't seem to me to fall within the province of either physical or intellectual handicap of significant degree . . . , The AAT said that many doctors found the concept of a 'handicapped child' in the *Social Security Act* difficult to understand. The Act defined 'severely handicapped child' as one with a physical or mental disability, needing constant care and attention permanently or for an extended period:

> It will be seen that while a physical or mental disability is a pre-requisite to entitlement it is not the disability or handicap which is required to be 'severe'. The degree of disability is determined not by the nature of the disability but by reference to the extent of the care and attention which the child needs namely, 'constant' care and attention for a severely handicapped child, and care and attention marginally less than that for a handicapped child.

(Reasons, p. 4).

In the present case, the child suffered from a physical disability (as the paediatrician had told the AAT when giving evidence). The care and attention provided by Bosworth at night, the extra washing of bed linen, supervision of medication, trips to the children's hospital – all these could be described as care and attention only marginally less than constant. The child was, therefore, a 'handicapped child' and Bosworth qualified for the allowance under s.105JA of the *Social Security Act* – the DSS having conceded that Bosworth was subjected to severe financial hardship.

The Tribunal noted that the child spent 7 hours a day at school, but adopted the view expressed in *Seager* (1984) 21 *SSR* 230 to the effect that this did not prevent a child receiving constant care and attention in the private home:

> The allowance is paid for a state of affairs which is permanent or likely to continue for an extended period, and in considering whether care and attention is constant or frequently recurring it seems reasonable to consider absences from direct parental care in relation to weeks or months or longer periods, rather than in relation to a day.

(Reasons, p. 7).

BERG and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. Q82/222)

Decided: 26 September by J.B.K. Williams, D.J. Howell and N.C. Davis.

The AAT *affirmed* a DSS decision to refuse a handicapped child's allowance to the father of a 14-year-old boy who suffered from achondroplasia – a condition which produced disproportionate dwarfism.

The AAT said that the child suffered a serious disability but that, in many ways, he led a normal life. His main difficulties were in reaching various objects and in the serious social disadvantage from which he suffered.

But this was not a case where the child required close supervision or constant medication. The child was, 'to a substantial degree, able to go about his daily routine unaided by others. He requires some assistance but we think it is trite to say that any child requires care and attention': Reasons, p. 7.

Widow's pension: for women only

HARLEY and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/73)

Decided: 5 October 1984 by R. Balmford, H.W. Garlick and R.G. Downes.

The AAT *affirmed* a DSS decision to refuse a widow's pension to Francis Harley, a 58-year-old man, who had held a supporting parent's benefit between 1977 and late 1982 (when the youngest of his 4 children had ceased to be a full-time student).

Harley's claim for a widow's pension had been based on s.60(1)(b) of the *Social Security Act*, which provides that a widow who does not have the custody, care and control of any child and is not less than 50 years of age is qualified to receive a widow's pension. (The subsection also allows a widow to qualify for the pension if she is at least 45 years of age and, after reaching that age, has ceased to receive a 'class A' widow's pension because she no longer has the custody, care and control of children.)

The DSS rejection of his claim was based on the definition of 'widow' in s.59(1) of the Act: the definition used exclusively female terms – 'dependent female', 'deserted wife', 'woman' and 'wife'.

The AAT said that the Federal Court had decided in *Baron* (1983) 14 *SSR* 146 that s.59(1) indicated that widow's pension was only available to persons who qualified within the specified categories. The AAT said that this barrier was not overcome by s.23 of the *Acts Interpretation Act* 1901:

> **23.** In any Act, unless the contrary intention appears – (a) words importing a gender include every other gender . . .

That provision was not applicable because s.59(1) 'clearly includes only women and so can be said to show a contrary intention': Reasons, para. 10.

The AAT also noted that s.40 of the *Sex Discrimination Act* 1984 'specifically excludes from the operation of the general anti-discrimination provisions of that Act anything done in direct compliance with the *Social Security Act* 1947'; and said that this exclusion prevailed over any argument based on the objects of the *Sex Discrimination Act* – 'to eliminate . . . discrimination against persons on the ground of sex . . . in the areas of . . . the administration of Commonwealth laws and programs [and] to promote recognition and acceptance within the community of the principle of the equality of men and women.'

It followed that Harley was not a 'widow' as defined in s.59(1) of the Act and that he could not qualify for a widow's pension under s.60(1).

A breach of international obligations?

The AAT noted that the exclusion of men from widow's pension could be a breach of the *International Covenant on Civil and Political Rights*, which had been ratified by Australia and which had come into force in 1980. Article 26 of the Covenant bound the parties to guarantee effective protection against discrimination to all persons on the ground of sex (amongst others). However, Australia had lodged a reservation to Article 26 when ratifying the Covenant; so that, the AAT said, it could not be bound by this Article.

On the other hand, Australia had made no reservations when ratifying the *International Covenant on Economic, Social and Cultural Rights*, which came into force in 1976. Article 9 of that Covenant bound Australia to guarantee that the right to social security would be 'exercised without discrimination of any kind as to . . . sex . . . ' The Australian Government had claimed in 1978 that the widow's pension program did not infringe this Covenant because 'a broadly equivalent payment, supporting parent's benefit, exists *inter alia* to assist men in comparable difficulties.'

The AAT said that there was an inconsistency in this statement: when the last child of a supporting father turned 16 or finished full-time education, the father was no longer entitled to supporting parent's benefit but was 'in comparable difficulties' to those of a woman in the same position. Unless he was 65 years of age (and could qualify for an age pension) he would be left with unemployment benefit ($78.60 a week in October). But a woman in the same position could qualify for a widow's pension (then $89.40 a week). It would appear, the AAT said, that the *Social Security Act* discriminated between men and women in similar circumstances by assisting

> a less advantaged group' [a term used in a 1981 explanation of Australia's reservation to the *International Covenant on Civil and Political Rights*], namely, women, who had been left in 'necessitous circumstances', but ignoring the possibility that men might find themselves in similar circumstances . . . 19. While recognising that the payment of this form of pension to members of one sex only reflects long-established social attitudes, the Tribunal would nonetheless note, in the light of [the international covenants], that the time may be approaching when this policy should be reconsidered as those attitudes change with changing circumstances.

(Reasons, para 15, 19).

Sickness benefit

STEWART and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/754)

Decided: 18 October 1984 by R. Balmford.

Clive Stewart had been seriously injured in 1967, as a result of which he continued to suffer significant disabilities. In April 1980 the DSS granted Stewart a sickness benefit which continued until August or September 1982, when the DSS 'terminated' the benefit on the ground that Stewart had not supplied the DSS with his correct residential address (an allegation which Stewart denied).

In April 1984, Stewart again applied for and was granted sickness benefit on the basis of a medical certificate which showed that he was unfit for work for the period 1 March 1984 to 1 June 1984.

Meanwhile, Stewart applied to the AAT for review of the DSS decision of August or September 1982. In August 1984, the DSS varied that decision and reinstated Stewart's sickness benefit from the date of its 'termination'. However, the DSS went on to decide that Stewart should not be paid sickness benefit for the period from 7 to 27 August 1982, because he was outside Australia over that period; and that his sickness benefit should be cancelled from 2 October 1982, because there was no evidence (in the form of regular medical certificates) of Stewart's medical condition after that period. However, at the time that this decision was made (August 1984) the DSS had in its possession a medical certificate dated 6 March 1984 which declared that Stewart had been and continued to be unfit for work since 1967.

The legislation

Section 108(1) provides that a person is qualified to receive a sickness benefit if the person meets an age requirement, resided in Australia throughout the relevant period and satisfies the Director-General that, during the relevant period, he was temporarily incapacitated for work by reason of sickness or accident and had thereby suffered a loss of income.

Section 117(1) provides that a claim for sickness benefit shall be supported by a medical certificate 'certifying as to such matters, and containing such information as the Director-General requires.'

Section 129, in force in August and September 1982, required a beneficiary to provide information 'relating to any matter which may affect the payment to him of his benefit' whenever required by the Director-General.

Section 131(1) provided, at that time, that the Director-General could cancel or suspend the benefit if a beneficiary failed to comply with s.129 of the Act.

The original decision

The AAT said that the original decision, to 'terminate' Stewart's benefit, had no legal basis. There was no power in the Act to 'terminate' a sickness benefit and, in any event, the Director-General had no power to require a beneficiary to furnish her or his residential address:

> If there is a suspicion that a fraud is being committed on the Department, different considerations arise: but I have no reason to suppose that there was any such suspicion here . . . Further, when the beneficiary appears at the counter of the Department's regional office, complaining that he has not received his benefit, it is hardly consistent with the administration of social welfare legislation to tell him that he will not receive it any more until he gives an address at which he is living. Why should he not collect it from the counter? Why is it thought desirable that he should be found to be resident at the address from which he collects his mail? If the benefit were paid to a bank account the Department would not be concerned to know where he lived.

(Reasons, para 14).

Stewart's absence from Australia

The Tribunal said that the word 'reside' in s.108(1) should be read according to its ordinary meaning – that is, as referring to the place where a person had her or his settled or usual place of living. A person's place of residence was not lost merely because the person left that usual place of living from time to time. In the present case, the AAT said, the evidence showed that Stewart had his settled or usual place of living in Sydney and the suggestion that he had not 'resided' in Australia during his 3 week trip overseas could not be sustained.

The need for medical certificates

The AAT said that, although at one time there were several periods not covered by medical certificates certifying that Stewart was incapacitated for work, the medical certificate of 6 March 1984 provided adequate evidence of Stewart's incapacity.

The Tribunal rejected the DSS argument that a retrospective certificate could not meet the requirements of s.117(1):

> If the *Social Security Act* required the medical certificate to be contemporaneous with the claim and to relate only to the future and not to the past, then Mr Stewart would, effectively have no right of review of the decision [to cancel his sickness benefit as from 2 October 1982]. However, there is no such requirement in s.108, s.117 or elsewhere in the Act and I have no reason to assume or to imply such a requirement. A certificate describing the past is as good evidence of incapacity for work by reason of sickness or accident as a certificate predicting the future. In many cases it would be easier for a doctor to describe the past condition of a patient than, with any confidence, to predict the patient's future condition.

(Reasons, para 30).

Formal decision

The AAT set aside the decisions to suspend Stewart's sickness benefit during his absence from Australia and to cancel his sickness benefit from 2 October 1982 and remitted the matter to the Director-General with a direction that Stewart was qualified to receive sickness benefit while out of Australia and from October 1982 until the recent grant of sickness benefit to him in April 1984.

MENGI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/100)

Decided: 25 October 1984 by J.A. Kiosoglous, J.H. McClintock and A.P. Renouf.

Mehmet Mengi had migrated to Australia from Turkey, with his wife and 3 of his 8 children, in 1970. His other children joined him in 1973, by which time his wife had developed an ulcer in the abdomen.

In 1975, Mengi, his wife and 3 of their children returned to Turkey, in the hope that Mrs Mengi might regain her health there. Mengi returned to Australia within the 12-month period on his re-entry visa but his wife and 3 children did not, as she was unfit to travel. Mengi returned to Turkey for 6 months in 1978 and for 3 years in 1980, on each occasion attempting to arrange his wife's travel to Australia – but without success, as Australian immigration authorities would not allow her to enter Australia because of her health.