V. A. and SECRETARY TO DSS (No. V84/359)

Decided: 21 June 1985 by J. R. Dwyer, H. C. Trinick and G. F. Brewer.

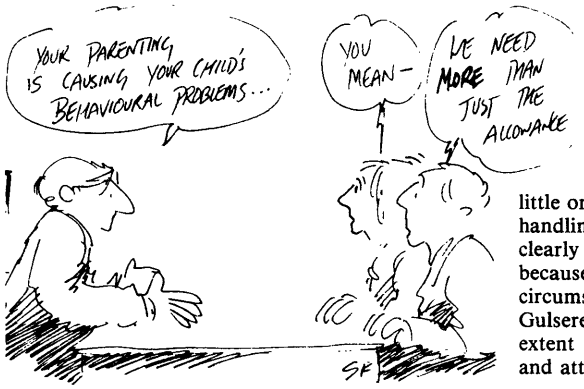
The applicant in this matter, V. A. was the mother of 2 daughters. She had been granted a handicapped child's allowance for the younger daughter, Gulseren, in 1977 on the basis that the child was 'severely handicapped'. In October 1983, after a review, the DSS decided that Gulseren was no longer severely handicapped.

Shortly afterwards, V. A. applied to the DSS for a handicapped child's allowance for her elder daughter, Gunay. However the DSS rejected that application. V. A. then asked the AAT to review both DSS decisions.

The younger child

Evidence was given to the Tribunal that Gulseren, who was 14 years of age, was 'mentally slow' and that she was 'given to throwing tantrums if not given her own way'. The child's parents told the AAT that they found it necessary to provide very close supervision to the child, that she had frequent episodes of destructive behaviour and that the child could not be left unattended.

The principal of Gulseren's school said that, although there were occasional discipline problems, she was not particularly difficult to control. And there was evidence from the two psychologists that the child's behavioural problems owed something to the parent's inability to manage her. One psychologist said that the child would be helped most by a long term programme to change her parent's responses so that the child would learn to modify her behaviour and become more independent.



On the basis of this evidence, the Tribunal concluded that Gulseren was a 'severely handicapped child' within s.105H(1) of the *Social Security Act*. First, she had a mental disability—mental retardation and significant behavioural problems. It did not matter that these problems had in part been aggravated by her parents' limited skills in controlling her behaviour. Secondly, her mental disability did create a need for her parents to provide constant care and attention whenever Gulseren was at home:

> The fact that trained teachers at a special school can manage Gulseren more effectively than her parents can is not in any way surprising and does not detract from the evidence that when she is at home her parents need to give her constant care and attention.

(Reasons, para. 22)

Thirdly, Gulseren was likely to need this care and attention for an extended period:

> Although there was some evidence suggesting that behaviour therapy for the whole family could limit the amount of care and attention required by both girls and could provide them with a more independent life style it is apparent that the professional advice so far had little or no effect on the parents' methods of handling the children. Mrs V. A. stated quite clearly that she has abandoned the advice because in her view it does not work. In these circumstances we think it very unlikely that Gulseren's behaviour will improve to such an extent that she does not need constant care and attention in the foreseeable future.

(Reasons, para. 23)

Finally, the AAT said, V. A. was providing this care and attention in their private home. As the decisions in *Seager* and *Shingles* (1984) 21 *SSR* 230 had established, the fact that Gulseren had attended a special school each day did not prevent the Tribunal finding that she was being provided with 'constant care and attention' in her private home.

The elder child

Turning to the other child, Gunay, the AAT concluded that, although she suffered from some intellectual retardation, she was able to look after herself, did not suffer from any particular behavioural problems and posed no risk of danger or violence. Although Gunay required more care and attention than a normal child, she could not be said to require either 'constant care and attention' or care and attention which was marginally less than constant.

Formal decision

The AAT set aside the decision to cancel the handicapped child's allowance for Gulseren and affirmed the decision to reject the claim for that allowance in respect of Gunay.

Cohabitation

AISTROPE and SECRETARY TO DSS (No. N84/477)

Decided: 8 February 1985 by J. O. Ballard, D. J. Howell and J. P. Nichols.

The AAT *affirmed* a DSS decision to treat Audrey Aistrope as the 'wife' of W because she was living with W as his wife on a bona fide domestic basis although not married to him. The consequence of this decision was that W's income reduced the rate of Aistrope's age pension.

The AAT concluded that Aistrope was living with W as his wife for the following reasons:

- Aistrope had applied for a passport as W's *de facto* wife;
- A had been employed under the name of Mrs W;
- A held a union membership card, a bank card, medical benefits and electoral enrolment in the name of Mrs W.

Aistrope and W told the Tribunal that they shared a house but occupied separate rooms and had never had a sexual relationship. Aistrope explained that she had applied for a passport as W's *de facto* wife because she could obtain a cheaper fare if she travelled under that name. The AAT said:

> 16. We accept the evidence of the applicant and W that they did not have sex together. Nevertheless, the applicant and W cannot have it both ways and claim to the Commonwealth that they have a *de facto* relationship when it helps them for the purposes of passport and then expect it to be accepted by the Commonwealth that such a relationship does not exist for the purposes of the *Social Security Act*.

SMITH and SECRETARY TO DSS (No. N84/530)

Decided: 22 May 1985 by B. J. McMahon, G. D. Grant and G. R. Taylor.

Kathleen Smith had been granted a widow's pension in 1975, following her desertion by her husband. In July 1980, Smith and her two daughters moved into a house occupied by a man, R, and his daughter. Shortly after moving into the house, Smith acquired a legal interest (a tenancy in common) in the house with R.

Smith began employment in October 1983 and, at her request, her pension was cancelled by the DSS. In July 1984, Smith gave up her job and re-applied for a widow's pension, which the DSS rejected on the ground that Smith was living with R as his wife on a *bona fide* domestic basis although not legally married to him. In March 1985, Smith and her children moved out of the house and the DSS granted her a widow's pension.

Smith asked the AAT to review the July 1984 refusal of her application for a widow's pension.

The legislation

Section 60(1) of the *Social Security Act* provides that a widow with the custody care and control of a child is qualified to receive a widow's pension. Section 59(1) defines 'widow' as excluding—

> A woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

Living together—but not as 'man and wife'

Smith told the AAT that, during the early part of their joint occupancy of the house, she and R had a brief sexual relationship which had not lasted beyond 1980. Throughout the 5 years of their joint occupancy, Smith was responsible for housekeeping, Smith and R accepted some responsibility for the care of each other's children, Smith and R had some common social life and also shared household ex-

penses. However, at no stage did they share a surname and they had regular independent social activities.

On the basis of this evidence, the AAT decided that, although Smith had been living with R on a *bona fide* domestic basis during the period in question (which was from July 1984 to March 1985), she had not lived with R 'as his wife'. The AAT said that several aspects of the relationship between Smith and R had to be examined, including the following:

(1) the fact that Smith and R had lived apart since March 1985 suggested that any relationship which they had had was not a permanent one;
(2) during the period when they shared the house, there was no suggestion that their relationship was an exclusive one;
(3) Smith and R had pooled only part of their resources (namely the cost of purchasing food);
(4) Smith had gone out of her way to explain to other people that she was not married to R;
(5) Smith and R had not regarded their relationship as being like one of man and wife (this, the AAT said, was 'the most important test': Reasons, p.13);
(6) there had been no sexual relationship between Smith and R during the period in question; and
(7) Smith and R had enjoyed largely separate lives.

The AAT summarised its assessment as follows:

> Perhaps it is some emotional element that must exist in the relationship between a man and woman before she can be regarded in anyway as his wife. Whatever spark is required to ignite the tinder of cohabitation into the fire of a quasi marriage relationship, we are clear that it did not exist in the present circumstances. An arrangement of mutual convenience for the housing and the material welfare of the parties and their children is the highest level at which it could be put.

(Reasons, p.16)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Smith be granted the widow's pension.

Income test: damages settlement

PAYNE and SECRETARY TO DSS (No. W85/47)

Decided: 14 June 1985 by G. D. Clarkson.

Graeme Payne was granted unemployment benefit in January 1984 and payment of that benefit continued for some time. However, the DSS decided that, because his wife received a payment of $14 000 in the week ending 11 May 1984, unemployment benefit could not be paid to Payne for that week.

The payment to Payne's wife was a settlement of her damages claim for injuries suffered in a car accident. According to evidence given to the Tribunal, the damages related to disfigurement and pain and suffering but did not include any economic loss suffered by her. Payne asked the AAT to review the DSS decision.

The legislation

Section 114(1) of the *Social Security Act* provides for unemployment benefit to be reduced by taking account of the beneficiary's weekly income. According to s.114(3), the income of a married person includes the income of that person's spouse.

Section 106(1) defines 'income' as meaning—

> any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . .

The s.106(1) definition goes on to exclude certain payments from the definition of income, including a payment of compensation for loss or damage to buildings, plant or personal effects (para. (cd)).

'Income' does not include capital receipts

The AAT said that the 'two terms, "moneys" and "valuable consideration", are equivocal and could refer . . . to what is commonly described as capital': Reasons p.5.

However, the AAT said, the meaning of those terms should be influenced by the other phrases in the s.106(1) definition, 'personal earnings' and 'profits'; so that the definition of 'income' should be taken as referring to income as distinct from capital receipts.

It might be argued, the AAT said, that the specific exclusion of compensation payments for loss of property in para. (cd) suggested that all compensation for personal injury should be treated as income; but the Tribunal said that it was wrong to read too much into that specific exclusion, 'because Acts of Parliament are not always drafted as precisely as might be desirable': Reasons p.8. The AAT concluded that the definition of 'income' did not apply to capital receipts and that—

> the general policy of the Act [is] that bare capital assets, in no way derived from or related to the loss of past or future earnings, do not affect the amount of periodic payments made under Part VII of the Act.

As the general damages received by Payne's wife had not covered loss of earning capacity, past or future, there could be no question that those damages amounted to 'income' within s.106(1).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that the sum of $14 000 general damages received by Payne's wife was not income for the purposes of ss.106 and 114.

Income test: war restitution pension

KOLODZIEJ and SECRETARY TO DSS (No. S84/44)

Decided: 6 June 1985 by J. A. Kiosoglous.

Stanislaw Kolodziej had been granted an invalid pension in March 1980. At the time of this grant, the DSS reduced his pension on the ground that payments received by Kolodziej and his wife under the West German *Federal Restitution Act* were 'income' for the purposes of the social security income tests.

Kolodziej had spent 5 years as a prisoner of war in Germany and had been subjected to severe physical maltreatment over this period. In 1949, he married his wife, who had also been imprisoned and ill-treated by German authorities during the war. They had migrated to Australia in 1950 and, in 1964, had been recognized by the West German Government as victims of Nazi persecution. As a consequence they had been granted compensation under the West German *Federal Restitution Act* and that compensation had been converted to periodic pension. In 1980, Kolodziej's restitution pension was $4800 a year and his wife's pension was $3600 a year.

Following the decision of the DSS to reduce his invalid pension by reference to these restitution pensions, Kolodziej sought review by the AAT.

The legislation

Section 6 of the *Social Security Act* now defines 'income' as—

> personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for that person's own use or benefit by any means from any source whatsoever, within or outside Australia and includes a periodical payment or benefit by way of gift or allowance . . .

The West German *Federal Restitution Act* provides for the payment of compensation or a pension to a victim of Nazi persecution who 'suffered damage to life, body, health, freedom, property, wealth, his employment or economic livelihood . . .'

'Income'

The AAT said that the definition of 'income' in s.6 of the *Social Security Act* was broad but it was not unlimited. That definition differed markedly from the notion of 'income' under the *Income Tax Assessment Act* 1936, as the AAT had pointed out in *Paula* (1985) 24 *SSR* 288 and *Schafer* (1983) 16 *SSR* 159.

Because the *Social Security Act* and the *Income Tax Assessment Act* used quite different concepts of 'income', statements made in Parliament when the *Income Tax Assessment Act* was being amended to exclude restitution pensions from 'assessable income' for income tax purposes, were not relevant to the meaning of 'income' in the *Social Security Act*. On this point, the