Rent assistance: 'government rent'

PARKYNS and SECRETARY TO DSS

(No. N84/428)

Decided: 10 May 1985 by J. R. Dwyer, J. H. McClintock and G. F. Sutton.

Beryl Parkyns had been granted an invalid pension in 1976. In 1980, she was granted supplementary assistance under s.30A of the *Social Security Act* because she was paying board and lodging to her mother, who was then a tenant of a Housing Commission flat.

In February 1983, Parkyns' mother died and Parkyns took over the tenancy of the flat. The DSS then cancelled payment of supplementary assistance to Parkyns because she was now paying 'government rent' for which supplementary assistance was not available.

Parkyns asked the AAT to review that decision.

The legislation

Before February 1982, s.30A provided that a pensioner who was paying rent (including board and lodging) was eligible for supplementary assistance. As from February 1982, the definition of rent was amended to exclude 'government rent'.

However, the *Social Service Amendment Act* 1981, which made this change, preserved the right of persons who were paying 'government rent' and receiving supplementary assistance before February 1982 to continue to receive that assistance.

Right to rent assistance not preserved

The AAT decided that Parkyns' right to receive supplementary assistance was not preserved by the 1981 amending legislation, because the transition provision in that legislation applied only to those pensioners who were, prior to February 1982, paying 'government rent'. Parkyns, the AAT said, was paying board and lodging to her mother and not 'government rent' prior to February 1982.

The Tribunal rejected Parkyns' argument that, because she actually attended at the office of the Housing Commission and handed over the rental payments on behalf of her mother, she fell within the protection of the transition provision—that is, that she was the person who was paying the government rent. The AAT said that a person, like Parkyns, who paid rent on behalf of another person was not the person who was paying the rent.

Because Parkyn did not qualify for the protection of the transition provision in the 1981 Amendment Act, she lost her right to supplementary assistance when she ceased to pay board and lodging and began to pay rent direct to the housing commission in February 1983.

Formal decision

The AAT affirmed the decision under review.

Age pension: payment overseas

SCHLAGETER and SECRETARY TO DSS

(No. V83/437)

Decided: 7 February 1985 by I. R. Thompson.

The AAT *affirmed* a DSS decision to reject a claim for age pension lodged by Paul Schlageter.

Schlageter had migrated to Australia from Switzerland in 1951; and, after 20 years residence here, had left Australia for Switzerland in 1972. He returned to Australia in February 1983 and claimed an age pension, declaring that he had returned for the sole purpose of claiming that pension and that he would return to Switzerland permanently within two months.

The AAT said that, to qualify for age pension, a claimant must be 'residing in . . . Australia on the date on which he lodges his claim for a pension': s.21(1)(b) of the *Social Security Act*.

But Schlageter had not met that requirement. In February 1983, Australia was not his settled permanent home; nor did he have a 'deemed' residence in Australia under s.20(1) as it stood in February 1983—his home had not remained in Australia during his 11-year absence.

Finally, Schlageter was not a 'deemed' resident of Australia under s.20(2): he had not retained his Australian domicile but had reverted to his Swiss domicile after leaving Australia in 1972.

The AAT noted that Schlageter could not qualify for age pension under s.21A because he had not resided in Australia for a total of 30 years, even though he met most of the other requirements of that section.

The AAT concluded that Schlageter should not be granted a special benefit under s.124 of the *Social Security Act*. Even if he was 'unable to earn a sufficient livelihood', the discretion in s.124 should not be exercised in his favour:

> 18. It is, I consider, significant that Parliament has made express provision for the granting of age pensions to persons who are resident in Australia and who are in special need of financial assistance and in doing so has set a period of 30 years' residence in Australia as a qualification. The circumstances would need to be exceptional for a special benefit to be granted in circumstances for which s.21A was clearly intended to provide where the qualification of 30 years' residence was not met.

Invalid pension: permanent incapacity

MAMARI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/418)

Decided: 6 June 1985 by B. J. McMahon.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 54-year-old former labourer who had not worked since 1975.

The AAT found that, because of a fractured wrist suffered by Mamari in 1975, he was now unable fully to use his right arm; and that this impairment, combined with his lack of work skills, very poor English and his 10 year absence from the workforce meant that he had virtually no chance of obtaining employment.

The AAT noted that it was now reviewing a DSS decision to reject invalid pension made in May 1980 and observed:

> Although . . . the reasons for the delay are understandable, it is a matter for some regret (if it be the case), that this application has not been reviewed since May 1980, in the light of the many decisions of this Tribunal that have been given since that date in relation to facts similar to the present facts. It may be the case that once an application is made to this Tribunal for review of a refusal . . . the matter takes on the status of suspended animation. If there were to be only a short interval between application and full hearing, this would no doubt be a satisfactory procedure. Where however, as in the present circumstances, there have been a number of adjournments and the delay leading up to the hearing lengthens, it should be possible to devise some mechanism for review. This is sometimes done to bring medical evidence up to date. Is it ever done to review the decision entirely in the light of other decisions of this Tribunal given in the interim?

(Reasons, p.10)

PHILLIP and SECRETARY TO DSS (No. N83/489)

Decided: 27 March 1985 by B. J. McMahon.

The AAT *set aside* a DSS decision to cancel an invalid pension held by 42-year-old former boiler-maker who had resigned from his employment at the end of 1978, suffering from chronic hypertension and depressive neurosis.

Medical evidence established that these conditions had, in the past, been aggravated by alcohol addiction; but that this condition was under control and that his psychological problems were not as acute as they had been in 1978. However, the improvement in Phillip's condition was, to some extent, due to his absence from regular employment. Consequently, the AAT said, 'any return to employment could very well bring about a deterioration in his condition'. The AAT concluded:

> Whatever improvement there has been in his medical condition and general circumstances since the pension was granted in November 1978 has not been sufficient, in my view, to turn a then incapacity into a now present capacity. I see no real hope of the present circumstances changing. If I were the applicant's medical advisor, however, I would do all I could to encourage the applicant to find light part-time work producing no stress. This, of course, is not the 'work' referred to in s.24 of the *Social Security Act*. There 'work' means a 'work programme which would reflect full-time work as ordinarily understood in the Australian context (*Mann's* case (1982) 8 *SSR* 75)

(Reasons, pp.12–13)

PISANI and SECRETARY TO DSS (No. V83/362)

Decided: 17 May 1985 by J. R. Dwyer.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 44-year-old man.

Pisani had migrated to Australia in 1968 and worked in several unskilled occupations until 1978, when he suffered a back injury. He was granted an invalid pension in 1980 and the DSS cancelled that pension in July 1983, on the basis that he was no longer 85% permanently incapacitated for work.

The medical evidence established that Pisani suffered from some minor degenerative changes to his spine; and the AAT concluded that, on the ground of physical disability, Pisani would be fit for a wide range of work.

Pisani's psychiatrist said that he suffered from a severe hysterical conversion reaction which was entrenched and untreatable; and that this condition prevented him from working. However, a psychiatrist called by the DSS said that Pisani's psychiatric disability did not limit his work potential.

The AAT said that it could not resolve the conflict of psychiatric opinion and, accordingly, on the authority of the Federal Court decision in *McDonald* (1984) 18 *SSR* 118, it could not conclude (on the balance of probabilities) that Pisani's invalid pension should be cancelled.

GEORGE and SECRETARY TO DSS (No. N84/321)

Decided: 31 May 1985 by J. O. Ballard.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 51-year-old former labourer who suffered from chronic low back pain and obstructive airways disease.

The Tribunal noted that the assessment of incapacity for work for an invalid pension involved two steps—an evaluation in purely medical terms of the person's impairment and an assessment of the extent to which that impairment affects the person's ability to engage in paid work.

The AAT said that previous consideration of this matter had concentrated only on the first step. Other factors, such as George's very limited work skills, the poor labour market in the country town where he lived and the exclusion of certain types of work because of his criminal record, had to be taken into account.

The AAT acknowledged that, before a person could qualify for an invalid pension, the person's capacity for work must arise from medical conditions and that it was necessary to draw a fine balance between labour market factors, sociopathic factors and medical conditions.

But, in the present case, the AAT was satisfied that 'a significant source of incapacity for work' was medical; and, accordingly, George was entitled to the invalid pension.

BERTA and SECRETARY TO DSS (No. N83/858)

Decided: 10 May 1985 by J. R. Dwyer, G. P. Nicholls and G. F. Sutton.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 49-year-old former carpenter who suffered from chronic back pain, a hernia and asthma.

The AAT found that Berta was incapacitated for the type of work for which he had developed skills; and that, at best, he might be able to undertake light duties. The AAT referred to the Federal Court decision in *McBay* (1984) 24 *SSR* 296 and stressed the importance of investigating the question whether there was suitable work available in the community for a person who had a partial capacity for work. The Tribunal was satisfied that Berta would have great difficulty finding employment because of his disabilities:

> 36. In our opinion the evidence does establish that Mr Berta's medical complaints substantially limit the work he can do and that his history of accidents, compensation and continuing lumbar back problems makes him extremely unlikely to attract an employer. There is no reasonable prospect of him being able to attract an employer who would offer him employment 'tailor made' to suit his limited capacity for work.

Family allowance: claimant overseas

ANDERSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q84/69)

Decided: 19 March 1985 by J. B. K. Williams.

Valmai Anderson, an Australian citizen, had lived in Papua New Guinea, where she had given birth to 2 children, R and J, from 1966 to November 1975. She, her husband and 2 children had then returned to Australia, intending to live here permanently. A third child, S, was born in July 1976 and Anderson was granted child endowment for that child.

In November 1976, the family returned to Papua New Guinea, intending to remain there for 2 years. (They retained ownership of a house in Brisbane and placed their furniture in storage.) Anderson told the DSS of her departure; and the DSS decided to continue paying endowment for S.

At the end of 1978, Anderson's husband renewed his employment in Papua New Guinea for a futher 3 years; and Anderson wrote to the DSS in February 1979, advising that she now expected to return to Australia at the end of 1981, and asking for payment of endowment for R and J from January 1979.

In September 1979, Anderson and her husband separated; Anderson then obtained employment in Papua New Guinea; and, in January 1982, she returned to Australia with her 3 children. On her return, she applied for and was granted child endowment for her 3 children. But the DSS refused to pay Anderson any endowment for the period from February 1979 to February 1982. She then asked the AAT to review this refusal.

The endowment for S: temporary absence from Australia?

In February 1979, s.103(1) of the Social Security Act provided that child endowment granted to a parent ceased to be payable where the parent 'ceases to have [her] usual place of residence in Australia' or where the child 'ceases to be in Australia', unless their absence was 'temporary only'.

The AAT said that, in deciding whether a person's absence was temporary, it was necessary to examine that person's intentions at different stages of her or his absence, as the AAT had said in *Houchar* (1984) 18 *SSR* 184. It was not sensible to look at the intentions of S (who was less than 1 year old when she went to Papua New Guinea); rather, the AAT said, it was 'necessary to look at the intention of those in whose care she was': Reasons, p.9. The AAT continued:

> [F]or an absence to be temporary, not only must it be intended not to last indefinitely, but the time for which it is intended must not be of great length. That involves consideration of questions of degree which must be decided by reference to all the circumstances of the particular case.

(Reasons, p.10)

In the present case, the circumstances showed that Anderson had not intended to stay in Papua New Guinea indefinitely, but had intended to stay there initially for 2 years, and had later extended this period by another 3 years. Accordingly, her absence (and S's absence) from Australia had been temporary and Anderson had remained qualified to receive endowment for S.

Endowment for R and J: domicile and residence

In January 1979, s.96(1) of the *Social Security Act* prevented the grant of child endowment unless the claimant was in Australia and the child was living in Australia.

However, s.104(1) allowed a person, usually resident in Australia, to be treated as if in Australia for child endowment purposes, during a period of temporary absence; so long as the person was a resident of Australia under the *Income Tax Assessment* Act 1936 (s.104(2)).

According to s.6 of the Income Tax Act, a person was resident of Australia if