Federal Court decisions

Handicapped child's allowance: late claim

BEADLE, BLURTON, CORBETT, JOHNS v DIRECTOR-GENERAL OF SOCIAL SECURITY
Federal Court of Australia (Full Court)
Decided: 7 June 1985 by Bowen CJ, Fisher and Lockhart JJ.

These were four appeals, under s.44 of the *AAT Act* 1975, against decisions of the AAT.

Each of the appellants had originally been granted handicapped child's allowance for a child; but the DSS had refused to backdate payment of the allowance (for periods varying between 3 and 5 years) and the AAT had affirmed the DSS decisions. [The AAT decisions are noted in 20 *SSR* 210 (*Beadle* and *Corbett*), 211 (*Johns*) and 21 *SSR* 234 (*Blurton*).)

These appeals focused on s.102(1) of the *Social Security Act* which, in combination with s.105R, provides that handicapped child's allowance is payable to a parent from the next family allowance period after the parent becomes eligible for the allowance *if* a claim is lodged with 6 months of the date of eligibility or, where the claim is lodged later that that, 'in special circumstances'.

The AAT had decided that, in the cases of Beadle and Blurton, there were no 'special circumstances' to justify extending the period for lodging claims. However, in the cases of Corbett and Johns, the AAT said that there were such 'special circumstances'; but that a residual discretion in s.102(1) should be exercised against Corbett and Johns.

'Special circumstances'
The Federal Court said that it was not 'possible to lay down precise limits or precise rules' as to the matters which could amount to 'special circumstances':

> The matter is one for the Director-General bearing in mind the purpose for which the power is given. The phrase 'special circumstances', although lacking precision, is sufficiently understood in our view not to require judicial gloss.

(Judgment pp.7–8)
However, the Court did say that 'special circumstances must include events which would render the 6 months [time limit] unfair or inappropriate'; and the Court referred to misleading advice by the DSS, the negligence of a third party, and the 'more difficult . . . questions of ignorance, literacy, isolation, illness and the like'.

The Tribunal said that, in deciding whether there were special circumstances, the Secretary was entitled to take account of the length of time for which backdating was sought: in the case of a lengthy delay, weighty facts would be required to establish 'special circumstances' because the *Social Security Act* was 'concerned generally with current payments to meet current expenses and not with large capital payments in the nature of compensation or otherwise': Judgment p.8. The Secretary was also entitled to take account of any debts incurred in caring for a handicapped child by the applicant.

No residual discretion
But, the Federal Court said, once 'special circumstances' had been shown to exist, the Secretary had no

> residual discretion to allow or to refuse to allow the longer period to bring the claim within time . . . The existence of special circumstances is a pre-condition to the power arising. But once special circumstances are found to exist the power must, not may, be exercised.

(Judgment p.9)
The 4 appeals
Turning to the 4 cases before it, the Federal Court said that *Beadle* and *Blurton* had failed before the AAT because that Tribunal had decided that there were no 'special circumstances' to explain their delay in claiming the allowance. The Court had not been shown that either of those decisions had been affected by an error of law.

However, *Corbett* and *Johns* had, according to the AAT, shown 'special circumstances' but had only failed because the Tribunal had exercised what it regarded as a residual discretion against them. Because, the Federal Court said, there was no such residual discretion, there had been an error of law in these two matters and they should be sent back to the Tribunal to be decided in accordance with the Federal Court's interpretation of s.102(1).
Formal order
The appeals of Beadle and Blurton were dismissed; but the appeals of Corbett and Johns were allowed and those two matters sent back to the Tribunal to be determined in accordance with the Court's reasons for judgment.

Family allowance: claimant overseas

HAFZA v DIRECTOR-GENERAL OF SOCIAL SECURITY
Federal Court of Australia
Decided: 23 May 1985 by Wilcox J.

This was an appeal, under s.44 of the *AAT Act* 1975, from a decision of the AAT, noted in (1984) 23 *SSR* 277.

Hafza had left Australia with her husband and two children (for whom she was being paid child endowment) in April 1978, intending to return to Australia in 6 months. However, her return had been delayed by civil war in the Lebanon, her pregnancy and by the family's shortage of funds with which to purchase return air tickets. In fact Hafza and her children had not returned to Australia until June 1982. Relatively early in that 4 year absence, Hafza's husband had obtained sporadic work in the Lebanon.

On the basis of that evidence, the AAT had decided that Hafza had retained her Australian residence and had been temporarily absent from Australia (so that child endowment continued to be payable to her) until her husband obtained employment in the Lebanon; but that, from that time, her absence had become permanent and she was no longer entitled to payment of child endowment.

The legislation
At the time of the decision under review, the *Social Security Act* provided that child endowment was only payable to a person outside Australia if that person's 'usual place of residence' was in Australia or if the person's absence from Australia was 'temporary only': s.103(1)(d).

Section 104(1)(e) provided that a person, whose 'usual place of residence' was in Australia and who was 'temporarily absent' from Australia, should be treated, for child endowment purposes, as if she and her children were in Australia. (However, s.104(2) provided that a person could only take advantage of s.104(1)(e) if the person was a resident of Australia as defined in the *Income Tax Assessment Act* 1936—that is, domiciled in Australia, 'unless the Commissioner is satisfied that [her] permanent place of abode is outside Australia'.)

Overlapping legislation
Wilcox J pointed out that s.103(1)(d) and s.104(4)(e) largely duplicated each other. And, in deciding whether Hafza remained entitled to child endowment during her absence from Australia, the latter provision was immaterial: in order to satisfy s.104(1)(e), Hafza would need to show that her usual place of residence had remained in Australia and that she had been absent from Australia temporarily—precisely the matters upon which the application of s.103(1)(d) depended:

> If she cannot succeed on these issues under s.103(1)(d) she must fail to bring her case within s.104(1)(e); so that the latter section will not operate to save the cessation of endowment under s.103.

'Usual place of residence'
Wilcox J then said that the phrase 'usual place of residence' should be given its ordinary English meaning 'without reference to any artificial meaning specified for the purposes of the legislation': (Judgment p.11).

Wilcox J then observed that s.103(1)(d) referred to a person's '*usual place* of residence'—'the suggestion being that there is only one place which answers that description in relation to any particular

[person]'. That approach was supported by the contrast drawn in the provision between a person's 'usual place of residence' and that person's 'temporary absence': 'the notion of residence', Wilcox J said, 'accommodates temporary absences'. Wilcox J continued:

> So interpreted the paragraph is more restrictive than the general legal concept of residence, which concept encompasses the possibility that a person may be resident simultaneously in more than one place . . . I think that the words 'usual place of residence' in s.103(1)(d) should be read as *prima facie* limiting benefits to endowees who, during any particular period, ordinarily eat, sleep and live in a place in Australia. I emphasize my conclusion is restricted to s.103(1)(d) . . . I say nothing as to the meaning of the word 'residence', or any cognate thereof, in any other context within the Act.

(Judgment, pp.14, 16)

In coming to this conclusion, Wilcox J disagreed with the approach taken by the AAT in *Kehagias* (1981) 4 *SSR* 42 and *Houchar* (1984) 18 *SSR* 184 (where the phrase 'usual place of residence' had been construed as synonymous with the general law concept of 'resident'.

'Temporary absence'

Taking that approach to the phrase 'usual place of residence', it would be relatively easy for a person to cease to have her 'usual place of residence' in Australia. But such a person would be assisted by the reference, in s.103(1)(d), to a temporary absence—the right to endowment (now family allowance) would

> be maintained notwithstanding that for a 'temporary' period—whatever that may mean—the person does not usually eat, sleep and live in a place in Australia. The critical question, then, is what is meant by the word 'temporary'.

(Judgment p.16)

Wilcox J said that it was implied in the concept of 'temporary absence' that the absence would be relatively short and of a definite duration or limited to meeting a specific, passing purpose. There was no problem, Wilcox J said, in describing as a 'temporary absence' a particular journey undertaken in order to attend a sick relative—it would be 'a short term absence to fulfil a particular purpose'. But if the person, who had left Australia to visit her sick relative, decided to stay on indefinitely at the relative's home after completing the visit, the absence would 'cease to be temporary notwithstanding an intention eventually to return to Australia': Judgment pp.18, 19. In deciding whether an absence was temporary, the intention of the person was of considerable importance and would often be decisive, as the AAT had said in *Houchar* (above).

In the present case, Wilcox J said, Hafza had ceased to have her 'usual place of residence' in Australia when she and her family left on their visit to Lebanon. In deciding whether that visit amounted to a 'temporary absence', the AAT had correctly focused on her intention to return to Australia. Although she had intended, when she left Australia, to return within a definite period (namely, 6 months), she had changed her plans some time after arriving in the Lebanon; and, as soon as the date of her intended return to Australia became indefinite, her absence from Australia was no longer 'temporary'. This probably occurred before her husband found casual work in the Lebanon; but there was no doubt that, by that date, her absence from Australia had ceased to be 'temporary', Wilcox J said. Accordingly, the AAT had not made any error of law to the disadvantage of Hafza.

Formal order

The Federal Court dismissed the appeal.

Invalid pension: permanent incapacity

KOUTSAKIS v DIRECTOR-GENERAL OF SOCIAL SECURITY (Federal Court of Australia)

Decided: 12 April 1985 by McGregor J.

This was an appeal, under s.44 of the *AAT Act* 1975, against a decision of the AAT, which had affirmed a DSS decision to cancel Koutsakis' invalid pension: (1984) 17 *SSR* 175.

The AAT had concluded that, although Koutsakis was presently incapacitated for work because of an anxiety state and depression, this incapacity was not permanent because it was likely to respond to psychiatric treatment. Koutsakis had refused to undergo that psychiatric treatment because he maintained that his incapacity had a physical and not psychological basis; but the AAT had said that Koutsakis' refusal was unreasonable and that, consistent with the approach established in the workers' compensation area, he could not be treated as permanently incapacitated: *Fazlic* v *Millingimbi Community Inc.* (1982) 38 ALR 424.

In this appeal, the appellant relied on the Federal Court decision *Dragojlovic* (1984) 18 *SSR* 187. But McGregor J said that the earlier Federal Court decision did not establish that an applicant for invalid pension could refuse any treatment which might improve his condition. McGregor J suggested that the principle in *Dragojlovic* (that is, that a person could still be permanently incapacitated when he refused to undergo medical treatment) should be confined to cases where there was a 'question of fear of "invasive surgery" or previous failure of surgical processes or affronted religous conviction': Judgment p.10.

McGregor J also referred to the AAT decision in *Korovesis* (1983) 17 *SSR* 175 and suggested that the Tribunal which had decided that matter would have also found against Koutsakis. He commented that the principles developed for the purposes of workers' compensation in *Fazlic* (above) were directly relevant to the circumstances in the present case, and continued:

> And I am of the opinion that in judging permanent incapacity one ought not to ignore readily available exterior corrections which are not objectionable because, for example, they involve religous affront or surgical damage.
>
> It is therefore not sufficient for the applicant to have, if he did have, 'genuine' belief wherefor he refuses the 'relatively simple, not life threatening' attention thus maintaining an incapacity; or if he does, incapacity may not be regarded as 'permanent', entitling him to a pension.

(Judgment, p.10)

Formal order

The Federal Court dismissed the appeal.