

Administrative Appeals Tribunal decisions

Unemployed benefit: children overseas

HOANG ZU NGUYEN and
SECRETARY TO DSS
(No.N85/496)

Decided: 2 July 1986 by B.J.McMahon,
D.J.Howell, and C.J.Stevens.

Hoang Zu Nguyen left Vietnam in January 1982, accompanied by 2 of his 7 children. He was obliged to leave his wife and 5 of his children in Vietnam. He travelled to Hong Kong where he stayed for more than 2 years. During that period, he sent 3 parcels of goods to his family in Vietnam, the value of which totalled about \$A2700.

During this period, his wife died and he married another Vietnamese woman in Hong Kong. In April 1984, Nguyen, his second wife, his 2 children and a nephew migrated to Australia. Following their arrival in Australia, Nguyen and his second wife had a child. Between that time and March 1986, Nguyen sent 2 parcels of goods, with a total value of \$A1900, and a cash transfer of \$A500 to his family in Vietnam for the support of his children there.

Following his arrival in Australia, Nguyen was granted unemployment benefit and in February 1985 he applied for additional benefits for the 5 children who were still in Vietnam. When that application was rejected, Nguyen sought review by the AAT.

The legislation

At the time when this matter came before the AAT, s.112(5) of the Social Security Act provided that a person receiving unemployment benefit who -

- (a) has a dependent child or dependent children; or
 - (b) is making regular contributions towards the maintenance of a child or children'
- is qualified to receive additional benefit of \$16 a week for each child.

The term 'dependent child' is defined in s.6(1) as meaning -

- (a) a child under the age of 16 years who -
 - (i) is in the custody, care and control of the person; or
 - (ii) where no other person has the custody, care and control of the child - is wholly or substantially in the care and control of the person

Section 6(6) provides that a child is not to be treated as a dependent child for the purposes, inter alia, of unemployment benefit if the child is living outside Australia unless the Secretary is satisfied that the child will be brought to live in Australia within 4 years of the arrival of the person claiming unemployment benefit.

Alternative tests

The AAT pointed out that, under

s.112(5), there were 2 alternative ways in which a person could qualify for additional benefit for children:

'An applicant may show either that he has a dependent child or that he is making regular contributions towards the maintenance of a child. If he relies on the first test and the child in question is outside Australia, then he must meet the additional requirements of showing custody, care and control and the "four year likely immigration" test. If he relies on the second part of the test, namely "making regular contributions towards the maintenance of a child" he does not have to show either of the additional qualifications in our view. . . . Whether or not there was a reason for making a distinction between a dependent child on the one hand and a child being maintained on the other hand, the distinction has certainly been effectively drawn.'

(Reasons, p.5).

'Regular contributions towards . . . maintenance'

The AAT said that there were 6 contributions which Nguyen had made towards the maintenance of his children. The fact that these contributions amounted to less than full maintenance was not critical: 'It is not necessary for an applicant to show that he is totally supporting or maintaining a child so long as he is making some contribution to that end'. (Reasons, p.12).

The critical question was whether Nguyen's contributions could be described as 'regular'. '[F]or the purposes of the *Social Security Act*' the AAT said, 'regular does not mean rigidly periodic'; and the Tribunal referred to the earlier decision in *Mattons* (1981) 4 SSR 38 and *Re Chapple* 82 WN (Part 1) (NSW) 53, where Asprey J. had said that regularity of payment involved 'some constancy or continuity'. The AAT continued:

'Following the reasoning in this case, it is in our view valid to describe the sending of parcels as "regular" notwithstanding the fact that there were long intervals in between each one . . . Long intervals alone are no bar to the establishment of a regular pattern. The variations in the length of those intervals furthermore will not, in our view, necessarily vitiate the creation of a pattern of regularity.'

(Reasons, p.14).

The AAT accepted evidence given by a social worker that the practice of sending parcels of goods to families in Vietnam was common amongst the Vietnamese community. This was a relevant factor in characterising what

Nguyen had done as the making of regular contributions. Even more relevant, the AAT said, was the value of the parcels, particularly where those parcels had been sent relatively infrequently. In the present case, Nguyen had a very limited income from unemployment benefits and this prevented him from making larger contributions to the maintenance of his children:

'He has, notwithstanding these financial constraints, demonstrated in our view a reasonable attempt consistent with his circumstances and means to provide whatever he can in the way of material contributions towards the maintenance of his children.'

(Reasons, p.15).

The AAT noted that there had been a gap in the sending of contributions between December 1984 and March 1986. However the sending of a contribution in March 1986 'maintains the regularity', the AAT said:

'The regularity lies in the fact that he has exerted himself and strained his financial resources (indeed has gone into considerable debt), whenever it was possible to put together a suitable contribution towards the maintenance of the children concerned. We are after all dealing with an Act that should be interpreted beneficially. We are dealing with circumstances in a culture where fixed intervals and fixed sums towards maintenance are not the norm, nor are they to be expected. In the context of the Act, and in the context of the circumstances in which the applicant finds himself, regular contributions must not be read to mean exclusively fixed sums paid at fixed periodic intervals. Rather they should be looked at as part of a pattern of continuity, a homologous sequence, a rhythm of events which may at times be somewhat syncopated.'

(Reasons, p.18).

The AAT concluded that Nguyen had satisfied the requirements of s.112(5)(b) of the *Social Security Act* and that he was entitled to additional benefit for his children. It was not necessary, the AAT said, to consider whether those 5 children could be described as 'dependent children' within s.112(5)(a).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Nguyen was entitled to receive additional unemployment benefit during the period from February 1985 to the date of the decision.