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 rhythym 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.

Family allowance: absence

LE and SECRETARY TO DSS (No.N85/375)
Decided: 28 July 1986 by J.D. Davies, C.J. Bannon and H.E. Hallowes.

In November 1977, Frank Le left Vietnam and came to Australia with 4 of his children. His wife and another child remained in Vietnam and, in May 1978 Le's wife gave birth to another child.

Over the succeeding years, attempts to obtain exit permits for Le's wife and 2 children were unsuccessful. During the period from 1978 to 1985, Le sent 13 payments, ranging from $50 to $750 and totalling $A2815 to his wife, partly to pay for exit permits and partly to cover their living expenses.

In 1979, Le applied for a family allowance for his 6 children, including the 2 in Vietnam. The DSS granted him family allowance for the 4 children in Australia, but refused to pay allowance for the 2 children in Vietnam. Le asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.95(1) of the Social Security Act provided that a person who had the 'custody, care and control of a child' was qualified to receive family allowance for that child.

In 1985, s.95(1) was amended to provide that a person who had a 'dependent child' was qualified to receive family allowance for that child. The term 'dependent child' was defined as meaning (so far as is relevant) a child under 16 'in the custody, care and control of the person': s.6(1).

The relevant legislation
The parties in this matter had agreed that it should be decided in accordance with the provisions of the Act as they stood before the 1985 amendments. Two members of the AAT, Davies and Hallowes, said that they thought that the 1985 amendments had not significantly altered the concept which the Act had in mind:

> 'The Act looks to a person who has the responsibility for the care of a child and exercises that responsibility . . . The Act is not concerned primarily with the niceties of the common law principles as to guardianship or with the niceties of an order of the Family Court of Australia as to custody, access or the like.'

(Reasons, p.4).

No responsibility for the children
The AAT said that, in the present case, Le had not continued to exercise any responsibility for the day-to-day maintenance, training and advancement of the 2 children who had remained in Vietnam. Although his authority, as the children's father, had been accepted, and he was consulted to the extent that this was possible, the tasks of maintaining the children and arranging with whom they should live were undertaken by relatives in Vietnam and not by Le. As one member of the AAT, Bannon, put it:

> 'He does not enjoy actual custody of his 2 children nor factual control, because the Vietnamese authorities have so far refused to permit them to leave the country in which they live and are domiciled . . .'

(Reasons, p.6).

Formal decision
The AAT affirmed the decision under review.

Assets test

HENRY and SECRETARY TO DSS (No.V85/425)
Decided: 27 June 1986 by J.D. Davies, J.R. Dwyer and J.D. Hourigan.

Mr and Mrs Henry were age pensioners. Following the introduction of the assets test in March 1985, the DSS decided to cancel their pensions because of the value of two farms held by a family trust in which they had a beneficial interest, and which owed them $190 000. It was this debt which the DSS had treated as Mr and Mrs Henry's property for the purposes of the assets test. (However, the AAT had approached the matter by asking whether it was reasonabled to require the sale of part of the farming property because that was the only practical way in which Mr and Mrs Henry could realise the debt which the trust owed to them.)

The DSS subsequently reviewed that decision and decided to reduce the rate of their age pensions to $8.30 a fortnight each. Mr and Mrs Henry asked the AAT to review those decisions.

The legislation
The central question before the AAT was whether Mr and Mrs Henry could be said to be suffering severe financial hardship because of the assets test so that the value of the property could be disregarded.

Section 6AD of the Social Security Act obliges the Secretary to the DSS to disregard the value of property where the property cannot be sold, realised or used as security for borrowing money or where it would be unreasonable to expect the property to be sold, realised or used as security; and where the Secretary is satisfied that the person would suffer severe financial hardship if the value of the property were taken into account in reducing the person's pension.

Reasonable to sell or use as security?
Evidence was given to the Tribunal that, even if a substantial amount of money was spent on improving the property in question, it would not be a viable financial proposition. However, because the property was close to Melbourne, its value was appreciating and two 50 acre segments of the property had been placed on the market in the past 12 months.

The AAT referred to a press release from the Minister for Social Security and to an internal DSS instruction, the effect of which was that it would not be reasonable to expect a person with a 'long term attachment to a property on which he or she resides' to sell that property. A long term attachment was defined as one which had lasted for 20 years. The AAT said that the press release and the instruction were relevant -

> 'if only to inform the Tribunal of the background within which the decision must be made. However, neither the press release nor the departmental instruction can be given effect strictly according to their terms. They do not state the law. The law is stated in the Act. The Tribunal must make up its own mind as to what is reasonable in the circumstances. See *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.'

(Reasons, pp.8-9)

The Tribunal said that, in determining the question of what was reasonable, it should keep in mind 'the special relationship which farming families have with the land' and the interest which those families have in handing down a viable farm from one generation to the next. However, in the present case the property in question was not now and was unlikely in the future to be viable. Its future lay in sub-division and there was no member of the family who was likely to take over the property as a farm.

The AAT said that it was not reasonable that Mr and Mrs Henry should be supported by the taxpayers while the property appreciated in capital value so that it could be eventually sub-divided for the benefit of their children and grandchildren.

Having regard to Mr and Mrs Henry's long involvement in farming, the AAT thought it would be unreasonable to expect that they should now alter their whole lifestyle. But in order to maintain that lifestyle, they did

not need to retain the whole of the property. Two 50 acre lots had already been put up for sale. The Tribunal could not see how it was unreasonable to expect Mr and Mrs Henry to proceed with that sale.

The AAT also thought that it would be possible for Mr and Mrs Henry to borrow further money on the security of the property, particularly if steps were taken to sell the two 50 acre lots.

Accordingly, the AAT concluded that s.6AD did not apply to Mr and Mrs Henry and that, accordingly, the value of their property had to be taken into account in fixing the rate of their pension.

Formal decision

The AAT affirmed the decision under review.

REYNOLDS and SECRETARY TO DSS
(No.N85/386)

Decided: 2 May 1986 by R.C. Jennings.

Mr and Mrs Reynolds were age pensioners whose age pensions had been cancelled by the DSS following the introduction of the assets test in March 1985. They asked the AAT to review that decision.

The legislation

This case focussed on s.6AD of the *Social Security Act* which provided that property of a pensioner should not be included in the assets test where the property could not be sold, realised or used as security for borrowing money or where that property could not reasonably be expected to be sold, realised or used as security for borrowing money; and where the Secretary to the DSS was satisfied that the pensioner would suffer severe financial hardship if the value of the property were taken into account.

'Property that . . . the person . . . cannot sell'

The property involved in this case consisted of shares in a family company which was the registered proprietor of a farming property. Mr and Mrs Reynolds held 90% of the shares in the company and it was clear that they had the capacity to sell the farm. Accordingly, the AAT said, the farm should be treated as 'the property' under consideration for the purposes of s.6AD.

Mr and Mrs Reynolds had been attempting to sell the farm for about 18 months. No bid had been made for it at an auction and they were now attempting to sell it for its valuation. The DSS conceded that Mr and Mrs Reynolds had made reasonable efforts to sell the property but argued that the expression 'cannot sell or realise' in s.6AD referred to some legal prohibition rather than to an inability to sell for the lack of a buyer.

The AAT rejected this argument, saying that 'cannot sell' did include the lack of legal capacity to sell but also included 'the alternative meaning "is unable to sell" for whatever reason': Reasons p.6. The AAT said that, in the light of the evidence and the concession made by the DSS, it had no difficulty in deciding that Mr and Mrs Reynolds could not sell the farm.

'Severe financial hardship'

However, the AAT said, Mr and Mrs Reynolds were not able to show that they would suffer 'severe financial hardship' if the value of the property in question were taken into account. The AAT noted that Mr and Mrs Reynolds had income (from a war disability pension and from investments) which totalled $10 500 a year:

> 'The level of pension or benefit payable to different persons in different circumstances is a recognition by Parliament of the amount which is considered to be appropriate for that purpose from time to time.
>
> The decision to introduce the assets test was the implementation of a policy not to subsidise the income of some persons who had sufficient resources of their own if those resources in fact produce an income in excess of the maximum pension payable to an aged person. It will be difficult for such a person to demonstrate "severe financial hardship". . . .
>
> The facts of this case demonstrate a joint income of at least $2000 per annum more than the maximum pension and accordingly I cannot describe the present circumstances of the applicants as involving them in severe financial hardship.'

(Reasons, pp.7-8).

Formal decision

The AAT affirmed the decision under review.

FARROW and SECRETARY TO DSS
(No.T86/8)

Decided: 13 June 1986 by R.C. Jennings, QC.

Eric Farrow had qualified for an invalid pension because he was permanently incapacitated for work in March 1985, when he was 39 years of age. However, the DSS took account of a farming property (totalling 72 hectares) on which Farrow lived, some plant and stock, and decided that Farrow was not entitled to payment of invalid pension. In 1986, the DSS reviewed this decision and decided that the value of Farrow's property entitled him to a pension of $3292 a year (rather than $11 352 a year - the full rate payable to a person with Farrow's family commitments).

Farrow asked the AAT to review these decisions.

The legislation

It was agreed that the value of Farrow's property totalled $134 700. The central question in this review was whether Farrow was entitled to take advantage of s.6AD of the *Social Security Act*, the terms of which are described in the cases of *Reynolds* and *Henry*, noted in this issue of the Reporter.

'Security for borrowing'?

The AAT noted that the land in question was not mortgaged but accepted that, because Farrow had only meagre income and because he had been refused a loan by the Commonwealth Bank, Farrow could not reasonably be expected to use any of his assets as security for borrowing.

'Reasonably be expected to sell or realise'?

The basic question, the AAT said, was whether it was reasonable to expect Farrow to retain his farming property: the question whether it was reasonable to expect him to sell any of the plant or stock would depend on the answer to that question.

In order to decide whether it was reasonable to expect Farrow to retain or sell the farm, it was important to look at his circumstances. He was 40 years of age, had been married for 9 years and had 3 young children. In February 1985 he had been severely injured in an accident for which he had received no compensation. As a result of that accident he would never be able to return to strenuous physical activity.

Nevertheless, he had been able to maintain his property which produced little income but on which he had planted fruit trees. It was his intention to expand the area devoted to fruit trees, which should begin to produce an income within 4 years.

The DSS referred to its internal guidelines on the administration of s.6AD and in particular to para. 6.1232 of those guidelines which said, in part:

> 'A desire to continue a particular lifestyle . . . would not constitute an adequate reason as to why the person should not sell or borrow against his assets . . . [P]ersons should make adequate use of their own financial resources before calling on the community for income support.'

The AAT said that it was not necessary for Farrow to show that his case fell inside or outside the guidelines and said that the word 'lifestyle' was ambiguous and tended to be misleading. If it referred to 'a comparatively indulgent lifestyle' which allowed a wealthy landowner to engage in hobbies or sporting activities, it could 'be easily understood as an example of a situation where social welfare payments are not expected to support': Reasons, p.12.

However, the AAT indicated that it was not appropriate to apply this term to the 'efforts of an aged or invalid person to turn a smallholding to its best economic advantage for the bene-