COOPER and SECRETARY TO DSS (No. S86/114)
Decided: 12 December 1986 by J .A. Kiosoglous, J. T. B. Linn and D .B. Williams

Susan Cooper successfully applied for handicapped child's allowance in respect of her son in June 1984. Her application for backpayment for the period June 1975 to June 1984 was refused. She applied to the Tribunal for review of the decision.

The legislation
Section 105R of the *Social Security Act* applies sub-sections 102(1) and (2) (which relate to family allowances) to the payment of handicapped child's allowance. Sub-section 102(1) allows for the backdating of the allowance where the claim is lodged within six months of eligibility or for such period as the Secretary determines there are 'special circumstances'.

Did special circumstances exist?
The applicant was ignorant of the existence of the allowance until 1984. But she had a long history of medical problems dating from 1970. She was rarely without a medical condition between that date and 1984. Her problems were significant ranging from epilepsy to a speech impediment. Additionally, the applicant had to care for her severely handicapped child.

Referring in particular to the Federal Court decision in *Beadle* (1985) 26 *SSR* 321 the Tribunal concluded that the personal predicament of the applicant prevented her from gaining access to information about the allowance. It was not a case of simple ignorance. Even though there was some evidence that she was active in school activities, the totality of her circumstances supported the conclusion that she was isolated from the broader community. Her health condition and speech problem were of greater significance.

Formal decision
The Tribunal set aside the decision under review and directed that 'special circumstances' existed for the backpayment of the allowance.

Assets test: 'severe financial hardship'

KORAC and SECRETARY TO DSS (No. N86/486)
Decided: 11 December 1986 by B.J. McMahon, M.S. McLelland and J.H. McLintock

The applicant had her widow's pension cancelled after the introduction of the assets test. She applied to the AAT to review the cancellation.

The facts
The applicant owned four blocks of land valued at $160,000. The land was currently on the market. Mrs Korac in the meantime regarded the land as a liability with rates of $1,000 a year. She receives no income from the land. She also had only between $4,500 and $5,000 remaining of $10,000 invested after the sale of a fifth block of land.

As the value of the land was not in dispute and payment of the pension ceased when assets to the value of $129,000 are reached for the single homeowner, the applicant could only receive the pension if she came within the hardship provisions.

The legislation
Section 6AD(1) of the *Social Security Act* provides that the value of a person's property is to be disregarded if the property in question cannot be sold or realised or used as security for borrowing (or if it would be unreasonable to expect the property to be sold or realised or used as security for borrowing) and if the Secretary is satisfied that the person would suffer severe financial hardship if the property were taken into account for the purposes of the assets test.

Unreasonable to sell?
The AAT did not consider it unreasonable for the applicant to sell the land. It was not property that had been in the family for generations nor was it the source of the applicant's income. If sale was not possible, then borrowing on the security of the land was a reasonable expectation. The Tribunal noted that the asking price that the applicant had placed on the land was probably excessive. It was not unreasonable to lower that price.

The only financial hardship was the payment of rates. But such a hardship was not of a type contemplated by the section. More severe hardship than the payment of rates is required.

The Tribunal could find no place for the application of s.6AD.

Formal decision
The AAT affirmed the decision under review.

STRANGE and SECRETARY to DSS (No. W86/79
Decided: 5 December 1986 by R. Balmford

Doreen Strange had her pension cancelled after the introduction of the assets test. She applied for consideration under the hardship provisions of the legislation but this claim was rejected. She applied to the AAT for review.

The facts
Mrs Strange had been in receipt of a age pension since November 1983. Her husband had died in 1968 and left her the family farm. The farm was extended in 1977. The applicant along with her son and his wife farmed the land in partnership. The Taxation Office valued the property at $325,000 which included the sum of $50,000 for the house on the property occupied by the applicant. The applicant's total assets after allowing for the house and mortgage commitments were about $326,000 on her own valuation although the Taxation Offfice valued her assets at about $240,000. On either valuation her assets precluded her from receiving any pension.

The only way in which she could receive any pension was if the financial hardship provisions contained in s.6AD of the Act could be applied to her case. [The legislation is set out in *Korac*, this issue.]

Severe financial hardship
The Tribunal adopted the view expressed in *Reynolds* (1986) 32 *SSR* 404 and cited in *Lumsden* (1986) 34 *SSR* 430 that '"severe financial hardship" is a condition that is more likely to be demonstrated by a person whose income is materially less than the current maximum pension'.

The applicant put to the Tribunal that all income received from the property was put back into the farm. The applicant received no income from the property and had no car or telephone of her own. Groceries were bought in bulk for the family [her son and his family lived on another house on the property]. All major payments were paid in respect of the property as a whole.

The AAT considered the applicant's position if s.6AD did apply and if it did not apply in order to determine if she would suffer 'severe financial hardship' if it were not applied to her circumstances. Essentially this required the Tribunal to come to a determination as to the current income of the applicant.

What was the applicant's income?
It was noted that Mrs Strange had very few direct expenses to meet personally. It had also been put to the Tribunal that she had little in the way of disposable income. But what may be an inadequate income in the city may be wholly adequate on a farm where one has access to the produce of the farm.

The Tribunal discussed the meaning of the word 'income'. To ascertain the

applicant's income it was assumed that she retained all her current sources of income and they continued to yield income at the current level [*Harris* (1985) 24 *SSR* 294]. The Tribunal then adopted the reasoning in *Haldane-Stevenson* (1985) 24 *SSR* 296 that in the context of the *Social Security Act* 'income' did not mean taxable income but 'net earnings, moneys, valuable consideration and profits and it is the net income from each source which is to be taken into account in the calculation of a pensioner's annual rate of income' (cited in Reasons, para.16).

The AAT arrived at an annual income of $5,891. This figure was arrived at by adding to her taxable income an amount which represented a capital expenditure in relation to a windmill on the property and the clearing of the property. The Tribunal said:

> 'These are items of capital expenditure, which Parliament has said are nevertheless to be deductible from a taxpayer's assessable income in order to arrive at a taxable income. This has no doubt been done with a view to encouraging the improvement of land for use in primary production. Considering the definition of 'income' in the *Social Security Act* in the light of the passages cited from *Haldane-Stevenson* ... I do not consider that it is appropriate, in calculating 'income' in the context, even if it not strictly for the purposes, of the *Social Security Act*, to deduct the whole share of the cost of the windmill in the year in which it was incurred. The appropriate method of allowing for the capital costs incurred in earning income must be by some form of depreciation over a period.' (Reasons, para.24)

The tax returns of the family had shown that the whole cost of the expenditure on the windmill had been allocated to the applicant. The AAT did not consider that such an allocation, however correct in the context of taxation, was an appropriate method of ascertaining the income of a pensioner for the purposes of the assets test.

The income figure arrived at by the AAT being greater than the amount of the maximum rate of pension for a single person it could not be said that she suffered 'severe financial hardship'.

Formal decision
The AAT affirmed the decision under review.

Assets test: shares

COWLING & COWLING and SECRETARY TO DSS
(No. S86/149)
Decided: 19 December 1986 by R.A. Layton, J.A. Kiosoglous and B.C. Lock

The applicants had had their age pensions cancelled after the application of the assets test to their assets. They applied to the AAT for review of that decision.

The facts
The combined income of the applicants (from interest, shares and bonds) was $11,689 per annum. This gave each a weekly income of $112.39 which would have qualified them for a part pension if the income test only were to apply.

The assets of the applicants totalled $197,667. This included bank accounts, shares, bonds, household goods and a car. By the application of the assets test this amount reduced the rate of their pension to zero.

Discrimination against those subject to the assets test?
The applicants presented a number of arguments in support of their application. First, they argued that the Act discriminated against persons dealt with under the assets test. An assessment under that test led to harsher dealing than under the income test.

The AAT agreed that the Act did discriminate against those with assets but commented that:

> 'this reflects the advantages of owning property which may not only appreciate in value over the years, but which gives flexibility, and a capacity to be converted for variable use according to need.' (Reasons, para.9)

'Property' of the applicants
The AAT disagreed with the applicants' second argument that the shares they owned should not be assessed as 'property' but as 'income'. The Tribunal considered that shares were normally treated in law as a form of personal property.

The applicant's had then argued that their shares should be assessed at their nominal value and not at their market value. The assets test provisions of the *Social Security Act* do not refer to the 'market' value but only to the 'value' of property.

However, the financial hardship provisions imply a market value when referring to the 'sale' or 'realization' of property. Also, the common usage of 'value' implies the amount that could be obtained for a thing when sold.

The Tribunal also referred to the decision in *Reynolds* (1987) 35 *SSR* 444 where the Tribunal concluded that the value of property to be disregarded in s.6AA of the Act was ascertained by reference to the net market value of the property. The AAT concluded that all property should be valued at its market value.

> 'If persons have income or property above [the] limits [imposed by the income and assets tests], then the income or property is expected to be used for their financial support, if required rather than relying on governmental, and therefore public, support by way of a pension. If the property or asset is sold or realized for their support, it is the market value which is the more appropriate measure of value...' (Reasons, para.17)

Fluctuation in market value of shares
The AAT conceded that there existed a problem with notifying the DSS of the value of assets given the fluctuation in the share market. This may be resolved, it was suggested, by the DSS adopting a more appropriate time frame (currently eight weeks) within which changes in the market value of shares must be notified.

Share portfolio or superannuation fund?
Finally, the applicants pointed to apparent discrimination against pensioners who created their own share portfolio. The AAT did not accept this argument. Persons who joined superannuation funds did not have access to the assets of the fund but only to some form of pension or lump sum. This lack of flexibility or control was a disadvantage that the applicants did not suffer.

In either event the recipient of a pension or lump sum from a superannuation fund would be treated as having 'income' or 'property' - depending upon the nature of the receipt - and so be subject to the income and assets test just as are those who make their own arrangements.

Formal decision
The AAT affirmed the decision under review.

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