Invalid pension: rate

AMBROZICH AND SECRETARY TO DSS
(No. S86/287)
Decided: 1 May 1987 by J.A. Kiosoglous

The applicant had been in receipt of invalid pension since November 1974. In April 1975 he had returned to West Germany and continued to receive the pension in that country. The DSS sent him a cheque in Swiss francs which the applicant then converted to Deutch Marks.

In February 1977 the applicant requested a review of the rate of his pension on the basis that the cost of living in West Germany was high and he also lost part of his pension as the result of the exchange rates. He also referred to his inability to obtain any health care benefits. In 1985 the DSS began to issue cheques in United States dollars. The applicant again raised similar complaints and appealed to an SSAT. The SSAT recommended that the appeal be not allowed as the applicant was already receiving the maximim rate of pension. No increase could be made under the *Social Security Act*. The applicant then applied to the AAT.

The AAT confirmed the view of the SSAT. The rate of pension was fixed by the Act. There is no discretion to vary the rate of pension paid to a person.

> 'This Tribunal is mindful that the applicant is suffering a loss resulting from fluctuations in the exchange rate, and sympathises with the financial position the applicant finds himself in, but it is beyond the control of the Department. There is no provision to make up the variation in the exchange rate. However, as the exchange rate fluctuates it is conceivable that at certain times the exchange rates wil benefit the applicant. This is the risk the applicant took when he left Australia.' (Reasons, para.18)

The AAT could only make similar comments with respect to the high cost of living in West Germany and his lack of health care cover in that country. These were factors that the Australian social security system could not address.

Formal decision
The AAT affirmed the decision under review.

Wrong claim

REID AND SECRETARY TO DSS
(No. V86/674)
Decided: 30 March 1987 by I.R. Thompson

[Note: The Tribunal gave its reasons orally in this decision. The following is from a DSS summary of the decision.]

The applicant had a severely handicapped child. The wife of the applicant had been in receipt of family allowance and handicapped child's allowance. In December 1983 the son turned 16 and the DSS sent a family allowance review form without any information as to invalid pension. Family allowance and handicapped child's allowance continued for the son who attended a special school and then a sheltered workshop. In February 1986 a claim was made for invalid pension. The applicant appealed against a DSS refusal to backdate payment.

The AAT's view
The AAT said that the review form was a claim form for family allowance and handicapped child's allowance, that on the facts of the son's disability a claim for invalid pension would be a claim for payment to the parents, that handicapped child's allowance was similar in character to invalid pension and that the DSS procedures to notify the availability of invalid pension had broken down. As a result the Tribunal said that the discretion in s.135TB(5) of the *Social Security Act* should be exercised to regard the claim for handicapped child's allowance as a claim for invalid pension. [Section 135TB(5) gives the Secretary to the DSS a discretion to treat an application for one pension, benefit or allowance as an application for another pension, benefit or allowance which 'is similar in character'.] Thus the invalid pension could be backdated to the first pension pay day after the claim was lodged.

Formal decsion
The AAT set aside the decision under review.

Federal Court decision

SECRETARY TO DSS v. COPPING
(Federal Court of Australia)
Decided: 1 June 1987 by Forster, Jenkinson and Burchett JJ.

This was an appeal from the AAT's decision in *Copping* (1987) 38 *SSR* 475.

The Tribunal had decided that a farming property owned by Mr and Mrs Copping, but farmed by their son, was covered by s.6AD(1) of the *Social Security Act* and should not be included in the assets test, because they could not reasonably be expected to sell, realize or use the property as security for borrowing; and they would suffer 'severe financial hardship' if the value of the property were included.

The AAT had also decided that there was no income which Mr and Mrs Copping could reasonably be expected to derive from the property under s.6AD(3) of the Act. This was because they could not be expected to throw their son off their property; he was struggling to survive in the slumping rural economy; and to expect him to pay rent to Mr and Mrs Copping was unrealistic.

Personal circumstances relevant
In this appeal, the DSS argued that the AAT had made an error of law by taking account of the personal and financial circumstances of Mr and Mrs Copping's son.

The Federal Court, in a judgment delivered by Jenkinson J., decided that the matters taken into account by the AAT were matters which it was required to take into account. There had, accordingly, been no error of law on the part of the AAT and the appeal should be dismissed with costs. Jenkinson J. said:

> 'I think the word "reasonably", in the context which s.6AD(3) supplies, directs the Secretary's attention to *inter alia*, all the circumstances, including the personal relations of those concerned in the property, which in his judgment might reasonably be taken into account by "the person" . . . in deciding how the property was to be exploited to produce income. . . The construction suggested [directs] enquiry as to what annual rate of income the Secretary, or the AAT on a review, considers would be likely to be derived from, or produced with the use of, the property by that person if that person made decisions concerning the exploitation of the property which in all the circumstances, including personal circumstances, the Secretary, or the Tribunal on review, considered reasonable.'

(Judgment, pp.10-11)

This was the enquiry, Jenkinson J. said, which the AAT had undertaken. It had not been argued that the AAT's conclusion on that enquiry was unsupported by the evidence; and so the

AAT's decision contained no error of law.

Formal decision
The Federal Court dismissed the appeal with costs.

SECRETARY TO DSS v. BARNES
(Federal Court of Australia)
Decided: 14 May 1987 by Forster, Northrop and Burchett JJ.

This was an appeal against the AAT's decision in *Barnes* (9 February 1987).

The AAT had been asked to decide whether a farming property previously owned by Mrs Barnes should be treated as part of her property for the purpose of the assets test. She had transferred the property to her son, for no consideration, in September 1984. The AAT had concluded that Mrs Barnes should not be treated as still owning that property.

The legislation
Section 6AC of the *Social Security Act* provided that a person was to be treated as the owner of property where she had disposed of that property after 1 June 1984 without adequate consideration - unless the disposition had been 'part of a course of conduct under which the person ceases employment or ceases to engage in a business or profession . . .': s.6AC(10).

'Ceasing to engage in a business'
The AAT had decided that Mrs Barnes' transfer of property was not a 'disposition of property' because she had withdrawn from a long-standing share-farming arrangement with her son at the time of the transfer.

The Federal Court, in a judgment delivered by Burchett J., dismissed the appeal. It noted that there had been a share-farming agreement between Mrs Barnes and her son from about 1964; that Mrs Barnes (now aged 93) had played an active part in the work of the farm; that the level of her involvement had reduced over the years; and that she had finally withdrawn from the agreement and the work of the farm at the time she transferred the farm to her son.

On the basis of that evidence, Burchett J. said, it was open to the AAT to decide that Mrs Barnes' transfer of the farm was 'a course of conduct under which [she] cease[d] . . . to engage in a business' within s.6AC(10):

> 'The section looks to a process of disengagement from employment, business or profession. The process will often be preceded by some slowing down of the activity involved, and the legislature should not be understood to have ignored that obvious feature of common human experience. But it is not necessary to attempt to define the limits of the legislative phrase, which is expressed in broad terms. The evidence here indicates that, right up to the transfer, there was a series of share farming arrangements, involving the carrying on of a farming business with the participation of [Mrs Barnes], and the incurring by her of the appropriate obligations, and of course, the receipt by her of the appropriate payments under the agreements. If her activity grew less, that is not necessarily inconsistent with her continuing to be engaged in the business.'

(Judgment, p.5)

Formal decision
The Federal Court dismissed the appeal with costs.

[Each of these Federal Court decisions has prompted the Government to move to amend the *Social Security Act*.

Barnes: According to an announcement which accompanied the 1987 Budget, the current exemption, from the disposition provisions, of a transfer which accompanies a decision to cease business, allows 'an unintended avoidance of the income or assets test'. From 13 November 1987 -

> 'the exclusion clauses in the present s.6(10) and (11) of the *Social Security Act* [formerly s.6AC(10) and (11)] will be deleted to ensure that assets and income disposed of without adequate consideration will be included in the value of the person's assets and income.'

Copping: According to the same announcement, the intention of the deemed income provision in the former s.6AD(3) 'was that, where disregarded property had the potential to produce income, its commercially potential income would be deemed to be received'; but 'appeal bodies have determined the deemed income . . . on the basis of subjective factors and the user's capacity to pay a lease price, rather than its commercial potential.' From 13 November 1987 -

> 'Pensioners seeking to have their property or business disregarded under the assets test hardship provisions will be deemed to have income of 2.5 per cent of the value of the property, or the market rental value, whichever is the higher.']

Background

SENTENCING WELFARE OFFENDERS

The legacy of the Australia Card debate (debacle?) may be that we have firmly implanted in the collective consciousness of the community the notion that welfare and tax 'cheats' are tantamount to enemies of society. While that notion dominates thinking it is then very easy to justify the harsh treatment of those who fail to pay their share or those who take more than their share.

Of course, few would deny that any person who fraudulently obtains a financial advantage by manipulating the welfare or tax system should go unpunished. But what is the appropriate punishment? In a climate created by the above thinking the danger may be that the community will over-react and demand penalties which are out of proportion to the offence, or which fail to take into account mitigating factors.

Welfare cases
In the case of welfare recipients who fraudulently obtain benefits there are obvious problems when cosidering penalties. A fine may be absurd when imposed on a person without any means to pay. A jail sentence may in reality mean that the community must then provide support to a family now deprived of its main income source.

Other factors that must be considered are the motivations for the fraud. A person who defrauds the welfare system to, in their eyes, provide an adequate standard of living for their children, may not be seen to be as blameworthy as the person who fraudulently claims benefits to finance an overseas holiday.

Difficulties for Courts
Such factors to be taken into account must present great difficulty for Courts when sentencing persons for welfare fraud. One only has to consider the disparities in sentence at different levels of the system to observe just that.

In Giannakopoulos v. Helm (County Court of Victoria, 20 May 1987) the appellant appealed against his conviction and sentence in the Magistrates Court on 14 charges of making false statements to the DSS and on 2 charges of obtaining benefits not payable to the sum of $5,238.84. The magistrate had sentenced Mr Giannakopoulos to one months imprisonment on each charge. Six months imprisonment was suspended leaving an effective sentence of ten months.

The appellant was a Greek migrant who had purchased a lease of a Greek tavern in August 1983. The lease expired in April 1984. During that time the tavern was running at a loss.