Family allowance: child overseas

VAN THIEM TRAN and SECRETARY TO DSS
(No. V86/493)
Decided: 5 October 1987 by R. Balmford, L.S. Rodopoulos and J.H. Wilson.

Van Thiem Tran left Vietnam illegally with his 3 sons and came to Australia in June 1985. His wife and 3 daughters remained in Vietnam.

In November 1985, Tran claimed family allowance for his 3 daughters. When the DSS rejected his claim, he asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.96(1) of the *Social Security Act* provided that a person who had a 'dependent child' was qualified to receive family allowance.

The term 'dependent child' was defined in s.6(1) to mean either a child under 16 who was 'in the custody care or control of the person'; or a full-time student child aged at least 16 but under 25, who was 'wholly or substantially dependent upon the person'.

Section 96(1), (5), (7) and (8) prevented payment of the allowance for a child outside Australia, unless the Secretary was satisfied that the claimant was likely to bring the child to Australia within 4 years.

'Custody, care and control'
The youngest of Tran's daughters was 3 years of age when he claimed the allowance. She lived with her mother. Tran told the Tribunal that letters between Vietnam and Australia could take several months. Letters from his wife referred to the difficulties of communication, mentioned the activities of the youngest child but did not ask his advice about her.

The majority of the AAT, **Balmford** and **Wilson**, adopted the approach in the earlier decisions of *Hung Manh Ta* (1984) 22 *SSR* 247 and *Le* (1986) 32 *SSR* 403. In the latter case, the Tribunal had said that the Act required that a person had lawful custody of, and exercised responsibility for, the welfare of a child.

The majority said that the decision in *Van Luc Ho* (1986) 36 *SSR* 454 (which had taken account of the traditional authority of the father in Vietnamese culture) was difficult to reconcile with the other two decisions, which the majority preferred to follow.

Nothing in the evidence, the majority said, showed that Tran was exercising, even by delegation, or jointly with his wife, any responsibility for the day to day welfare of his youngest daughter. Accordingly, she was not in his 'custody, care and control' and was not his 'dependent child'.

On the other hand, the third member of the AAT, **Rodopoulos**, said that the neither the decision in *Van Luc Ho* nor the present case required -

> 'explanations along traditional patriarchal lines but rather on the evidence [required] recognition that, given the unusual social and political circumstances and the enforced separation . . ., the father is attempting to meet his obligations to his family and exercise his rights in relation to it.
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> Because of the unique circumstances of this case I would not expect to find explicit evidence of the day to day custody, care and control involvement of Mr Tran with his youngest child seeing that he is physically apart from her.'

(Reasons, p.2)

In these circumstances, a parent should not be considered as having relinquished custody, care and control but to have delegated it, the minority member said.

'Wholly or substantially dependent'
Tran's other daughters were aged 20 and 22. They were attending school full-time in Vietnam, their education having been interrupted after the end of the war.

Tran told the AAT that his family in Vietnam was able to provide 20-25% of their needs from the rice crop from their 2 acres of land. They depended on him for the rest of their support. He said that he had sent goods, valued at more than $4000, paying freight of more than $800, to his wife between January 1986 and May 1987. He also told the AAT that his only income since arriving in Australia had been from unemployment benefit; and that, after meeting his and his sons' living expenses, he had a surplus of $60 a fortnight.

Letters from Tran's wife mentioned that parcels sent by Tran were not reaching her because she was 'not allowed to receive them'.

The majority of the AAT, **Balmford** and **Wilson**, said it was clear that the 2 older daughters were not 'wholly' dependent on Tran: the question was whether they were 'substantially' dependent on him. In this context, 'substantially' meant 'in the main' or 'essentially', they said.

The majority said that the evidence indicated that Tran was making a significant contribution to the needs of his daughters. But, the majority said, the fact that his parcels were not getting through made it difficult to rely on Tran's evidence that the only other means of support available to his family was their rice crop. Further, it was difficult to see how Tran could spend almost $5000 in 18 months when his only income came from social security payments.

Accordingly, the majority said that it was not satisfied, on the evidence before the AAT, that the 2 older daughters were 'wholly or substantially dependent' on Tran. They could not be classed as 'dependent children' and Tran was not eligible for family allowance for them.

The third member of the AAT, **Rodopoulos**, disagreed with this conclusion. The fact that Tran's parcels were not arriving did 'not mean that the family has no continuing financial need; merely that, because of the political circumstances, the parcels do not arrive': Reasons, p.3. The *Social Security Act* 'should be interpreted beneficially'; the 2 older children had been 'supported since 10th January to a sufficient level': Reasons, p.3.

Formal decision
The AAT affirmed the decision under review.

DONOVAN and SECRETARY TO DSS
(No. Q86/311)
Decided: 21 October 1987 by D.P. Breen.

By a decision of the AAT dated 12 March 1986, Francis Donovan had been granted family allowance and additional unemployment benefit for his daughter: *Donovan* (1986) 31 *SSR* 391. His daughter was in Papua New Guinea and Donovan had lived in Australia since 1 February 1982. The DSS decided to cancel the family allowance and additional unemployment benefit from 1 February and 1 July 1986. Donovan asked the AAT to review that decision.

The legislation
At the time of the decision under review, section 96(5) and (7) of the *Social Security Act* allowed family allowance to be granted to a person in Australia for a child outside Australia for a period which ended 4 years after they had begun to live apart. Section 103(3) provided for the cancellation of a family allowance where the child had not been brought to live in Australia within the 4-year period.

Section 96(8) allowed the Secretary to extend the 4-year period 'for any special reason in any particular case'.

Until 3 July 1986, additional unemployment benefit was payable in respect of a child outside Australia, so long as the child was dependent on the beneficiary. But, from 3 July 1986, s.112 (5) of the Act was amended to

fix the same maximum 4-year period for the payment of this benefit as for the payment of family allowance - subject to a similar discretion for the Secretary to extend the period as in s.96(8).

'Any special reason'

Donovan had told the DSS, in July 1986, that his wife and daughter (who were both living in Papua New Guinea) would be joining him in Australia in January 1987. The necessary money for airfares was tied up on deposit until then. The DSS had taken the view, which it repeated before the AAT, that Donovan's receipt of $2500 arrears of family allowance and unemployment benefit (following the AAT's decision in March 1986) was enough to enable him to bring his wife and child to Australia.

Donovan's wife and child had not joined him by the time of the hearing in this matter, in mid-1987. The AAT observed that, despite Donovan's wish to have his family join him in Australia, 'his wife was resisting leaving home and extended family in New Guinea': Reasons, para.23.

The AAT noted that s.96(8) allowed the time limit to be extended beyond 4 years for 'any special reason in any particular case'. While this was similar to the reference to 'special circumstances' in other parts of the Act, it was not identical; and to apply the various decisions which had considered that phrase to the phrase in s.96(8) -

> 'would not assist inquiry . . . [because] the latter phrase is even more capable of embracing a wide variety of matters of a more particular kind rather than setting general limits against which particular cases must be measured as had been the tendency in interpreting the phrase "special circumstances" under the Act, particularly in regard to invalid pensions.[*sic*]'

(Reasons, para.20)

The AAT said that 'any special reason' should be examined in the context of the purpose of the legislation. Both benefits -

> 'primarily . . . are benefits provided for Australian residents, that residency requirement applying to both the claimant and to the child with exceptions arising for temporary absences. . . . [A] four year period is not a restrictive one within which to effect compliance with the overriding purpose of the Act, namely, to provide benefits for persons permanently based in Australia.'

(Reasons, para.21)

In the present case, no 'special reason' had been established for exercising the discretion to extend the 4-year period.

Formal decision

The AAT affirmed the decision under review.

Assets test: valuation

REYNOLDS and SECRETARY TO DSS
(No.S85/199)
Decided: 3 November 1987 by R.A. Layton.

The AAT *affirmed* a DSS decision that, for purposes of the assets test, the value of Reynolds' land should be taken as $15 000.

The land in question was the excess part of the 4.6 hectares on which Reynolds' principal home stood - that is, the 2.6 hectares of that land in excess of the 2 hectares 'curtilage' which is exempted from the assets test: s.4(4), *Social Security Act*. In an earlier decision, *Reynolds* (1986) 35 *SSR* 444, the AAT had set out the principles by which the value of this excess should be decided.

The DSS's valuer had valued the 4.6 hectares at $120 000, and the 2 hectares with the house at $105 000.

But a valuer employed by Reynolds had valued the whole property at $134 855 and the 2 hectares with the house at $129 105, leaving a value for the excess of $5750.

At the hearing of this review, Reynolds said that he was prepared to compromise and accept a valuation for the 2.6 hectares of $10 375. However, the DSS indicated that 'it would be inappropriate to bargain in such a manner with social security entitlements'.

Although the AAT accepted the valuation made for the DSS, it was critical of the inflexible attitude of the DSS, particularly in light of the subjective nature of valuation. Such an attitude undermined the value of preliminary conferences, the AAT said:

> 'Bearing in mind that this matter does not raise questions of law or principle but merely a decision on the facts, reasonable compromise would appear to be the best and most cost effective solution. Lack of negotiation and compromise becomes more ludicrous when one looks at the difference in values in this application being some $5000 on property valued at in excess of $130 000.
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> In the Tribunal's view, the respondent's refusal to negotiate in a genuine claim is a waste of departmental time, money and resources and the respondent should consider its attitude to allow some margin for negotiation in a genuine case in which two different values are obtained by experts. For example, a guideline may enable negotiation where a differential value of less than $10 000 or 10% exists, whichever figure is the lesser.'

(Reasons, para.16)

Supporting parent's benefit: 'dependent child'

LAM VAN BIEU and SECRETARY TO DSS
(No. W87/67)
Decided: 22 October 1987 by J.O. Ballard.

Lam Van Bieu was granted a supporting parent's benefit from February 1979, the date when he and his wife separated and he retained custody of their 3 sons.

At some time before 1986, Lam moved to Perth with 2 of his sons, leaving the third, Chan, with his sister in Melbourne. The DSS cancelled payment of additional benefit for Chan from 12 June 1986. Lam asked the AAT to review that decision.

The legislation

Lam's entitlement to additional benefit for Chan depended on whether Chan was a 'dependent child' of Lam. At the time of the decision under review, this term was defined in s.6(1) of the *Social Security Act* as meaning a child under 16 years in a person's custody care and control or -

> '(b) a student child, not being the spouse of the person, who is wholly or substantially dependent upon the person.'

'Substantially dependent'

Chan was 19 years of age and enrolled as full-time secondary student. Chan had lived with Lam's sister until September 1986. He had received some payments under the Secondary Allowance Scheme, as well as financial assistance from his grandmother and Lam's sister. However, it appeared that Lam did not provide his son with financial support during 1986.

From January 1987, when Chan entered the final year of his secondary studies, he moved into a flat and was paid an AUSTUDY payment of $45 a week (which was not the independent rate). Lam sent his son $100 in February 1987, but was unable to make any other payments because he was not receiving additional benefit for Chan.