

Invalid pension: payment to detainee

GILBERT and SECRETARY TO DSS
(No. W86/275)

Decided: 2 October 1987 by
J.O. Ballard, N. Marinovich and
K.J. Taylor.

Robert Gilbert had been charged with murder and found not guilty by reason of unsoundness of mind by the Supreme Court of Western Australia. The Court committed him to prison during 'Her Majesty's pleasure'. In April 1986, he applied for and was granted an invalid pension.

Following an amendment to the *Social Security Act*, the DSS cancelled Gilbert's invalid pension; and he asked the AAT to review that cancellation.

The legislation

At the time when Gilbert was granted an invalid pension, s.135THA of the *Social Security Act* prevented the grant of an invalid pension to a person who had been imprisoned after conviction for an offence but did not affect a person confined in a psychiatric institution without being convicted of an offence.

The Act was then amended, so that s.135THA(2)(b)(ii) prevented the grant of an invalid pension to a person who was -

'confined in a psychiatric institution, whether by order of a court or otherwise, in consequence of having been charged with the commission of an offence . . .'

According to s.135THA(7) -

'A reference to a psychiatric institution shall be read as including a reference to a psychiatric section of a hospital and to any other place

where persons with psychiatric disorders are, from time to time, confined.'

Subsequently, s.135THA was further amended by inserting subsection (9), which saved the position of any person confined in a psychiatric institution while 'undertaking a course of rehabilitation.'

It was argued on behalf of Gilbert that he was not confined in a psychiatric institution as defined in s.135THA(7) as he was held in a prison; and that, because he was undertaking a 'resocialisation program', s.135THA(9) preserved his entitlement to invalid pension.

'A psychiatric institution'

The AAT adopted a broad reading of the term, 'psychiatric institution'. The Tribunal noted that the definition of this term in s.135THA(7) referred to 'any other place' as well as to 'a psychiatric section of a hospital'; and this was sufficient to cover Gilbert's situation.

Because the two meanings of 'psychiatric institution' were separated by the words 'and to', the specific phrase did not control the meaning of the general phrase, 'any other place'. This reading of s.135THA(7), the AAT said, was consistent with the literal meaning of the words in the subsection. The AAT commented:

'The Act is designed to support those in need. The intention of the section is surely to exclude from a benefit under the Act persons who are receiving food and sustenance while in a prison. It seems to us

that this application is designed to defeat the manifest purposes of Parliament in enacting the amending legislation.'

(Reasons, para.14)

The AAT also referred to the Minister's Second Reading speech on the Bill to amend s.135THA:

'... the Bill precludes payment of pensions and benefits to mentally ill persons who are confined without being convicted of an offence. The Act will treat such persons in the same way as a person who is imprisoned in connection with his or her conviction for an offence.'

If there were any doubt about the meaning of 'any other place' in s.135THA(7), the AAT said, s.15AB(2) of the *Acts Interpretation Act* allowed it to refer to the Minister's speech. That speech conclusively resolved the interpretation of s.135THA(7) against Gilbert.

'A course of rehabilitation'

Gilbert was undergoing a 'resocialisation programme', designed to allow him to fit into the normal prison environment and to prepare him for ultimate release from prison. The programme was described by a prison doctor as common to all long term prisoners, and as having no rehabilitative aspect.

On the basis of that evidence, the AAT decided that Gilbert was not undergoing 'a course of rehabilitation' within s.135THA(9).

Formal decision

The AAT affirmed the decision under review.

Handicapped child's allowance

BRYER and SECRETARY TO DSS
(No. W87/78)

Decided: 23 September 1987 by
R.D. Nicholson, I.A. Wilkins and
P.A. Staer.

Robin Bryer gave birth to her child, A, in May 1986. The child was diagnosed as suffering from phenylketonuria (PKU).

Bryer applied for a handicapped child's allowance. When the DSS rejected that application, Bryer applied to the AAT for review.

The legislation

At the time of the decision under review s.105J (now s.102) of the *Social Security Act* provided that a person was qualified for handicapped child's allowance if the person provided constant care and attention to a 'severely handicapped child' in their private home.

Section 105H(1) (now s.101(1)) defined a 'severely handicapped child' as

a child with a physical or mental disability who, by reason of that disability, needed 'constant care and attention', and was likely to need that care and attention - 'permanently or for an extended period'.

The DSS had adopted an administrative guideline which declared that 'PKU children will not generally be classified as "severely handicapped" unless there are other significant disabilities.'

The evidence

The condition of PKU prevented the normal use of protein food and would, without treatment, lead to impaired brain development. A's condition was expected to continue until he reached 10 years of age. In the meantime, it was necessary for his diet to be carefully controlled by Bryer in consultation with a dietitian. In addition, she had to consult regularly

with medical advisers and supervise closely A's activities and contacts.

'Constant care and attention'

The AAT observed that the evidence in this matter -

'casts some doubt on the appropriateness of the present guideline relating to PKU but in any event shows the guideline produces an unjust decision in its application to [A].'

(Reasons, p.15)

The care and attention needed by A and provided by Bryer, including preventive care, was 'constant' in the sense that it was regular and continually recurring, rather than spasmodic.

As there was no dispute that A had a physical disability and that his need for care and attention would continue for an extended period, Bryer met the requirements to qualify for handicapped child's allowance.