

operations in Greece and contracted an infection while in hospital from which she took some 3 years to recover.

The Helas' said they tried many times to return to Australia but were prevented from doing so by a combination of Vicky's medical treatment and financial problems. They returned to Australia in August 1986 after twelve years in Greece.

The AAT adopted the reasoning in *Houchar* (1984) 18 SSR 184 in rejecting the application. The Tribunal concluded:

'...the period of twelve years and two months absence from residence in Australia cannot be construed as being "temporarily absent" as it is, to adopt the words of the Tribunal in *Re Houchar* (supra), "of great length" and thus must be seen as being indefinitely absent.'

[B.W.]

Family allowance: child part-time in institution

MATTHEWS and SECRETARY TO DSS

(No. V87/325)

Decided: 5 May 1988 by J.R. Dwyer.

S was born to Helen Matthews in March 1975. Matthews first received handicapped child's allowance (HCA) for S in November 1980. S attended special school and in April 1986 she began to live at Marillac House, an institution for the purposes of s.94(1) of the *Social Security Act* [now s.79(1)] from Monday to Friday. The DSS ceased to pay family allowance from 6 April 1986, and HCA from 15 June 1986, although both allowances were paid to Matthews during school holiday periods. Matthews appealed, arguing that both allowances should be paid for weekends and other periods in addition to school holidays, that S spent with her mother.

Family allowance: custody, care and control

The AAT dealt first with family allowance from April 1986 to 15 November 1987.

The Tribunal decided that Simone was a dependent child, i.e., she was in Matthews' 'custody, care and control' - (s.6(1) and s.6(1A) - now s.3(1) and s.3(2)) as Matthews had regular contact with the Marillac House staff, took Simone on doctors' appointments etc; she had 'the right to make decisions concerning the daily care and control' of Simone: see *Van Luc Ho* (1987) 40 SSR 510.

The DSS argued that they were acting in accord with s.103(1) [now s.89(1)] which provided that family allowance ceased to be payable if the child, being a dependent child, became an inmate of an institution and family allowance became payable to that institution.

'Inmate of institution'?

The AAT then went on to decide if S was 'an inmate of an institution'. S slept at her home 3 nights out of 7, and this caused the Tribunal some hesitation in deciding that she was an 'inmate'. It dealt extensively with the meaning of 'inmate' looking to dictionaries and decided cases under other legislation.

It concluded that these supported the AAT decision in *Piggott* (1986) 35 SSR 443, that a child dwelling in Marillac House between Monday and Friday was an inmate.

The question then arose as to whether she was still an inmate of the institution during the weekends when she was discharged into her mother's care. No admission and discharge forms were completed at Marillac House for these periods, though Marillac House stated this was because, under the DSS *Family Allowance Manual*, absences of less than 3 days did not have to be reported. The Tribunal concluded that Simone 'ceases to be an inmate of an institution whenever she returns to her home to sleep. On these occasions she is an inmate of her home.'

Sharing of family allowance

Next, the Tribunal considered whether family allowance could be shared between a person and an institution. The Tribunal concluded that the combined effect of then ss.95 and 103 [now ss.82 and 89] meant that it could be so shared; family allowance was payable to the institution when the child was an inmate and to Matthews when she was with her.

The changes in the legislation after 15 November 1987 did not effect Matthews' entitlement to family allowance, except that if she received payment under the Assistance for Isolated Children Scheme after 1 January 1987 she would be ineligible for family allowance in the relevant periods.

Handicapped child's allowance

The Tribunal then considered eligibility for handicapped child's allowance. It considered whether Matthews was covered by the exception in the then s.105 KA(2) [now s.103(2)], which effectively provided that the secretary could direct that entitlement to HCA was not affected if the child had been absent from home for more than 28 days in a year and the absence was temporary. The AAT followed the Federal Court's definition of temporary in *Hafza* (1985) 26 SSR 321 and found that Simone's absences were 'temporary in

that they are limited to the fulfilment of a passing purpose - to enable Simone to attend school in Ormond and to give her mother periods of respite from her care. They are also relatively short and the duration of each absence is defined in advance': (Reasons, para 51).

The Tribunal also decided it should exercise the discretion in s.105 KA(2) in Matthews' favour because Matthews would only receive HCA for the periods when Simone was with her and she had financial and other responsibilities in relation to Simone both when she was with Matthews, and to a lesser extent, when she was at Marillac House. These responsibilities include provision of a special diet, vitamin supplements, and the cost of travel etc to various appointments for Simone. Furthermore, Matthews should not be deprived of a financial benefit in respect of the weekends and s.105 M [now s.104] established that HCA could be paid on a daily basis.

Formal decision

The Tribunal set aside the decision under review and decided that Matthews was entitled to be paid family allowance and HCA for all periods of one night or more which S spent at home from April 1986 to the date of the Tribunal hearing.

[J.M.]

Unemployment benefit: work test

HUNT and SECRETARY TO DSS

(No. V87/583)

Decided: 19 April 1988 by

H.E. Hallows.

The AAT varied a DSS decision to recover overpayment of unemployment benefits from 1 April 1982 to 7 October 1983.

Hunt had applied for unemployment benefit in approximately April 1982. In October 1983 he advised the DSS that he had started two businesses in April 1982, one for the making of solar food dryers and one selling dried flowers for sachet and pot-pourri making, and stated that these had not become financial till September 1983.

Each dryer apparently took half an hour to make. At first he was only spending 5 hours a week on the project. By October 1983 he was making 8 dryers a week. Mr Hunt stated that he did not really consider this a business as he made no profit; it was more of a hobby. During this period, Mr Hunt spent a lot of time looking after his ill wife and young son. He continued to look for work as a personnel officer,