# Federal Court decisions

## Income test: income 'derived'

**INGUANTI v SECRETARY TO DSS**

**Federal Court of Australia**

**Decided:** 5 May 1988 by Sheppard J.

This was an appeal, under s.44 of the *AAT Act*, against the AAT's decision in *Inguanti* (1987) 39 *SSR* 496.

The AAT had decided that payments under the Italian pension fund **INPS**, to which Inguanti was entitled, should be included in his income for the purposes of the invalid pension income test.

INPS operated a contributory pension fund. Its finance came from employee and employer contributions and Italian government grants. INPS made quarterly pension payments to eligible pensioners, such as the applicant. The INPS fund was heavily in debt; but it appeared that the Italian government had assisted the fund in the past, when it was faced with financial difficulties.

From 1978 to August 1986, pension payments had been made to Inguanti's relatives in Italy, in order to reduce a debt he owed them. In August 1986, he asked INPS to make all future pension payments to him in Australia. He was told, by the Italian Consul, that he should expect a delay of 12-18 months before the first payment, including arrears, arrived in Australia. However, he had not received any payment by the date of the AAT's decision in September 1987, nor by the date of the hearing of this appeal in March 1988. It appeared that Inguanti would immediately be paid the moneys owing if he travelled to Italy.

### The legislation

At the time of the decision under review, s.28(2) of the *Social Security Act* [now s.33(12)(a)(i)] provided that the rate of a person's invalid pension was to be determined by the annual rate of the person's 'income', a term which was defined in s.6(1) [now s.3(1)] to mean -

> 'personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever, within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance . . .'

### 'Moneys . . . derived'

Sheppard J. said that the pension was not 'moneys . . . earned' within s.6(1), because the word 'earned' in the definition did not apply to the word 'moneys':

> 'The definition uses a number of nouns and the three verbs ["earned, derived or received"], the intention being to catch a wide range of accruals and receipts which are to be treated as income for the purposes of the Act. I think the nouns which relate to the verb "earned" are "personal earnings" and "profits".'

(Reasons, p.7)

Plainly, Sheppard J. said, the verb 'received' did not apply in this case. But could Inguanti be said to have 'derived' the moneys which were payable to him?

Sheppard J. said that the word 'derived' had a different meaning from the word 'received'. The former would cover moneys to which a person was periodically entitled.

The possibility that an entitlement might be disappointed, because of the financial failure of some institution or investment could 'give rise to difficulty'; and if it appeared that Inguanti's pension was unlikely to be paid, 'different considerations might arise', Sheppard J. said. But this matter had to be examined as at the date of the AAT's decision on 9 September 1987. There was nothing in the evidence before the Tribunal to suggest that Inguanti would not receive the pension payments within the 12-18 month period predicted by the Italian consul. Sheppard J. noted that Inguanti could apparently collect the pension owing to him if he travelled to Italy:

> 'In some respects this may be an impractical suggestion, bearing in mind the expenses of such a trip. But the fact that payment could be obtained in this way was a further indication that the applicant's entitlement, on the evidence as it was before the Tribunal, would be met within the stipulated time.
>
> 'The question is, in essence, one of fact and degree. There will be cases which so clearly fall on one side of the line or the other that only one decision is appropriate. But, within those extremes, it will be open to a tribunal of fact to determine the matter in accordance with the facts and circumstances of the case as it sees them. If the prospect of the moneys ever being received is remote, or, if receipt of them, although certain, is likely to be so far in the future as to make entitlement to them of no relevant benefit at the time the matter is considered, it will be correct to say that the moneys are not being "derived". This case is not in either of those categories.'

(Reasons, pp.10-11.)

On the evidence before the AAT, Sheppard J. said, it had been open to the Tribunal to conclude that the moneys owing to Inguanti would be paid at a time which was not so remote from the date of the Tribunal's decision as to make his entitlement 'either nugatory or of no relevant benefit': Reasons, p.11.

Sheppard rejected an argument that there was a discretion to disregard income as relevant to be taken into account until that income was received.

### Formal decision

The Federal Court dismissed the appeal.

**[P.H.]**

## Assets test: financial hardship provisions

**REPATRIATION COMMISSION v HALL**

**Federal Court of Australia**

**Decided:** 30 March 1988 by Sweeney, Davies and Einfeld JJ.

This was an appeal against the decision of the AAT in *Hall and Repatriation Commission* (1986) 11 ALD 80, where the AAT had decided that property of Mr and Mrs Hall should be excluded from the assets test under s.53(1) of the *Veterans' Entitlements Act* 1986 - which was in the same terms as s.6AD(1) of the *Social Security Act* [now s.7(1)]. The result was the restoration of their service pensions, which the Commission had cancelled on the introduction of the assets test.

### The legislation

Section 53(1) of the *Veterans' Entitlements Act* provided that property should be excluded from the assets test if it could not be sold or realised or the owner 'could not be reasonably expected to sell or realise' it: para.(c)(i); and if the person 'would suffer severe financial hardship' if the property was taken into account: para.(c)(iii).

### The grounds of appeal

The property involved was a farm of more than 1000 hectares, which the Halls' son was working. It produced an income of $13,970 in the 1984/85 tax year. It was this property which the AAT had said the Halls could not reasonably be expected to sell or realise. And the AAT had said that reducing or cancelling their pensions by reference to the property would cause the Halls severe financial hardship.

In the appeal, the Repatriation Commission argued that the AAT should have considered only the

personal financial circumstances of Mr and Mrs Hall when deciding whether it was reasonable to expect them to sell or realise the property. The Commission also argued that the AAT had not separately considered the issue of 'severe financial hardship'; and that the evidence before the AAT could not support its finding of 'severe financial hardship'. These errors, the Commission argued, were errors of law, which the Federal Court could correct under s.44 of the *AAT Act*.

**A wide range of factors**

The Federal Court said that, when determining whether a person could reasonably be expected to sell or realise a property, consideration should not be restricted to the personal financial circumstances of the claimant for a pension. This, the Court said, had been decided by the Federal Court in Secretary to DSS v Copping (1987) 39 *SSR* 497. The Court continued:

> 'In our opinion, the Tribunal was not obliged to characterize the factors which it took into account as personal and social on the one hand, and financial and economic on the other, and exclude the former from consideration. It was called upon to apply a very broad test, namely what the [Halls] could be reasonably expected to do, and was entitled to have regard to the whole of their circumstances.'

(Reasons, p.9)

This, the Court said, was 'clearly an objective test [which] was not dependent upon the personal view of the claimant for a pension as to what should or what should not reasonably be done.' The AAT continued:

> 'Among the relevant factors to be considered are the purpose or object of the assets test provisions and the aim of the legislation to ensure that pensions are not paid to those who can afford to maintain themselves. The test of reasonableness takes into account the public or community interest as well as the interests of the claimant for a pension and of other persons with whom the claimant is associated.'

(Reasons, p.10)

The AAT had, the Federal Court said, approached the question posed by s.53(1)(c)(i) in the correct way.

**'Severe financial hardship'**

The Federal Court noted that the AAT's Reasons had not separated the question of 'severe financial hardship' from the question of the sale or realisation of the property. 'Nevertheless,' the Court said, 'the Court must be careful not to look too critically at the words used by a busy Tribunal': Reasons, p.11.

The Court said it was clear that, as a matter of substance, the AAT had dealt with the two. In cases involving farming properties with capital values out of proportion to their incomes, the same facts would often be relevant to the two questions:

> 'It is the commitment of the family to the land, the involvement of succeeding generations in the one property and the lack of a sufficient return to support more than one generation which leads so often to the conclusion that the elderly parents who own the farm property could not reasonably be expected to sell or realise the property and that they would suffer severe financial hardship if s.53 were not applied.'

(Reasons, p.11)

The Federal Court concluded by holding that the evidence before the AAT had been sufficient to support the finding of 'severe financial hardship'. This did not require 'proof of destitution'. The levels of pensions and benefits and the income and assets tests, under the *Veterans' Entitlements Act* and the *Social Security Act*, provided a 'guide as to the level of income which, in Australia, is accepted as requiring the provision of government assistance.' The Court observed:

> 'It would be wrong to read the assets test provisions as requiring destitution when the income test provisions do not.'

(Reasons, p.13)

What was or was not severe financial hardship was a matter to be resolved in each case by the Repatriation Commission and, on review, by the AAT. It was a question of fact; and it must be remembered that 'there is no error of law simply in making a wrong finding of fact', as the High Court said in *Waterford v Commonwealth of Australia* (1987) 61 ALJR 350, 359.

Here the majority of the AAT had said that the Halls' income was low, 'vastly below the poverty level' and that they would suffer severe financial hardship. There was no error of law in this approach.

**Formal decision**

The federal Court dismissed the appeal.

**[P.H.]**

# Cohabitation

**SECRETARY TO DSS v KERSHAW**

**Federal Court of Australia**

**Decided:** 28 March 1988 by Burchett J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Kershaw* (1987) 39 *SSR* 487.

The AAT had set aside a DSS decision to recover an overpayment from Maureen Kershaw on the basis that she had been cohabiting with her husband while receiving a widow's pension. The AAT had been faced with conflicting evidence about the relationship between Kershaw and her husband; and had said that, as the *Social Security Act* was 'beneficial legislation', the Tribunal was 'obliged to give the benefit of the doubt to Mrs Kershaw'; and that it could not 'be sure beyond reasonable doubt' that Kershaw and her husband had reconciled.

The Federal Court said that the characterisation of the *Social Security Act* as 'beneficial legislation' did not help in dealing with a problem of onus of proof. The Court referred to the Federal Court decision in *McDonald v Director-General of Social Security* (1984) 18 *SSR* 188, which had indicated that the appropriate standard of proof was 'the balance of probability'. The Court continued:

> '... I have not been referred to any authority which would justify the tribunal's proposition, in the present case, that because the legislation is beneficial, an onus of proof beyond reasonable doubt is imposed on a party in the position of the applicant. It is a matter of persuasion. A simple persuasion that the respondent was no longer a deserted wife as at a particular date would, I think, suffice.'

(Reasons, p.8)

**Formal decision**

The Federal Court allowed the appeal and remitted the matter to the AAT for rehearing according to law.

**[P.H.]**

# Family allowance: children overseas

**VAN CONG HUYNH v SECRETARY TO DSS**

**Federal Court of Australia**

**Decided:** 20 April 1988 by Sheppard, Morling and Burchett JJ.

This was an appeal against the decision of Davies J. in *Van Cong Huynh* (1987) 41 *SSR* 525. Davies J had affirmed a decision of the AAT, which in turn affirmed a decision of the DSS cancelling Van's family allowance for his children who were living in Vietnam.

The issue before the AAT had been whether Van had the 'custody, care and control' of his children. The AAT had decided that Van did not have the children's 'custody, care and control'. This was, the AAT had said, a factual question: did the appellant have the responsibility for the welfare of the children and did he undertake their care and control? The AAT had treated the children's inability to join their father in Australia, because of the refusal of the Vietnamese Government to issue exit