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

visas, as decisive against Van having the children's custody, care and control.

On appeal to the Federal Court, Davies J. held that this approach had not involved an error of law.

The legislation

At the time of the decision under review, s.95(1) of the *Social Security Act* provided that a person who had the 'custody, care and control of a child' was qualified to receive a family allowance for that child.

Section 96(5) provided that family allowance could be paid to a person for a child living outside Australia, if the Secretary was satisfied that the claimant intended to bring the child to Australia 'as soon as it is reasonably practicable to do so'.

An error of law

The Federal Court said that the AAT had correctly said that the 'custody, care and control' necessary to establish entitlement to family allowance required that the person have responsibility for the welfare of the child and undertake the child's care and control. But the AAT had treated the inability of Van's children to leave Vietnam as conclusive against him having their 'custody, care and control'; and this involved an error of law. It was, Morling J. said, plain from the former s.96(5) -

> 'that family allowance may be payable to a claimant in respect of children who are living overseas and who are experiencing difficulty in obtaining exit permits permitting them to travel to Australia.'

(Reasons, p.7)

Burchett J. also referred to the former s.96(5), which required that the 'custody, care and control' referred to in s.95(1) be adapted to the situation where a child was in another country and it was 'not reasonably practicable for the parent to bring the child to Australia', the chief examples of which would relate to migrants:

> 'The Act should be construed against the background of the various and complex problems created by mass migration, often of people with very limited resources, and often of political refugees and fugitives from civil war, persecution or invasion. It cannot be supposed that Parliament used the general language found in s.96(5) with the intention that it should apply to a multiplicity of reasons for the delay of reunion of a family, but not to one of the most tragic and most common.'

(Reasons, p.12)

The Federal Court conceded that the AAT, as an administrative body, should not have its decisions 'too closely scrutinised for the purpose of searching for errors of law, in what may be imprecise language': Morling J., at p.9. But the Tribunal had erred in law in treating the inability of Van's children to obtain exit visas as conclusively demonstrating that he did not have their custody, care and control.

Formal decision

The Federal Court set aside the judgment of Davies J. and the decision of the AAT and remitted the matter to the AAT to be heard and decided again.

[P.H.]

Update

DSS Field Officer Investigations

A report prepared by the Victorian Federation of Community Legal Centres and the Welfare Rights Unit has strongly criticised the activities of DSS field officers.

The report, *Investigations by Social Security Field Officers: Myths and Realities* (June 1988) is based on 26 detailed case studies of the experience of social security clients. It emphasises the particular problems caused by unclear definitions and guidelines in relation to de facto relationships, and recent negative government propaganda about social security fraud. These factors have resulted in many social security clients living in fear of interrogation by DSS field officers.

A further problem lies in the extraordinary powers to obtain information, now set out in the *Social Security Act*: see (1988) 41 *SSR* 528. A year after the introduction of those powers, guidelines for their administration have still not been developed by the DSS.

The report's case studies highlight the imbalance of power and access to information between field officers and social security clients; and makes the point that field officers regularly contravene DSS guidelines, particularly those set out in the *National Field Officers Handbook*.

Amongst the report's recommendations are:

- introduce legislative guidelines for field officer activities;
- limit the DSS cohabitation rule by placing it within more precise boundaries;
- require DSS to obtain more substantial proof of the existence of cohabitation;
- introduce disciplinary action against DSS field officers who breach the investigation guidelines;
- narrow the DSS's power to demand information to more precise circumstances;
- grant equal rights to beneficiaries and pensioners when responding to requests for information; and
- provide information, in the appropriate community language, to clients about their rights when being investigated.

Copies of the report are available (for $2) from -

Welfare Rights Unit,
First Floor,
193 Smith Street,
Fitzroy 3065.

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