Family allowance: likely to remain permanently in Australia?

GUPTA and SECRETARY TO DSS (No. 4707)

Decided: 26 October 1988

by R.A. Balmford.

Vijay Gupta came to Australia with her husband and two children in April 1986. They had been granted temporary entry permits under the *Migration Act* 1958, Gupta's husband having been appointed to a 3-year research position at an Australian university.

Gupta applied for family allowance for her children but the DSS rejected that application. Eventually the DSS granted Gupta family allowance from April 1987, following the grant (by the Department of Immigration Affairs) of resident status to her and her family from 31 March 1987.

Gupta asked the AAT to review the DSS decision not to pay her family allowance until April 1987.

The legislation

In April 1986, s.96(1) of the *Social Security Act* provided the family allowance was not payable to a person born outside Australia for a child born outside Australia unless each of them had been resident in Australia for 12 months. However, this restriction did not apply where the Secretary was satisfied that the claimant and the child 'were likely to remain permanently in Australia': s.96(2) and (2a).

From 1 July 1986, s.96(2) was amended so as to prevent payment of family allowance to a person for a child unless they were Australian citizens, persons granted non-temporary entry permits under the *Migration Act*, persons covered by temporary entry permits who had been in Australia for 12 months, or persons listed in one of the categories in s.8(1) of the *Migration Act*. (Neither Gupta or her children fell into those categories.)

The first period

The AAT first considered whether Gupta could qualify for family allowance during the period from April to June 1986 inclusive. This depended upon whether it was, at that time, likely that Gupta and her children would remain permanently in Australia.

Referring to the decision of the Federal Court in *McDonald* (1984) 18 *SSR* 188, the AAT said that Gupta had to -

> 'satisfy the Tribunal that it was, during the relevant period, likely that she and her children would remain in Australia for a long and indeterminate time, although not necessarily forever.'

(Reasons, para.14)

The Tribunal said that the term 'likely' should be read as meaning 'seeming as if it would happen', one of the alternative meanings in the *Shorter Oxford Dictionary*.

The AAT accepted evidence given by Gupta and her husband that they had, from the time they decided to come to Australia, always intended to stay here permanently. The AAT also took into account evidence from an experienced officer of the Department of Immigration and Ethnic Affairs, who said that in April 1986 there would have been a 'reasonable likelihood' that Gupta and her family would be granted permanent residence in Australia; and that there was no Government policy which would have interfered with the grant of permanent residence.

The AAT also noted that s.6A(1)(d) and (b) made provision for the Guptas to be granted entry permits allowing them to remain in Australia after their arrival here. The AAT concluded as follows:

> 'Thus, in the period immediately after their arrival in Australia, the Gupta family wished to remain permanently in Australia; they were eligible to be permitted to do so; and there was "a reasonable likelihood" of their being so permitted . . . I am satisfied on the balance of probabilities that during the period from 17 April to 30 June 1986, Mrs Gupta and her children, were in terms of s.96(2) and (2A) respectively of the Act as it then stood, "likely to remain permanently in Australia", and accordingly Mrs Gupta was . . . entitled to a grant of family allowance throughout that period.'

(Reasons, paras 20-21)

The second period

So far as the period from 1 July 1986 to 31 March 1987 was concerned, s.96(2) prevented Gupta from qualifying for family allowance, the AAT said.

They were not Australian citizens, their entry permits were temporary entry permits, they had not been in Australia for 12 months, and they fell within none of the categories in s.8(1) of the *Migration Act*.

However, the granting of resident status to the Guptas from the beginning of April 1987 brought them within s.96(2)(b) of the *Social Security Act* - they were persons who had been granted a non-temporary entry permit under the *Migration Act*. Accordingly, Gupta was eligible for family allowance for her children from April 1987 (as the DSS had decided).

Formal decision

The AAT set aside that part of the decision under review which related to the period between April and June 1986 inclusive and remitted it to the Secretary with a direction that Gupta and her 2 children were, throughout that period, likely to remain permanently in Australia.

The AAT affirmed the other aspects of the decision under review.

[P.H.]

Recovery of sickness benefits: can AAT look behind compensation award?

COCKS and SECRETARY TO DSS (No. 4915)

Decided: 7 February 1989

by T.R. Hartigan, R. C. Jennings and J. A. Kiosoglous.

Cocks applied to the AAT for review of a decision to recover from his worker's compensation award a sum of $3011 which was the full amount that had been paid to him as sickness benefits.

Cocks had been injured at work in October 1984 and ceased work soon after. He received sickness benefit from 9 November 1984 to 14 March 1985. On 6 August 1985 Cocks received a lump sum award of $9117 (plus medical costs). The DSS then decided to recover the sickness benefit under the then s.115B(3) of the Social Security Act, which authorised recovery where a person had received sickness benefit and a compensation payment for the same incapacity.

Compensation award not conclusive

The Tribunal noted that the relevant section (s.69) of the *Workers Compensation Act* (SA), did not allow payments for past incapacity, that is payments in the period when Cocks

received sickness benefit. However, the AAT said that it still had to determine 'whether or not the opinion can be held that the lump sum compensation payment . . . is in whole or in part a payment by way of compensation in respect of the same incapacity for which the Sickness Benefit was paid' (Reasons, para. 8). The Tribunal decided that in determining the answer to this question, the Tribunal could take account of any evidence that indicated that some part of the award had been made for past incapacity.

The Tribunal noted that it would often be quite difficult for the DSS (or the AAT) to find relevant evidence. For example, if an award had been made in a contested hearing, the DSS delegate would be likely to follow the award. But, where a consent order had been made, the delegate could go beyond this. However, even in that case, the DSS might still be unable to form the opinion that the compensation award and sickness benefit were paid for the same incapacity.

This approach is apparently at odds with that of the full Federal Court in *Siviero* (1986) 68 ALR 147. That decision suggested that the Tribunal and the Department could not go behind the terms of an award. The AAT distinguished *Siviero* on the ground that no request had been made in that case to go behind the award, and there had been no apparent reason to do so.

Thus, according to the AAT in the present case) *Siviero* did not decide that the DSS (and the AAT) were never warranted in going behind an award. The AAT went on to discuss the effect of consent awards, noting that they bind only the parties thereto.

The AAT said that the delegate in this case was alerted to go behind the award because there was no evidence that Cocks had suffered any permanent incapacity: the terms of the award, being for partial permanent incapacity, were factually incorrect. There was also no further evidence presented to the Tribunal indicating a permanent incapacity and the Tribunal concluded, on the balance of probabilities, that the compensation award had been made for a past period - that is for the same incapacity as sickness benefit. It followed that sickness benefit was recoverable from the compensation award.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Preclusion: is compensation award conclusive?

WALSH and SECRETARY TO DSS (No. 4921)

Decided: 13 February 1989

by J. Dwyer.

Veronica Walsh applied for review of a decision to preclude her from receiving invalid pension from 29 July 1987 to 25 July 1989 because she had received a lump sum compensation payment.

Retrospective preclusion

Walsh had settled her compensation claim on 28 July 1987, the Accident Compensation Tribunal ratifying an award of $46 500 for future compensation. Walsh also received $26 000 as a common law settlement.

The AAT confirmed the approach taken in a series of previous decisions (e.g. *Tallon* (1988) 43 *SSR* 544) that, although Walsh had not been covered by the preclusion clause when she received her compensation payment, the retrospective amendments made in 1988 to s.153(1) of the *Social Security Act* 'caught' compensation awards made after 1 May 1987.

The same incapacity?

The Tribunal went on to determine what part of the workers compensation award was 'in respect of an incapacity for work' as provided by s.152(2)(c) of the *Social Security Act*.

On its face the award was expressed to be for all other forms of future compensation, meaning other than medical or like expenses. The only other form of compensation available under the relevant Victorian legislation was weekly compensation payments for incapacity for work.

Walsh argued that the lump sum had also included an amount for future medical treatment. Walsh's legal representative said that there was no provision in the worker's compensation legislation for redemption of medical expenses so they were 'disguised as part of the the redemption of weekly payments'.

The Tribunal responded to this argument by suggesting that, whilst this may be a possibility, it was also possible that the employer was prepared to pay a relatively generous amount as redemption of weekly compensation payments, in order to be released from liability for future medical claims. The Tribunal concluded:

> 'Rather than guess what has happened I consider it appropriate for the Tribunal to accept the Award at face value'

(Reasons, para. 15)

The Tribunal referred to the recent AAT decision in *Cocks* (noted in this issue of the *Reporter*), noting that it had construed *Siviero* (1986) 68 ALR 147 more narrowly than other AAT decisions had. However, the AAT said it was not necessary to decide whether Siviero only applied where no request to go behind the award had been made, as the facts in the present case were quite different from those in *Cocks*.

The Tribunal said that here the evidence was not inconsistent with accepting the award at face value. It noted that Walsh clearly continued to be incapacitated for work, the employer's legal advisers gave no evidence as to what their view of the facts underlying the award were and it was certainly possible, given the evidence of Walsh's legal representative, that Walsh had agreed to not to pursue future medical costs in return for a generous amount for future lost earnings.

The Tribunal saw one further distinction between this case and *Cocks*. In *Cocks* it had been the Secretary who sought to go behind the award, whereas here Walsh, one of the parties to the award, was seeking to go behind it. The Tribunal concluded that there was nothing in *Cocks* to lead it not to accept the present award at face value.

'Special circumstances'

Finally, the Tribunal dealt with an argument that the discretion in s.156, to regard all or part of the compensation payment as not having been made in 'special circumstances' should be exercised in Walsh's favour. The Tribunal decided that a relevant special circumstance was that an operation Walsh had undergone in 1985 had developed post-operative complications requiring further unexpected treatment. The likely cost of this treatment was $1000, and that amount of the compensation payment should be disregarded.

Formal decision

The AAT varied the decision under review to the extent of disregarding $1000 of the compensation payment. Otherwise it affirmed the decision.

[J.M.]