Family allowance: income test

MORRISON and SECRETARY TO DSS
(No. 5188)

Decided: 21 April 1989 by S.A. Forgie.

Vivien Morrison was granted family allowance for her child from February 1987.

In July 1987, the *Social Security Act* was amended to introduce an income test for family allowance, to take effect from 15 October 1987.

In response to a request from the DSS, Morrison lodged a form with the DSS, setting out details of the combined taxable income of herself and her husband. The form showed that the family's combined income in the 1986-87 tax year was $59 283 — well above the income test limit. However the form also showed that the family's combined income would be more than 25% below that amount in the 1987-88 tax year.

The DSS then mislaid Morrison's form and, when the income test came into operation in October 1987, cancelled Morrison's family allowance.

In August 1988, Morrison lodged a second form relating to the family's combined income in the 2 tax years 1986-87 and 1987-88. She indicated on this form that the family's income for 1986-87 had actually been higher than she had notified in the previous year; and that the family income for the 1987-88 tax year had been higher than her original estimate. In fact, the actual family income for 1987-88 was not 25% less than the family income for 1986-87, although it did fall below the maximum income level for payment of family allowance.

Following Morrison's lodgment of this second form, the DSS found her first form. The DSS decided that Morrison should be paid family allowance from July 1988; but refused to pay her family allowance for the period between October 1987 and June 1988.

Morrison asked the AAT to review the decision not to pay her family allowance for that period.

The legislation

Section 85(3) of the *Social Security Act* provides that the rate of family allowance payable to a person is to be reduced where the combined family taxable income of the person exceeds a specified threshold.

Section 85(7) provides that, where a person makes a written request and the combined taxable family income for the following year of income 'is, or is likely to be, at least 25% less than the taxable income . . . for that last year of income', then 'that following year of income shall be used' for the purposes of the s.85(3) income test.

The DSS had issued a Staff Direction relating to the administration of s.85(7), and this read as follows:

> 'It should be remembered that where the delegate accepts the claim of a substantial reduction in income and that reduction does not eventuate, the family allowance paid is not recoverable unless there was a misrepresentation.'

Predicted or actual income?

The central question to be decided in this matter was whether the family allowance income test could be based on Morrison's 1987 prediction of the combined family income for 1987-88 or whether it should be based on the actual family income for that period.

The AAT noted that it was not limited to the facts which had been before the original decision-maker when reviewing a decision. In particular, the AAT could take account of changes in the factual situation up to the time of the AAT review. This point had been established by the decision *Tiknaz* (1981) 5 *SSR* 45.

However, the AAT said, that approach would have to be qualified in the light of the legislative basis of the decision which was being reviewed. This point was made by the Federal Court in *Banovich v Repatriation Commission* (1986) 69 ALR 395 at 404:

> 'The task of the AAT, in reviewing a decision relating to an application for a pension, is to make the decision which the primary decision-maker ought to have made, upon the basis of the evidence before the Tribunal. Subject to any change in the relevant law, the Tribunal should put the applicant in the position in which he or she was entitled to be put at the time of the primary decision.'

In the present case, the AAT said, the legislative basis was provided by s.85(7). Morrison had made a written request in accordance with that provision and provided an estimate of the family's current taxable income. On the basis of that estimate, the AAT said, the DSS ought to have made a decision granting family allowance to Morrison at the time of her request:

> 'On the evidence before the Tribunal, the applicant would seem to have provided reliable information and the Tribunal is reasonably satisfied that she did so. Therefore, on the evidence before the Tribunal at the date of the hearing, the proper decision for the respondent to make at the time the application was made would have been to grant the family allowance.
>
> 16. The legislation permitted the decision to be made on an estimate. Had sub-section (7) required the respondent to consider only her actual income and had omitted the words "or likely to be" then this Tribunal might have reached a different conclusion.'

Formal decision

The AAT set aside the decision under review and declared that Morrison was entitled to family allowance for the period from 15 October 1987 to 14 July 1988.

[P.H.]

Assets test: investment bonds

WILLE and SECRETARY TO DSS
(No. 5249)

Decided: 7 July 1989 by B.M. Forrest.

George Wille purchased investment bonds before January 1988. Under the terms of the investment, a bonus was added to the value of the bonds at the end of each financial year until the bonds matured after 10 years. At that time Wille would be entitled to the original capital sum plus the accrued bonuses.

The DSS decided that, as the bonuses were added to the value of the bonds each year, they should be included in Wille's assets for the purposes of the age pension assets test.

Wille asked the AAT to review that decision.

The legislation

Because Wille's investment was made before January 1988, the value of the bonuses was not treated as his 'income' for the purposes of the *Social Security Act* until bonds matured or were redeemed: s.3A(5) *Social Security Act*.

The DSS decision was that, although the value of the bonuses did not amount to 'income' they should be included in Wille's 'property' for the purposes of the assets test. The term 'property' is not defined in the *Social Security Act*.

The decision

On behalf of Wille, it had been argued that the DSS was 'double-dipping' by treating the bonus additions as property during the life of the bonds, and as income in the year after the bonds matured.

However, the AAT rejected that argument, pointing out that interest paid on a bank deposit would be 'assessed as income and then, if not withdrawn, the accrued interest and capital . . . treated as property': Reasons, p.8. The Tribunal continued:

> 'The bonuses on the applicant's bonds were treated only once as income, upon maturity. A person holding friendly society investment bonds and so assessed under the income test may be said to be at an advantage over the holder of most other forms of investment. To say that the bonuses are not to be treated as an asset during the life of the bonds as contended on behalf of the applicant is to ignore the reality of the value of the bonds . . .
>
> The Act contemplates that the rate of pension payable depends upon the person's property and/or income not exceeding prescribed levels. It would distort the value of the applicant's property and lead to a distinct anomaly if the capital value of the bonds was not to be treated as part of that property. That value includes the value of the accrued bonuses. One of the attractions of the bonds is the capital appreciation during the life of the investment combined with the income tax savings which flow from retaining the bonds until maturity. Failure to treat the bonds with bonus additions as an asset for the purpose of pension review is to ignore their true value in much the same way as, for example, with real property its purchase price may not reflect its true value some years later.'

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Income test: Italian pension

GUARNACCIA and SECRETARY TO DSS
(No. 4922)

Decided: 13 February 1989 by J.R. Dwyer.

Rosario Guarnaccia had been granted an age pension by the DSS. In calculating the rate of that pension, the DSS took into account the gross rate of pension payable to him by the Italian Pension Fund, INPS.

Guarnaccia asked the AAT to review that decision.

The legislation

This appeal focused on the definition of 'income' in s.3(1) of the *Social Security Act*. According to that sub-section, 'income' means —

> 'personal earnings, moneys, valuable consideration or profits . . . earned, derived, or received . . . for the person's own use or benefit by any means from any source whatsoever, within our outside Australia . . .'

Gross or net pension?

In the present appeal, it was argued on behalf of Guarnaccia that only the net amount of his INPS pension, after deducting Italian taxes and bank charges, should be treated as his 'income' for Australian social security purposes.

The AAT noted that, in *Haldane-Stevenson* (1985) 26 *SSR* 323, the Federal Court had said that references to 'income' were, in general, references to net income. However, the AAT said, this did not assist Guarnaccia in the present case:

> 'When that decision is carefully analysed it is clear that the Court was not distinguishing between gross and net income in the sense of income before and after tax, but rather between gross income in the sense of total receipts, and net income in the sense of income assessable to tax; that is to say receipts less expenses incurred in earning that income.'

(Reasons, para. 10)

The AAT noted that in *Nemaz* (1987) 38 *SSR* 479, the Tribunal had decided that it was the gross amount of an INPS pension which was to be treated as 'income' for Australian social security purposes. Although a contrary view had been taken in *De Marco* (9 September 1985), the present Tribunal preferred the approach in *Nemaz*.

The Tribunal pointed out that several other AAT decisions had included amounts payable by way of Australian income tax in the assessment of a pensioner's income. These included *Paula* (1985) 24 *SSR* 288 and *Geddes* (30 October 1985).

Accordingly, the AAT said, the whole of Guarnaccia's INPS pension entitlement was income 'derived' by him, even though he only received the amount transferred to Australia after Italian taxes and bank charges had been deducted:

> '17 . . . this conclusion means that Mr Guarnaccia is treated in the same way as pensioners who derive superannuation in Australia. At the hearing it was explained to Mr Guarnaccia that if he wishes to do so, he can apply to have his Italian pension paid in full here and to then be assessed for taxation purposes in Australia, on his total income.'

Formal decision

The AAT affirmed the decision under review.

[P.H.]

ZANON and SECRETARY TO DSS
(No. 5224)

Decided: 20 July 1989 by H.E. Hallowes.

Gelindo Zanon was granted an age pension in 1973. The rate of his pension was calculated by treating his Italian INPS pension as part of his income.

Until May 1988, the INPS pension was not large enough to affect the rate of Zanon's age pension. But, when his INPS pension increased in May 1988, the DSS reduced his Australian age pension.

When the reciprocal agreement between Australia and Italy came into operation in September 1988, the DSS decreased Zanon's age pension, because the agreement provided that the 'supplement' component of any INPS pension was to be excluded from the Australian social security income test.

Zanon asked the AAT to review the DSS decision to reduce his age pension between May and September 1988.

The legislation

Section 65(1) of the *Social Security Act* defines 'income' 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 . . .'

Section 65(2) provides that the provisions of any reciprocal agreement between Australia and a foreign country relating to social security —

> 'insofar as those provisions remain in force and affect the operation of this Act, have effect notwithstanding anything in this Act.'

Article 17 of the reciprocal agreement between Australia and Italy provided that, where a supplement was included in an Italian pension, that supplement should not be included as income for the purposes of Australian social security law. This Article of the agreement came into operation on 1 September 1988.

The decision

The AAT noted that, according to the Federal Court decision in *Inguanti* (1988) 44 *SSR* 568, an INPS pension