Family allowance: residence, temporary absence

VXI and SECRETARY TO DSS (No. 5598)
Decided: 21 December 1989 by R.A. Balmford.

A DSS decision not to pay family allowance and handicapped child's allowance from August 1982 to October 1986 (the relevant period) in respect of VXI's daughter B was based on the residential requirements of the *Social Security Act*.

The facts

VXI and her husband were born in Greece and their 3 children in Australia. The second child, B, suffered developmental problems. The family sold their house in Australia and went to Greece in April 1973. Payment of family allowance was suspended in June 1974 and cancelled in April 1986.

In August 1982 Mrs VXI and B returned to Australia on a visitor's visa and lodged a claim for handicapped child's allowance. They were not granted a permanent entry visa so returned to Greece in November 1982. The eldest child, A, returned to Australia in 1984, Mr VXI in July 1986 and Mrs VXI with the 2 younger children, in 1987. Claims lodged in 1986 for family allowance were granted with arrears from 15 October 1986.

The legislation

Sections 103 and 104 meant that VXI had no entitlement to family allowance in respect of B from 7 August 1982 to 30 June 1986 unless either VXI continued to have her 'usual place of residence in Australia' during that period, or her absence from Australia was temporary only, and the absence of B from Australia was temporary only.

The amendment of s.103 and repeal of 104 from 1 July 1986 left s.96 as the only relevant provision for the remainder of the relevant period. This review focused on the period to 30 June 1986.

The decision

The Tribunal followed *Hafza* (1985) 23 *SSR* 227 in determining that VXI had to show that her usual place of residence was Australia and her absence had been temporary. The Tribunal found that VXI had her usual place of residence in Australia from her arrival in August 1982 until her departure in November 1982 but not after that date (until her ultimate return to Australia). That being so, the Tribunal went on to examine whether the absence of VXI and B from November 1982 to 30 June 1986 was 'temporary only'.

The Tribunal was satisfied that VXI's original intention in going to Greece was to seek treatment for B and she did not intend to stay away any longer than was necessary for that purpose. The absence of VXI and B from Australia from 10 November 1982 until 30 June 1986 was both in intention and in fact limited to the fulfilment of a passing purpose and was thus temporary only in the terms of *Hafza*.

The passing purpose had been to ensure that the whole family could return from Greece to Australia — Mrs VXI having believed at that time that she had to be in Greece in order to apply for permanent residence in Australia.

Their eventual return indicated that the passing purpose was fulfilled in fact. Thus ss.103 and 104 did not affect VXI's entitlement, throughout that period, to family allowance and handicapped child's allowance.

Formal decision

The AAT set aside the decision under review and substituted a decision that family allowance and handicapped child's allowance was payable to VXI in respect of B during the period from August 1982 to July 1986.

[B.W.]

Married persons: living at separate addresses

UTCZAS and SECRETARY TO DSS (No. 5572)
Decided: 21 December 1989 by B.H. Burnes.

The Tribunal *affirmed* a decision of the DSS that Utczas and his wife were 'married persons' for the purposes of age pension entitlement.

The facts

Utczas and Mrs Spett-Utczas were married on 16 December 1987. Both were recipients of aged pension. The DSS was informed of the marriage and that the applicants intended to remain living at their respective addresses as they had done prior to their marriage. The reason for living apart was so that Utzcas would not lose a future entitlement to nursing home care.

The legislation

Section 3(1) of the *Social Security Act* defines 'married person' to exclude —

> '(a) a legally married person ... who is living separately and apart from the spouse of the person on a permanent basis; or
> (b) a person who, for any special reason in any particular case, the Secretary decides should not be treated as a married person.'

Findings

In finding that the applicants were married persons the Tribunal said:

> '... there is no suggestion in the evidence that the matrimonial relationship is anything other than alive and ongoing. The applicants bona fide recognise the marriage relationship as such, as does the Tribunal.'

The applicants were in good health and not suffering financial hardship. Their decision to live apart caused them additional expenses but this was not brought abut by illness or infirmity. Accordingly, there was no special reason for deciding pursuant to s.3(1) that they should not be treated as married persons.

[B.W.]

Income test: payment of debt for applicant

TAXIS and SECRETARY TO DSS (No. 5555)
Decided: 18 December 1989 by D.P. Breen, H. Pavlin and J.D. Horrigan.

Rosalie Taxis was granted supporting parent's benefit in May 1985, following her separation from her husband. In late 1986, the DSS decided to treat the payment of $5460, made by Taxis' former husband to a finance company, as Taxis' income for the purposes of calculating the rate of benefit payable to