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

her. Taxis asked the AAT to review that decision.

'Moneys . . . derived . . .'

According to the former s.6(1) [now numbered as s.3(1)] of the *Social Security Act*, the term 'income' was defined at the time when the payment was made as meaning —

> 'personal earnings, moneys, valuable consideration or profits earned, derived or received by [a person] for the person's own use or benefit by any means from any source whatsoever . . .'

In the present case, the money in question, $5460, had been paid by Taxis' former husband to settle a debt which Taxis owed to a finance company, representing interest payable on a bridging loan negotiated to cover the purchase of a house for Taxis and her daughter following the dissolution of Taxis' marriage.

The payment had been negotiated as the final settlement of the financial aspects of the separation and divorce of Taxis and her former husband, and was embodied in a consent order made by the Family Court, where it was described as a payment 'in lieu of maintenance for the wife and child of the marriage for a period of 12 months'.

On behalf of Taxis, it was argued that the payment was a capital transfer, rather than income. The AAT rejected this argument. After quoting from the judgments in *Read v Commonwealth* (1988) 43 *SSR* 555, the Tribunal said that capital receipts were caught by the definition of 'income' in s.6(1), even before that definition was amended to expressly cover capital receipts.

In the present case, Taxis had 'derived' the benefit of the payment made by her former husband to the finance company and, accordingly, the payment should be treated as her income within the *Social Security Act*.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Invalid pension: incapacity while an Australian resident

SECRETARY TO DSS and MANCER
(No. 5563)
Decided: 22 December 1989 by D.P. Breen.

The Secretary sought review of an SSAT decision that Deepika Mancer was eligible to receive an invalid pension from the day she applied, 5 September 1988.

The facts

Mancer was the adopted daughter of a couple who were directors of a handicapped persons' institution. She was born in Sri Lanka on 13 August 1971 where she lived in a government children's home.

On 9 August 1985, Mancer came to Australia with her adoptive parents, entering under a visa which conferred a right to stay indefinitely. Therefore she had been an 'Australian resident' since her arrival. Her condition upon arrival in Australia was described as the physical maturity of a 6-year-old and the emotional developmental level of a 4-year-old. She attended primary school in Australia until the age of 16.

The Department rejected Mancer's claim for invalid pension without establishing the level of her physical and/or mental retardation because 'clearly . . . any retardation existed when Deepika arrived in Australia'. That decision was set aside by the SSAT and the Secretary then sought review by the AAT.

The legislation

Section 30(1)(a) of the *Social Security Act* states that a person shall not be granted an invalid pension unless she 'became permanently incapacitated for work . . . while the person was an Australian resident'.

Incapacity while an Australian resident

The AAT adopted the reasoning of the SSAT, which had decided that Mancer's incapacity for work commenced when she left school on 30 August 1988, at which time she was an Australian resident.

The foundation for this decision was the distinction between an injury or disease and an 'incapacity for work' that was made by the AAT in *Panke* (1981) 2 *SSR* 9 and approved by the Federal Court in *Annas* (1985) 29 *SSR* 366.

The SSAT had said that the DSS had confused the origin of Mancer's disability with the origin of her incapacity, and that Mancer did not suffer an incapacity for work until she reached a working age.

However, the SSAT had also said it was not necessary to determine whether the incapacity commenced at 15 (the age at which a person is lawfully entitled to leave school in South Australia) or 16 (the age at which 'the *Social Security Act* deems a person to have a capacity for labour to sell') as Mancer was over 16 years of age when she left school on 30 August 1988. [Presumably the SSAT intended to say that it was not necessary to choose which of these 3 dates was the correct one because Mancer was an Australian resident on all of them.]

The AAT did not cast any light on this problem other than to say that, as Mancer would have been subject to the *prima facie* legislative requirement to remain at school until the age of 16 years, the Department was incorrect in submitting that her incapacity for work arose prior to her coming to Australia. The AAT rejected an argument by the DSS that, because the school leaving age requirement could be waived, incapacity for work arose prior to that age. Also, in the AAT's opinion, the fact that South Australian compensation laws covered workers regardless of their age did not support the Department's contention.

Formal decision

The AAT affirmed the decision of the SSAT under review.

[D.M.]

Invalid pension: impairment

ORAK and SECRETARY TO DSS
(No. 5506)
Decided: 29 December 1989 by J.R. Dwyer, J.H. Wilson, and D.M. Sutherland.

In March 1988, Gelter Orak, a 54-year-old woman, lodged a claim for invalid