Administrative Appeals Tribunal decisions

Age pension: transexual: qualifying age sixty or sixty-five

SECRETARY TO DSS and HH
(No. 6890)

Decided: 23 April 1991 by D.F. O'Connor J, D.W. Muller and A.M. Brennan.

The Tribunal was asked to review an SSAT decision which found that, for the purposes of the *Social Security Act*, HH was a woman. This enabled her to qualify for age pension from the age of 60. The DSS contended that HH was a man and would not qualify for age pension until the age of 65.

Policy

The Tribunal sought details of the Department's existing policies relevant to this review and of the implications for other areas under the *Social Security Act*. Counsel for the Department said there was no policy and invited the Tribunal to develop policy in this area. The Tribunal found this to be an 'extraordinary submission', in view of the fact that it had previously been criticised for attempting to develop policy.

The legislation

Section 25(1) of the *Social Security Act* provides that a person not receiving invalid pension and who, being a man, has attained the age of 65 years or, being a woman, has attained the age of 60 years, and who is an Australian resident for a continuous period of 10 years shall be qualified to receive an age pension.

The facts

HH was born in 1929. She had lived in Australia since 1956. She worked as a cane cutter and at a meatworks.

HH underwent sex reassignment surgery in 1976. Since that time she had lived as a woman. In 1977 she changed her name by deed poll and was granted Australian citizenship in that name in 1990. Her driver's licence showed her as a female and she was accepted by her friends and her local community as a woman.

A delegate of the Department rejected her claim for age pension on the ground that she was male and was therefore not entitled to pension until she turned 65.

The cases

The majority of the Tribunal (O'Connor J and Muller) referred to cases in criminal and family law which have examined the question of a person's sex.

In Britain, the first case which examined this question was *Corbett v Corbett* [1971] p.83. In that case a decree of nullity was issued on the grounds that one of the parties was, and had always been, a man.

In Australia, in the case of *In the Marriage of C and D* (1979) 28 ALR 524, Bell J. held that the 'husband' was neither man nor woman but a combination of both and therefore the marriage could not have taken place in the true sense.

The criminal law case of *R v Harris and McGuiness* (1988) 35 A Crim R 146 dealt with the question of whether the 2 appellants who were transexuals were male or female. Harris had undergone full sex reassignment surgery; McGuiness had not. Both lived as females. The court decided that the conviction of Harris could not stand as Harris was not at the relevant time 'a male person'. On the other hand McGuiness, being a pre-operative transexual was still 'a male person' for the purposes of the criminal law.

The majority found these cases unhelpful and not necessarily relevant to social security law. It cited the Full Federal Court in the case of *Rose v Secretary, Department of Social Security* (1990) 19 ALD 601, 601:

> 'The Act is a remedial provision in that it gives benefits to persons and thereby remedies parliament's perceptions of injustice. It calls for no narrow or pedantic construction.'

Social practicalities

The majority said it was impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities and most people are clearly male or female; but the time had come to arrive at some standard by which to test a person's sex. There being no unanimity of medical opinion regarding factors to be considered in forming an opinion, the majority listed the following factors which it considered relevant:

- sex chromosome constitution;
- gonadal sex;
- sex hormone pattern;
- internal sex organs;
- genitalia;
- secondary sex characteristics;
- sex of rearing; and
- psychological sex.

The majority members examined each factor in detail and pointed out problems with each. It found the psychological test appealing because it was at once practical, realistic and humane. It was concerned with an individual's assumed sex role, and the law was concerned with people's relations with other people and with society as a whole.

The majority noted the dangers to society of having a procreatively functional male classified as a female and that this was not the case after sex reassignment surgery. Functionally the person was a member of the 'new' sex with their anatomy conforming to the psychological self-image. Using the psychological test, the majority was satisfied that for the purposes of the *Social Security Act* HH is a female.

The majority members commented that Australian society permitted sex reassignment surgery. The law then must acknowledge this fact and accept the medical decisions made. The surgery is irreversible and a requirement that the surgery be completed before legal recognition is given protected the public against possible fraud.

The majority was satisfied that its decision would not impose any significant burden on the Department as transexuals who undergo the surgery are a very small percentage of the population. Only those transexuals who have undergone the surgery should be classified for the purposes of the *Social Security Act* as a person of the reassigned sex and they should be required to furnish a certificate from a hospital.

Minority view

The third member, Brennan, agreed with the decision of the Tribunal but arrived at her conclusion by a different route. She said the terms 'man' and 'woman' may be interpreted only in the context of the age pension provisions and in the light of the objects of the Act. The cardinal factors in considering age pension policies are 'ageing' and 'income support'.

Brennan noted that gender classifications and chronological ages are the

that he would not pass that year, largely because of difficulty with the English course. He decided to leave school, find employment and continue his secondary studies on a part-time basis.

Tran's father then told Tran that, if he left school, he would have to leave the father's home.

Tran told the AAT, and the AAT accepted, that he would be subjected to physical violence if he left school but attempted to remain in his father's home.

Tran's former teacher told the AAT that Tran had set himself a very high standard, but had accurately assessed his poor prospects of passing year 11. The teacher said that, in her opinion, a failure would produce more problems for Tran than leaving school.

A psychiatrist with whom Tran consulted told the AAT that Tran's decision to leave school had been a mature choice between options; and that, if he had remained at school, he would have been exposed to intolerable pressure from his father.

A youth welfare worker expressed the opinion that Tran had left school because, as with many migrants with interrupted schooling, 'school had become a trauma rather than a positive learning experience'. She also told the AAT that she had found Tran, after leaving his father's home, living with his cousin without food and in obvious poverty.

'Other such exceptional circumstances'

The AAT agreed with the DSS that the phrase used in para. (a)(ii) of the definition of 'homeless person', 'other such exceptional circumstances', had to be read as a reference to circumstances of the same kind (*ejusdem generis*) as domestic violence or incestuous harassment.

That is, such exceptional circumstances would need to involve 'behaviour which is intrusive or invasive or threatening': Reasons, p.11. The DSS Benefits Policy Manual recorded examples which, the AAT said, were well within the class covered by the phrase.

These examples included criminal activity within the home, drug abuse, alcoholism, prostitution by the parents or other persons living in the home and extended irrational parental behaviour.

The AAT's decision

On the basis of this evidence, the AAT found that there were 'exceptional circumstances' within the definition of 'homeless person' in s.115 which made it unreasonable to expect Tran to live at his father's home.

His father's insistence that Tran remain at school was not an exceptional circumstance which would justify his leaving his father's home; but the threat of violence to Tran did amount to such an exceptional circumstance:

> 'In my view, no person should be subjected to the threat or the risk of violence whether it be in domestic circumstances or otherwise. I am satisfied that [Tran] genuinely believed that in the event that he refused to leave the family home he would have been assaulted by his father, in the circumstances that he has earlier described.
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> In those circumstances it would be unreasonable to expect a person to live at a home where that risk or threat is apparent.'

(Reasons, p.12)

Formal decision

The AAT affirmed the SSAT's decision that Tran was eligible to receive benefit as a homeless person.

[P.H.]

Sickness benefit, late lodgment: sole or dominant cause

WESTON and SECRETARY TO DSS

(No. W90/160)

Decided: on 13 March 1991 by Deputy President P.W. Johnston.

Ms Weston applied for review of a decision of the SSAT affirming a DSS decision to reject a claim for sickness benefit on the ground that the claim had not been lodged within five weeks of the date on which the incapacity occurred. She also sought a recommendation from the Tribunal that a payment of an amount equivalent to sickness benefit be made in accordance with Finance Direction 21/3.

The facts

Ms Weston became incapacitated on 7 December 1989 when she injured her knee seriously while in Victoria. After being taken to hospital and informed that surgery would be required, Ms Weston telephoned the Department's Melbourne office on 12 December 1989 and enquired about making a claim for sickness benefit. When she mentioned that she was probably returning to Perth in the near future she was told that it would be better if she lodged her claim in Perth. There was no mention of time limits.

Upon returning to Perth on 24 December 1989, she tried to ring the Department to enquire further about making a claim. A recorded message led her to believe that the office was closed between Christmas and New Year.

On 4 January 1990 she rang the Department's Hotline. She was told that she would have to attend at a departmental office to fill in a form. Again she received no advice about the time limits for lodging a claim.

Since she was still troubled by her knee injury and finding it difficult to drive, she did not attend a DSS office until 23 January 1990. It was then that she realised that she was out of time to make a claim. She lodged a claim on 30 January 1990 and was advised that the claim was only payable from the date of lodgment and as she had been working since 12 January 1990 there was no benefit payable.

The legislation

Section 125(3) of the *Social Security Act* provides that sickness benefit is payable to a person from and including the 7th day after the day on which the person became incapacitated where their claim for benefit is lodged within 5 weeks after the date on which the person suffered incapacity.

Section 125(4) provides that whenever a claim for sickness benefit is not lodged within a period of 5 weeks as required by s.125(3), the benefit is payable from and including the day on which the claim was lodged unless the Secretary is satisfied that the sole or dominant cause of the failure to lodge the claim within the 5 week period was the said incapacity. Where the Secretary is so satisfied, benefit is payable from and including such date as the Secretary considers reasonable under the circumstances, not being a date earlier than 4 weeks before the date on which the claim was lodged.

Whether incapacity is sole or dominant cause

The SSAT had found that it was Ms Weston's lack of awareness of the time limit rather than her incapacity that was the 'sole and dominant cause' [sic]. The AAT said that the SSAT erred in treating the effects of the incapacitating injury and the applicant's unawareness of the time limit as mutually exclusive causes. The question of whether the incapacity was the sole or dominant cause of the failure to apply in time should not be