The Tribunal found that the evidence indicated that doctors were seeking to identify the underlying conditions troubling Chen in 1993 and 1994. In the months from September to December 1993, Chen had more than 30 consultations in different medical practices and outpatient sections of hospitals. Additionally on a claim dated 4 October 1993 Chen said he had weight loss and 'a terrible illness.' This contradicted Chen's recent view that he merely had flu-like symptoms and minor anxiety in 1993.

The Tribunal was satisfied that Chen had significant psychiatric problems in 1993 that prevented him from working and continued to suffer from these when he first claimed disability support pension in 1998. Had he been assessed for social security purposes at the time, his level of disability would have meant that he had 'a continuing inability to work' in 1993, that is, prior to being an 'Australian resident' within the meaning of the Act.

The Tribunal considered whether s.94(1)(e)(ii), 'a qualifying residence exemption for disability support pension' might apply to Chen. It considered s.7(6) and the meaning of 'refugee' contained in s.7(6B). The Tribunal was satisfied that the visas held by Chen did not fall within the definition of 'refugee' which would have allowed for a residence exemption for a disability support pension.

The Tribunal found that Chen was not an Australian resident at the time when he first had a 'continuing inability to work' within the meaning of the Act and therefore was not qualified for disability support pension.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Family tax benefit: whether exemption from obtaining child support should be granted

SECRETARY TO THE DFaCS and VAD
(No. 2001/1045)

Decided: 21 December 2001 by M. Handley.

Background

VAD was the mother of two children and S the father. There was no dispute as to paternity. S was married to another person and employed. VAD was solely dependent on welfare benefits. S did not pay maintenance. His wife did not know that he was the father of the two children. S had indicated that if he was compelled to pay maintenance he would sever all current ties he had with the children. The rate of family tax benefit (FTB) payable to VAD was reduced because she was 'not pursuing reasonable action for child support ...' VAD also had a child, N, from a previous relationship, and she did not receive maintenance from the father of N.

Issues

The issue was whether it was reasonable for VAD to take action to obtain maintenance from S. The issue was not whether S could or would pay maintenance.

Legislation

Section 58 of the *A New Tax System (Family Assistance) Act 1999* (the Act) provides that the rate of family tax benefit is to be determined by a rate calculator found within Schedule 1 of the Act.

Clause 10 of Part 4 of Schedule 1 of the Act provides that the FTB rate is the 'base FTB child rate' if:

(a) The individual or the individual's partner is entitled to claim or apply for maintenance for the child; and

(b) The Secretary considers that it is reasonable for the individual or partner to take action to obtain maintenance; and

(c) The individual or partner does not take action that the Secretary considers reasonable to obtain maintenance.

Reasonable to take action to obtain maintenance

VAD indicated that she was anxious to preserve the relationship between S and his children and did not wish to bring action which would precipitate him ceasing contact with the children. She believed if she brought maintenance proceedings he would carry out his threat to sever all contact. Having had that experience previously with the father of N she was content to allow the relationship between the children and S to continue at its present level and not bring proceedings against him for payment of maintenance. She also said she did not wish to precipitate the ending of S's marriage (which she believed would occur if he was obliged to pay maintenance).

The Tribunal noted s.3 of *Child Support (Assessment) Act 1989*, ss.3 and 4 of The Child Support (Registration and Collection) Act 1988 and Article 18 of The United Nations Convention on the Rights of the Child (to which Australia is a signatory).

The Department referred to its own Guidelines. The 'exemptions' from the 'maintenance action test' (that is the basis on which an officer of Centrelink might determine that it would be appropriate to grant an exemption from obtaining maintenance and thereby having a continuing entitlement to base FTB child rate) were set out in the Guidelines as follows:

- if they fear that if they take action for child support the non resident parent will react violently towards them or their family
- where it would be unreasonable to expect them to seek child support because of the harmful or disruptive effect it would have on them or the non resident parent
- if the identity of the father of the child or children is not known
- if they have had legal advice that paternity could not be proven through a court or have unsuccessfully tried to prove paternity
- where the child was conceived through artificial insemination procedures and the mother was neither married or in a marriage-like relationship at the time
- if there are cultural considerations that adversely impact on the customer's capacity to take reasonable action and;
- where there are other exceptional circumstances.

The Tribunal, referring to *Drake v Minister for Immigration and Ethnic Affairs* (No. 2) 1980 2 ALD 634, found the policy recorded in the guidelines to be 'sound and consistent with the Act. Adopting it as a guide will not delegate or fetter the responsibility of merits review nor will it be a predeterminant of outcome' (Reasons, para. 21).

The Tribunal found in respect of the Guidelines there was nothing to indicate that S would 'react violently towards the children or the respondent; his identity is known and his paternity is beyond doubt; neither child was conceived through artificial insemination and there are no cultural considerations relevant' (Reasons, para. 22).

The Tribunal was not persuaded by VAD's submission that pursuing maintenance against S was unreasonable because it would have a harmful or destructive effect upon the children or that it would be disruptive of his marriage and he would be unable to maintain mortgage payments over his house.

The Tribunal was satisfied that it was reasonable for VAD to take action to obtain maintenance and that VAD having failed to take 'action' to obtain maintenance was not reasonable. The Tribunal stressed that this matter was not about whether S was liable to pay maintenance as that was a matter for another forum.

> This review concerns the reasonableness of taking or failing to take action to secure payment of maintenance from the non-resident parent. Actually obtaining a payment of maintenance is not relevant.

(Reasons, para. 28)

The Tribunal found that an exemption against claiming child support was not appropriate in the circumstances of this application.

Formal decision

The decision of the SSAT made on 19 June 2001 was set aside, and in substitution it was decided that the decision of the ARO made on 3 May 2001 be reinstated.

[M.A.N.]

Preclusion period: special circumstances; severe incapacitating illness prior to compensation settlement

SECRETARY TO THE DFaCS and BULLOCK
(No. 2001/1016)

Decided: 12 December 2001 by J. Handley.

Background

Bullock was injured at work in April 1997, suffering injury to both shoulders. He sought compensation and settled his claim for $205,000 plus costs in April 2000. A preclusion period was set from April 2000 to November 2004, during which Bullock was ineligible for a social security payment. The SSAT on appeal in June 2001 determined that a portion of the compensation amount ($32,300) should be disregarded because of special circumstances, so reducing the preclusion period applicable to Bullock.

Shortly prior to the settlement, Bullock was diagnosed with haemochromatosis, the effects of which were described as 'truly horrific, debilitating and embarrassing'. The condition causes significant and painful effects on major joints, arthritis, liver enlargement and heart disease. Bullock required on-going treatment and two operations on his left ankle. Further operations on both ankles were anticipated. Because of his condition and the associated pain, Bullock was unable to remain in the two-storey house he and his wife had purchased, and had to buy an alternative single storey house, incurring $23,300 in transfer fees, duties and interest costs. Further, because of his condition he was advised by his treating doctors to install air conditioning in his home (at a cost of $4000), and also incurred $5000 in additional medical costs not met by his medical insurance. The condition, and its effects, were quite unrelated to the injuries for which Bullock received compensation.

The law

The *Social Security Act 1991* (the Act) provides by s.1184(1) that:

> For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:
>
> (a) not having been made; or
>
> (b) not liable to be made ...;
>
> if the Secretary thinks it is appropriate to do so in the special circumstances of the case.

In this matter, therefore, the question was whether the circumstances faced by Bullock could be said to amount to 'special circumstances'.

Discussion

The Tribunal noted the definition of 'special circumstances' in *Beadle and Director General of Social Security* (1984) 6 ALD 1 that, to be 'special' circumstances needed to be 'unusual, uncommon or exceptional ... [and must have a] particular quality of unusualness that permits them to be described as special'.

The Tribunal concluded that 'special circumstances' need not be confined to financial circumstances, that the consideration of what was 'special' involved application of a broad discretion without binding rules or rigidity (*Minister of Community Services and Health v Thoo* 1988 78 ALR 307), and that they should be found to exist if to do so would avoid injustice (*Springfield Nominees Pty Ltd v Bridgeland Securities Ltd* 1992 110 ALR 635). The fact that, if special circumstances were found to exist, Bullock would receive no immediate financial benefit (but rather would simply have the preclusion period reduced) was not determinative of the outcome as '... the discretion to determine whether special circumstances exist is not enlivened only when an applicant presents with financial insecurity' (Reasons, para. 28).

The Tribunal concluded that: 'Illness per se is not a special circumstance, but the consequences may be, for illness may not only involve the cost of treatment. It can as demonstrated in the present case, have far reaching and often dislocating consequences' (Reasons para. 30). The Tribunal found that special circumstances could be said to exist in Bullock's situation, and that an amount of $32,300 (being the total of the costs of relocation, installation of air conditioning, and additional medical treatment) should be treated for pension purposes as not having been made. The effect of this was to reduce the applicable preclusion period.

The formal decision

The Tribunal affirmed the decision of the SSAT.

[P.A.S.]