Reciprocal agreement with New Zealand

WILSON and DIRECTOR-GENERAL OF SOCIAL SECURITY
(3 December 1984)

Decided: 3 December 1984 by R.K. Todd.

In February 1971, Hugo Wilson had migrated to Australia from New Zealand, where he had resided for almost 8 years and where he had been receiving an invalid's benefit. (He had been granted his NZ benefit on the basis of his former residence in the United Kingdom.)

After his arrival in Australia, Wilson was granted an invalid pension under regulations which implemented a reciprocity agreement between Australia and the United Kingdom. The effect of those regulations was to pay Wilson only a partial pension.

In November 1974, the DSS reviewed Wilson's case and granted him an invalid pension pursuant to regulations which implemented a reciprocity agreement between Australia and New Zealand (the *NZ Regulations*). Under those regulations, Wilson received a full invalid pension.

In August 1980, Wilson left Australia for New Zealand. (He later gave evidence that he had enquired at a DSS office about his continuing eligibility if he travelled to New Zealand for 12 months, and had been told that he would continue to receive his pension.)

In February 1981, the DSS learned that Wilson was no longer in Australia and suspended his pension. In June 1981, the DSS cancelled Wilson's pension. Wilson was then granted an invalid's benefit by the New Zealand Department of Social Welfare, with effect from February 1981.

Wilson asked the AAT to review the DSS's decision cancelling his invalid pension.

The legislation

Section 25 of the *Social Security Act* provided that an invalid pension could not be granted to a person who had become permanently incapacitated for work outside Australia, unless that person had been continuously resident in Australia for at least 10 years.

However, Regulation 7 of the *NZ Regulations* provided that residence in New Zealand could be counted towards residence in Australia. Regulation 8 provided that a person residing in Australia was not entitled to receive an Australian pension –

> unless that person, if residing in New Zealand, would have been qualified under the [NZ] Social Security Act on residential grounds to receive [the corresponding benefit].

The NZ Social Security Act provided that a person could not qualify for invalid's benefit in that country unless the person had been resident in New Zealand for 10 years.

Section 46(1) of the *Social Security Act* gave the Director-General a discretion to cancel or suspend a pension where a pensioner had failed to comply with various provisions of the Act, including s.45(1), which provided as follows:

> (a) a pensioner shall not leave Australia without first giving to a Director notice of his intended departure from Australia.

Regulation 11 of the *NZ Regulations* provided that a person who was 'ordinarily resident in Australia [but] temporarily resident in New Zealand' should continue to receive his pension (if granted under the *NZ Regulations*) so long as 'in the opinion of the [NZ] Social Security Commission, [he was] not residing permanently in New Zealand'.

Regulation 15 of the *NZ Regulations* provided that a person was not entitled to receive an Australian pension during any period when he was 'entitled to receive the comparable benefit under the [NZ] Social Security Act'.

Wilson's residential status

Wilson told the Tribunal that, at the time of his depature from Australia in 1980, he had intended to return to Australia within 12 months; but he then found that he could not afford to do so; that by 1982 he had re-established himself in New Zealand; but that it was still his intention to return to Australia.

Evidence was given to the AAT of a formal decision by the NZ Social Security Commission that Wilson had not been permanently resident in New Zealand from March 1971 until at least 2 February 1981.

The AAT first considered a DSS argument that Wilson should not have been granted an invalid pension under the *NZ Regulations* in 1974 because of Regulation 8. The DSS argued that this Regulation prevented the granting of an Australian pension to a person who had not established 10 years residence in New Zealand.

The AAT rejected this argument, saying that such a reading of Regulation 8 was inconsistent with the general object of the *NZ Regulations*, which was to give to the residents of each country rights to social security 'to which they would not otherwise be entitled'. Moreover, the AAT said, Regulation 8 should be seen as 'an obvious progression from Regulation 7', which dealt with 'deemed residence':

> The Regulations [ie Regulation 8] cannot mean that the person, if notionally returned to New Zealand on the day of making his claim, must have had the factual residential qualifications to receive a New Zealand pension. More sensibly it asks that the assumptions made by Regulation 7 with regard to deemed residence be applied in the meaning to be given to the word 'residing' in Regulation 8.

(Reasons, para. 38)

Accordingly, the AAT decided that Wilson had been validly entitled to an Australian invalid pension under the *NZ Regulations*.

Failure to notify departure

The AAT was prepared to accept that Wilson had enquired at a DSS office about his pension rights if he were to leave Australia temporarily, even though the DSS file contained no record of this enquiry. However, the AAT said, that enquiry could not be described as 'notice of his intended departure from Australia' as required by s.45(a) of the *Social Security Act*; and, therefore, there was no evidence that Wilson had satisfied the requirements of that provision. It followed that the Director-General had the power, under s.46(1), to suspend or cancel Wilson's pension. However, it might have been appropriate for the Director-General to exercise his discretion under s.46(1) in favour of Wilson.

Continuing entitlement to Australian pension

The AAT decided that, 'on a favourable interpretation of the evidence', Wilson has remained 'ordinarily resident in Australia' from the time of his departure in August 1980 until some (uncertain) date in 1982. It appeared that, throughout that period, Wilson had intended to return to Australia; and in establishing residence his intention was the most important consideration.

Because of that intention and because of the formal opinion expressed by the New Zealand Social Security Commission (that Wilson was not permanently resident in New Zealand from March 1971 until at least 2 February 1981), Wilson remained qualified for his Australian invalid pension: Regulation 11 of the *NZ Regulations*; but that entitlement could have been suspended by the Director-General under s.46(1) of the *Social Security Act*.

By some date in 1982, which it was not necessary to identify precisely, Wilson had abandoned his residence in Australia and had become permanently resident in New Zealand; and from that date he was no longer entitled to his Australian pension.

However, the AAT pointedout that, from the time when Wilson was granted a New Zealand invalid's benefit on February 1981, he was prevented by Regulation 15 of the *NZ Regulations* from receiving an Australian invalid pension.

The '6 month rule'

In the course of its Reasons, the AAT commented on a policy developed by the DSS to the effect that a person covered by the *NZ Regulations* should be treated as no longer resident in Australia after 6 months absence from Australia. This policy was based on Article 3(2)(b) of the Australian-NZ reciprocity agreement, which provided a former New Zealand resident who returned to New Zealand

and resided there for 6 months should 'be deemed to be permanently resident in New Zealand'. However, this part of the agreement had not been implemented by legislation in Australia. Therefore, although the policy had 'its basis at the highest levels of the executive and therefore [had] much to commend it', there was no room for the application of that policy.

This was not a case, the AAT said, where Government policy had been developed to guide the exercise of some discretion. (If there had been some discretion in the *NZ Regulations*, that policy would have been relevant to the exercise of the discretion: *Re Drake (No 2)* (1979) 2 ALD 634.) However the AAT said, the Australian legislation was unambiguous and conferred no discretion; and, accordingly, the 6 month rule as suggested by the DSS had no legislative basis; and, as the High Court had said in *Green* v *Daniels* (1977) 13 ALR 1, any decision based on that policy would be unlawful.

Formal decision

The AAT affirmed the decision under review.

Cohabitation: separation under one roof

COOPER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/85)

Decided: 25 October 1984 by J.A. Kiosoglous, G.D. Grant and J.H. McClintock.

Mrs Cooper had been granted an age pension in 1977. In her application for that pension, she had stated that she had been living in a *de facto* relationship with a man (Mr Cooper) for over 20 years. Accordingly, the DSS took account of Mr Cooper's income when calculating the rate of her age pension. In May 1982, Mrs Cooper advised the DSS that her *de facto* relationship with Mr Cooper had ended some 12 years earlier. However, the DSS decided that she was still living with Mr Cooper as his wife on a *bona fide* domestic basis and that his income should still be taken into account in fixing the rate of her pension. Mrs Cooper asked the AAT to review that decision.

The legislation

At the time of the DSS decision, s.28 (2) of the *Social Security Act* provided that a pensioner's age pension should be calculated by taking account of the pensioner's income. Section 29(2) provided as follows:

> (2)For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall –
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> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
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> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines,
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> be deemed to be half the total income of both.

Section 18 of the Act defined 'wife' to include a woman who was living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

The evidence

Mrs Cooper had started to live with Mr Cooper in 1958 and had adopted his surname in 1969. Until about 1965 they had enjoyed a close relationship; but, from 1970, there had been no relationship between them – they had occupied separate bedrooms, had no common social life, exchanged few words and, by 1982, had stopped sharing meals. More recently, Mr Cooper had asked Mrs Cooper to leave the house (which he owned) and, when she was unable to find alternative accommodation, had demanded that she pay rent to him.

Mrs Cooper told the AAT that her main reason for staying in Mr Cooper's house was that she could not find alternative accommodation which she could afford. Another reason for her remaining there was that Mr Cooper's house was close to her medical practitioner from whom she was receiving regular treatment for a variety of illnesses.

The AAT's assessment

The Tribunal noted that all the evidence as to Mrs Cooper's domestic situation had been given by her and had not been corroborated. Although it was generally desirable, the AAT said, for evidence of separation under the one roof to be corroborated, that corroboration was neither essential nor desirable in the present matter. This was because there was no suggestion by the DSS that Mrs Cooper's evidence should not be accepted; and because requiring the applicant to call Mr Cooper to corroborate her evidence might have aggravated the difficult situation between them.

On the basis of the evidence given by Mrs Cooper, the AAT concluded that she had been living separately and apart from Mr Cooper, although under the one roof, for some years. The evidence which tended to show the persistence of a *de facto* marriage relationship between Mrs Cooper and Mr Cooper were also consistent with the conclusion that they were living separately and apart:

- although they maintained a joint bank account, this was used only for paying household expenses;

- although Mrs Cooper provided some household services to Mr Cooper this should be seen as her contribution towards her keep;
- the information supplied by Mrs Cooper to the DSS between 1977 and 1981, that she was living with Mr Cooper as his *de facto* wife, was not supplied with fraudulent intent nor did they have any substantial significance;
- neither the adoption by Mrs Cooper of Mr Cooper's surname nor the financial relationship between them was a conclusive factor but only one factor to be taken into account; and
- Mrs Cooper's continued residence in Mr Cooper's house should be viewed in the context of her lack of financial resources and alternative accommodation.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that the income of Mrs Cooper did not include the income of Mr Cooper for the purposes of calculation at the rate of her age pension.

DAVIS and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V84/104)

Decided: 30 November 1984 by J.R. Dwyer.

Margaret Davis had been granted unemployment benefit in October 1976, special benefit in May 1979 and invalid pension in August 1983.

Shortly before the decision to grant Davis an invalid pension was implemented, the DSS decided that she was living with a man, B, as his wife on a *bona fide* domestic basis although not legally married to him. Accordingly, the rate of her special benefit (and, later, her invalid pension) was reduced to take account of B's income.

David asked the AAT to review that decision. After the hearing of the application for review but before the AAT's decision was handed down David died.

The legislation

At the time of the decision under review, s.114(1) of the *Social Security Act* provided for the rate of special benefit paid to a person to be reduced by reference to the person's income. Section 114(3) provided that the income of a married person should include the income of that