Assurance of support: AAT's jurisdiction

LE VAN DIEP and SECRETARY TO DSS
(No. S87/302)
Decided: 5 February 1988 by J.A. Kiosoglous.

Le Van Diep came to Australia as a refugee in 1977. In 1982, he signed a maintenance guarantee, now known as an assurance of support, for his father so that his father would be allowed to migrate to Australia.

Le's father received special benefits from the DSS between May 1986 and July 1987. The DSS demanded that Le repay this amount to the Department.

Le appealed to an SSAT which recommended that his appeal be dismissed. A delegate of the Secretary then affirmed the decision to require repayment for Le; and advised him that he could apply to the AAT for review of the decision. This he did.

The legislation

Regulation 22(1) of the *Migration Regulations*, made under the *Migration Act* 1958, declared that a person who signed a maintenance guarantee was liable to repay to any government or public institution moneys expended on the maintenance of the person who was the subject of the guarantee. Regulation 22(3) gave the Minister for Social Security a discretion to write off any debt due to the Commonwealth under regulation 22.

Section 17(1) of the *Social Security Act* provided that the AAT could review a decision of the Secretary affirming a decision made under the Act if that decision had been reviewed by an SSAT.

No jurisdiction

The AAT said that, despite the sequence of events, its social security review jurisdiction was limited by ss.16 and 17 of the *Social Security Act* to reviewing decisions 'under this Act'; and the AAT's migration jurisdiction was limited to reviewing decisions under ss.12 and 48 of the *Migration Act*. The AAT concluded:

> 'To date in this matter the Minister [for Social Security] has not been given an opportunity to exercise his discretion to write off the debt. Of course this has been as a result of the respondent misleading the applicant, as a consequence of which the applicant appealed to the incorrect body and incurred unnecessary costs. It is in circumstances such as this that it is unfortunate that this Tribunal has only a very limited power to award costs in favour of one of the parties.
>
> 'Nevertheless the Tribunal is satisfied that it does not have the jurisdiction to determine whether or not the applicant should pay the debt which has arisen pursuant to regulation 22 of the *Migration Regulations*.'

(Reasons, paras 17-18)

Formal decision

The AAT directed that the matter be removed from the list of matters for hearing by the Tribunal.

[P.H.]

Invalid pension: permanent incapacity for work

GOUDGE and SECRETARY TO DSS
(No. A87/98)
Decided: 14 April 1988 by J.O. Ballard.

In May 1985, Goudge claimed an invalid pension. A Commonwealth medical officer reported he could work part-time, and his claim was refused in August 1985.

At the end of 1985, Goudge became ill again and he resigned from his part-time employment. In May 1987, he appealed to an SSAT against the 1985 rejection of his invalid pension claim.

The SSAT decided that Goudge had a permanent incapacity for work but that this incapacity was only 50%. It recommended, and a delegate of the Secretary subsequently decided, that the original rejection be affirmed. Goudge then applied to the AAT for review.

Now permanently incapacitated

On the basis of evidence given by Goudge's former general practitioner, an occupational psychologist with the CES, and his psychiatrist, the AAT decided that Goudge was 85% permanently incapacitated for work at the date of the AAT hearing; but that he had not established this incapacity at the time of his 1985 claim nor at the time of the SSAT decision in 1987.

Eligibility after date of claim

The DSS argued that the AAT could not award an invalid pension from a date after the claim for that pension. This argument was based on the Federal Court decision in Riley (1987) 41 *SSR* 527 and s.159(2)(c) of the *Social Security Act*.

Section 159(2)(c) provides that a claim for a pension or benefit, lodged at a time when a person is not qualified, shall be deemed to be lodged on a later day when the person is qualified, if that day occurs within 3 months of the lodgment.

The AAT referred to the earlier decisions in *Tiknaz* (1981) 5 *SSR* 45 and *Easton and Repatriation Commission* 6 AAR 558, where the Tribunals had said that they could take account of facts occurring up to the date of their decisions. The AAT said that s.159(2)(c) did not displace this approach: that provision was confined to 'certain specific circumstances' (which the AAT did not explain).

Turning to the Federal Court decision, the AAT said:

> 'Riley's case turned on a question whether the Tribunal had jurisdiction to consider a question not in issue before the SSAT from which the appeal was brought. Here, what I am considering is the same issue that was considered by the SSAT and the delegate, merely considering all available evidence as at a different date. The principle is, of course, that the Tribunal stands in the place of the respondent and makes its own decision. It is not reviewing the decision of the respondent. I do not therefore think that s.159(2) or Riley's case have the effect of preventing the Tribunal making a decision on the application of law to facts as those facts are established at the day of review by the Tribunal.'

(Reasons, para.16)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Goudge was not entitled to invalid pension to the date of the decision but was qualified from that date. **[P.H.]**