Pension portability

PETROPOULOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No.N83/23)
Decided: 9 August 1984 by B.J. McMahon, D.J. Howell and J.H. McClintock.

Erasti Petropoulos had been born in Australia in 1951. At the age of 10 she was taken to Greece by her parents who, it seems, were returning there permanently. In 1972, when she was 21, she married T and they had 2 children. In 1976, Petropoulos and her husband migrated to Australia but they returned to Greece in 1978.

At the end of 1980, Petropoulos was deserted by T, and lost contact with him. T's brother (who lived in Australia) then told Petropoulos that, if she and her children came to Australia, T would join her. In July 1981, Petropoulos and her children travelled to Australia (she had retained her Australian citizenship since her birth) and stayed with T's brother. She applied for and was granted a supporting parent's benefit in August 1981.

However, T did not come to Australia and, in February 1982, Petropoulos returned to Greece to live with her parents. Upon her departure from Australia, the DSS decided that supporting parent's benefit was not payable while she was outside Australia. Petropoulos asked the AAT to review that decision.

The legislation
Section 83AB of the *Social Security Act* provides that the right of a person to be paid a pension (which includes a supporting parent's benefit) is not affected by the fact that the person leaves Australia.

However, this 'portability' right is modified by s.83AD(1): where a former resident of Australia returns to Australia, claims a pension and then leaves Australia within 12 months of her or his return, the pension is not payable while the person is outside Australia.

But s.83AD(2) says that the Director-General may determine that s.83AD(1) does not apply if the Director-General is satisfied that the person's reason for leaving within the 12 month period 'arose from circumstances that could not reasonably have been foreseen at the time of [her] return to . . . Australia'.

A former resident?
The Tribunal first decided that Petropoulos was, at the time of her return to Australia in July 1981, a former resident of Australia, and so caught by the provisions of s.83AD(1).

Even though the meaning of 'resident of Australia' was extended by s.61(2) of the *Social Security Act* and s.6 of the *Income Tax Assessment Act* to include a person 'whose domicile is in Australia', Petropoulos could not take advantage of this extension. Although she had a domicile of origin in Austalia, she had acquired a domicile in Greece when her parents moved there in 1961. And she had retained this domicile after her marriage to T: under common law rules (in force in July 1981) a married woman's domicile depended upon the domicile of her husband; and the evidence did not establish that T had ever intended to make Australia his permanent home.

An 'unforseeable' reason for leaving?
The AAT then looked at Petropoulos' reason for leaving Australia in February 1982, to see if there were grounds for applying s.83AD(2) so as to protect her from the effect of s.83AD(1). She had told the DSS and the Tribunal that she had left Australia because she had realised, after waiting for 7 months, that T was not going to join her in Australia and because she believed that she would be better able to survive financially with the support of her parents, who lived in Greece.

The AAT said that, in assessing whether Petropoulos' reasons for leaving arose from circumstances which had not been reasonably forseeable at the time of her return here, a subjective rather than an objective test should be applied:

> You must look at the situation through the eyes of the applicant. Do not ask yourself whether it would have been reasonable for the man on the top of the Clapham omnibus to come to Australia with such hopes and expectations that were subsequently unfulfilled. Do not retrospectively botanise and classify emotions. Do not pin dead hopes to a board and then examine them like a lepidopterist. The Social Security Act does not operate in an ideal world peopled by logical rational thinkers. It is there for fallible mortals who need help. It is there to be administered humanely and beneficially.

The AAT said that, given Petropoulos' circumstances, her family background and the background of her marriage, her return to Greece in February 1982, 'dejected and disappointed', had not been reasonably foreseeable when she arrived in Australia in July 1981: Reasons, pp.19-20.

Is there a discretion in s.83 AD(2)?
The AAT said that, given that Petropoulos met the requirements of s.83AD(2), the Director-General should have decided that s.83AD(1) did not apply to her, and that there was no question of any discretion.

The Tribunal recognized that the earlier decisions of *Munna* (1981) 4 *SSR* 41, *Pasini* (1982) 7 *SSR* 68 and *Burnet* (1982) 8 *SSR* 81 had assumed that s.83AD (2) gave the Director-General a discretion. '[H]ad it been necessary,' the AAT said, 'we would have exercised our discretion in the applicant's favour for the following reasons.: The Tribunal then listed the following factors:

- Petropoulos and (presumably) her children were Australian citizens;
- there was evidence that the DSS had advised Petropoulos, before she left Australia, that her benefit would be portable;
- there was no evidence that Petropoulos had tried to 'exploit the system'; and
- Petropoulos was a deserted wife with two young children and no other source of income or maintenance.

Formal decision
The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that he should determine that s.83AD(1) did not apply to Petropoulos' supporting parent's benefit.

GALATI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/366)

Decided: 10 August 1984 by R. Balmford, H. E. Hallowes and A. H. Marsh.

Petro Galati had been born in Italy in 1918. He migrated to Australia in 1949 and, between that date and 1968, he spent some 14 years in Australia and five years in Italy. He spent the period between 1968 and 1982 in Italy, returning to Australia in March 1982.

On his return to Australia, he was granted unemployment benefit but, in January 1983, the DSS advised him that he would no longer be eligible for this benefit when he turned 65—that is from February 1983; and the DSS invited Galati to apply for an age pension. After interviewing him, DSS officers decided that Galati did not intend to stay in Australia and that he had returned here with the intention of obtaining an age pension and returning to Italy. The DSS then rejected Galati's claim for an age pension on the basis that he was not currently residing in Australia. Galati asked the AAT to review that decision.

The legislation
Section 21 of the *Social Security Act* defines the qualifications for an age pension. These include the requirements that the applicant, at the time that he claims the pension, be 'residing in, and . . . physically present in, Australia'; and the requirement that the applicant had been 'continuously resident in Australia' for at least 10 years. (That period of 10 years can consist of more than one period of residence in Australia; s.21 (2).)

Section 83AB provides that a person, who has been granted a pension, may continue to be paid that pension despite the fact that he has left Australia. However, s.83AD provides that, in general, this right to be paid a pension outside Australia is not available to a former resident who has returned to Australia, claimed the pension and left Australia within 12 months of his return to this country.

'Residing in . . . Australia'
The DSS had argued that the phrase 'residing in . . . Australia' in s.21 (1) of the *Social Security Act* meant 'residing permanently in Australia'; and that, because Galati had come back to Australia with the intention of leaving after he had obtained an age pension, he was not at the time when

he claimed that pension 'residing in . . . Australia'.

The AAT pointed out that the *Social Security Act* used a variety of different words ('residing', 'resident' and 'residence') in s.21. The AAT referred to several judicial decisions and to the second edition of *Statutory Interpretation in Australia* (by D. C. Pearce), which supported the idea that, where legislation could have used the same word but chose to use a different word, it should be assumed that the legislation intended to adopt a different meaning. Accordingly, the AAT said, the word 'residing' in s.21(1) expressed a more temporary association with Australia than the word 'resident' in the same provision.

Moreover, the Tribunal said, the argument made by the DSS that 'residing in . . . Australia' in s.21(1) involved permanent residence was difficult to reconcile with the portability provisions of the Act (mainly ss.83AB and 83AD).

The Tribunal pointed out that ss.15AA and 15AB of the *Acts Interpretation Act* 1901 now permitted reference to a range of extrinsic material to assist in the interpretation of a provision of an Act.

The Tribunal said that there was some ambiguity in the use of the words 'residing' and 'resident' in s.21(1) and it was therefore appropriate for the AAT to consider the purpose of this provision and of the portability provisions (ss.83AB and 83AD). In order to establish that purpose, the AAT examined second reading speeches made by the Ministers for Social Services at the time when the various provisions were enacted.

For example, the period of continuous residence required to qualify for age pension had been reduced, in 1962 from 20 years to 10 years in order, the then Minister had said, to encourage 'family migration'.

The current portability provisions had been inserted into the *Social Services Act* in 1973, for the purpose of encouraging migration to Australia. The fact that, when those povisions were introduced, an Opposition amendment to restrict portability in the case of returning residents was a clear indication that those returning residents should be allowed to take advantage of the portability provisions, even though their return to Australia may have been solely for the purpose of exploiting those provisions.

The AAT then referred to a decision of the House of Lords in *Shah* v *Barnet London Borough Council* [1983] 1 All ER 226 and said that, in the light of that case and the established purpose of various provisions of the *Social Security Act*, Galati should be regarded as 'residing in . . . Australia' at the time when he claimed his age pension because:

> it can be seen that he adopted his abode in Australia voluntarily and for a settled purpose as part of the regular order of his life for the time being. The fact that that settled purpose was to remain in Australia for a sufficient period to bring himself within a legislative provision is irrelevant to the consideration of whether he was 'residing in Australia' on 11 January, 1983.

(Reasons, para. 40)

'Continuously resident in Australia'

The AAT said, that in the light of the facts of this matter and the purpose of the 1962 amendment to the *Social Services Act* (that is, to encourage 'family migration'), Galati had been 'continuously resident in Australia' for periods which totalled 10 years:

> During those periods when he was in Australia he had a 'settled or usual abode' in this country. Whether or not he had a similar relationship with Italy is not relevant to the consideration of his relationship with Australia.

(Reasons, para. 38)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Galati should be granted an age pension from the date of his application.

Special benefit: migrants

MACAPAGAL and DIRECTOR-GENERAL OF SOCIAL SECURITY (NoV82/51)
Decided: 23 July 1984 by R. Balmford.

Mariano Macapagal had migrated to Australia in January 1980, when he was 70 years of age. Before he was permitted to enter Australia, his son-in-law, D, signed a maintenance guarantee for Macapagal and his wife, promising to the Commonwealth Government that D would be responsible for their maintenance while they were in Australia.

After arriving in Australia, Macapagal and his wife lived with D and his wife and their two children. In April 1980, Macapagal claimed a special benefit from the DSS. When that claim was rejected, Macapagal applied to the AAT for review.

The legislation

Section 124(1) of the *Social Security Act* gives the Director-General a discretion to pay special benefit to any person if the Director-General is satisfied that the person is 'unable to earn a sufficient livelihood'.

Section 125 of the Act provides that the rate of special benefit payable to a person shall be determined by 'the Director-General, in his discretion', but shall not exceed the rate of unemployment or sickness benefit which would be paid to the person if he were qualified.

Qualified for benefit

The Tribunal said that Macapagal satisfied the preconditions for the exercise of the Director-General's discretion to grant a special benefit. In particular, he was unable to earn a sufficient livelihood because of his age and because of the physical disabilities from which he suffered.

In exercising the discretion to grant a special benefit under s.124(1), the Director-General should not use the existence of the maintenance guarantee as the basis for refusing to exercise that discretion. This much, the AAT said, had already been decided in *Blackburn* (1982) *SSR* 53, *Abi-Arraj* (1982) 8 *SSR* 81 and *Sakaci* (1984) 20 *SSR* 221. The Tribunal said that the Australian social security system did not proceed on the assumption that children should support their adult parents. In the exercise of the discretion in s.124(1), the prime consideration should be a compassionate approach to the security in society of the applicant.

The Tribunal rejected a DSS argument that special benefit should be refused to Macapagal because granting him that benefit would allow him to circumvent the restrictions on the other pensions and benefits laid down in the *Social Security Act* (for which he was clearly not eligible). The Tribunal said that the purpose of s.124(1) was, broadly speaking, to provide for people who were in need and for whom the Act did not otherwise provide. It followed that the grant of special benefit should not be restricted to those persons who were eligible for some other pension or benefit under the Act.

The rate of benefit

The AAT also rejected the DSS argument that, in fixing the rate of benefit to be paid to Macapagal, the existence of the maintenance guarantee should be taken into account. The Tribunal said that the practice of the DSS, to take account of the financial capacity of a guarantor to meet his contractual obligations under a maintenance guarantee when fixing the rate of special benefit, was 'quite untenable' and not supported by s.125 of the Act.

The Tribunal said that in the present case, the factors which influenced the rate of special benefit to be paid to Macapagal were –

- Macapagal had no income;
- his wife was dependent on him and had no income; and
- both Macapagal and his wife were presently receiving full board and lodging from their daughter and son-in-law.

The AAT said that it did not want to produce elaborate and artificial calculations of the probable value of the board and lodging which Macapagal and his wife were receiving. But, the Tribunal said, a fair estimate of the value of that board and lodging could be achieved by reducing the amount of special benefit otherwise payable to them by two thirds.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with directions that