However, s.83AD sets out an exception to this right, and the DSS claimed that this section covered Varga's case. Section 83AD(1) declares that a pension is not payable to a person outside Australia if

(a) the person had formerly resided in Australia and had returned to Australia;
(b) the person had claimed a pension within 12 months of returning to Australia; and
(c) the person had left Australia within 12 months of returning to Australia.

(Sub-section (2) gives the Director-General a discretion to allow portability to a person covered by sub-s. (1): see, for example, *Pasini* (1982) 7 *SSR* 68; *Burnet* (1982) 8 *SSR* 81. That discretion was not relevant in this case; but the AAT suggested that, if it were relevant, Varga would probably be given the benefit of the discretion.)

Residence

The AAT decided that s.83AD(1) could not apply to Varga (so as to prevent him claiming portability under s.83AB), because he was not 'a person who formerly resided in Australia' when he returned to Australia in April 1980. In fact, he had never lost his residence in Australia.

The AAT pointed out that Varga had lived and worked in Australia from 1951 to 1978. When he went overseas, he maintained his flat, car and bank accounts and purchased a return air ticket. During that first period of absence in Europe he was still resident in Australia.

This followed 'from first principles, from the common law'. It was reinforced by the extended meaning given to 'resident' in s.20(1)(a) of the *Social Security Act*—his 'home remained in Australia'. And it was reinforced by s.6(1)(a) of the *Income Tax Assessment Act* (adopted by s.20(2)(b) of the *Social Security Act*)—Australia remained 'his permanent place of abode': Reasons for Decision, para. 16.

The AAT concluded:

> It follows there was no call for the suspension of his pension. He is simply an Australian resident who applied for a pension was granted it, and in terms of s.83AB was entitled to be paid it; his entitlement not being 'affected by the fact that he leaves Australia'.

(Reasons for Decision, para. 20)

Formal decision

The AAT set aside the decision under review and decided that Varga's pension should be restored from the date of suspension.

Misleading advice: no power to back-date pension

BOAK and DIRECTOR-GENERAL OF SOCIAL SERVICES No. V81/243

Decided: 27 August 1982 by E. Smith.

Campbell Boak became medically qualified for invalid pension in April 1977. He was then being paid worker's compensation, and these payments continued until August 1978.

In April 1977 Boak attended the Morwell office of the DSS where he was advised that, because he was on worker's compensation, he was not eligible for invalid pension. (This advice, the DSS later conceded, was not correct.)

In December 1978 (when the compensation payments had ceased) Boak applied for and was granted an invalid pension. In October 1979 he applied to the DSS for 'arrears of pension' from April 1977 to December 1978. When the DSS refused to make this payment, Boak sought review by the AAT.

The AAT accepted that Boak had been incorrectly advised by the DSS in April 1977 and that he had, quite reasonably, relied on that advice. But s.37 of the *Social Security Act* prevented payment of an invalid pension for any period before the lodgment of a claim for the pension. And s.37 required that claim to be in writing.

The views expressed in *Tiknaz*, (1981) 5 *SSR* 45, did not help Boak overcome the problem created by these sections. In that case the Tribunal had decided that a person, who had lodged a claim for invalid pension *before* becoming qualified for that pension, could be paid from the date when he qualified. The AAT had said that the Director-General could grant a pension 'notwithstanding that strict compliance with the procedural provisions of s.37 or s.39 would preclude him from doing so'.

Those observations, the AAT said, were not applicable to the present case, where the claim for invalid pension was lodged *after* Boak became qualified: he had 'no legal entitlement to payment from the earlier date from which he has sought to be paid'. The earlier AAT decision in *O'Rourke*, (1981) 3 *SSR* 31, confirmed this.

The AAT suggested that Boak could have an action for damages for negligent advice, based on the High Court decision in *Shaddock* v *Parramatta Council* (1981) 55 ALJR 713. But that action would have to be 'brought in an appropriate Court'.

Alternatively, Boak could lodge a complaint with the Commonwealth Ombudsman who might recommend an *ex gratia* payment to Boak.

Formal decision

The AAT affirmed the decision under review.

Overpayment: 'effective cause'?

PARR and DIRECTOR-GENERAL OF SOCIAL SECURITY No. W81/4

Decided: 22 July by G. D. Clarkson, J. G. Billings and I. A. Wilkins.

Olive Parr migrated to Australia from England, with her husband and two children, in 1972. In October 1974 she was granted an invalid pension. At the time of the grant of this pension, Parr was advised by the DSS that she should report any changes in her husband's income: he was employed as a teacher by the WA Education Department. (The obligation to report changes in income is imposed by s.45(2) of the *Social Services Act*.)

Parr's husband's income increased between 1974 and 1979 (in line with national wage increases). But the DSS claimed to have been unaware of the increases in his income: the DSS had abandoned the annual review of pensions between 1975 and 1978; and it alleged that Parr had not informed the Department of the changes in her husband's income (a claim which Parr disputed—see below).

The DSS continued to assess Parr's pension entitlement on the basis of her husband's 1974 earnings; this meant, of course, that her pension rose every six months (because pensions were indexed to the CPI).

In 1979, the DSS reintroduced annual reviews of pensions and, in response to a DSS review questionnaire, Parr informed the Department, in September 1979, that her husband's gross weekly earnings were $283. The DSS mistakenly treated this figure as his gross fortnightly earnings until 1980 when it discovered its error, calculated Parr's entitlement as 'nil' and cancelled the pension.

The DSS then demanded that Parr repay the overpayments of invalid pension between October 1974 and April 1980; the DSS calculated the overpayments as amounting to more than $8000.

The DSS decision to seek recovery of the overpayments was made under s.140(1) of the *Social Services Act*:

> 140(1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance, endowment or benefit which would not have been paid but for the false statement or representation, failure or omission, the amount so paid shall be recoverable in a court of competent jurisdiction from the person to whom, or on whose account, the amount was paid, or from the estate of that person, as a debt due to the Commonwealth.