

as he in fact did).

Section 83AD provides that a pension is not payable outside Australia to a former resident who has returned to Australia, and claimed a pension and left Australia within 12 months of his return (sub.s.(1)), unless the Director-General is satisfied that the person's reason for

leaving arose from circumstances which could not reasonably be foreseen at the time of his return (sub.s.(2)).

In Scrivano's case, 'his reasons for leaving (returning from) Australia were fixed before he left Italy and remained effective; and nothing further happened while he was in Australia to add a further

'reasons for leaving Australia'. There was no ground on which the s.83AD(2) discretion could be exercised to prevent the operation of s.83AD(1) (if Scrivano had qualified for age pension).

Formal decision

The AAT affirmed the decision under review.

Age pension for non-resident: 'special need'

HANAHOE and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. T81/32)

Decided: 26 January 1983 by R.K. Todd.

Joseph Hanahoe was born in Ireland in 1910 and came, as a Roman Catholic priest, to Australia in 1935. He worked as a parish priest until 1971 when he retired and returned to Ireland.

In March 1975 he applied to the DSS for an age pension, showing an income of \$10 a week and assets of 588. He was granted a pension under s.21A of the *Social Security Act* (see below).

In August 1980 Hanahoe advised the DSS that he now had assets of 13,699 and, in October 1980, the DSS cancelled his pension. Hanahoe applied to the AAT for review of this decision.

The legislation

Section 21A provides that a man is qualified to receive age pension if he -

- is 65 years of age;
- has not resided in Australia since 7 May 1973 [the date when portability of pensions was introduced];
- ceased to reside in Australia after turning 60;
- has resided in Australia for at least 30 years;
- is otherwise qualified for age pension; and
- is in the opinion of the Director-General, 'in special need of financial assistance'.

Section 46 gives the Director-General power to cancel or suspend a pension, 'having regard to the income of the pensioner' (para.(a)) or any failure to report

a change in circumstances (para.(b)) or 'for any other reason' (para.(c)).

'Special need of financial assistance'

The AAT found that, at the time of the hearing, Hanahoe had assets of 18,000 in bank deposits and owned the house in which he lived. He had a weekly private income equivalent to \$77.04 a week. If he had been an Australian resident with that income, the income test would have given him a pension of \$55.73 a week. If he had been an Australian resident with no income, his full age pension would have been \$77.25 a week.

The AAT said that any power to cancel Hanahoe's pension came from s.46(c) - the power to cancel 'for any other reason', which allowed cancellation if he no longer met the criteria laid down by s.21A.

The question was, could Hanahoe be said to be now 'in special need of financial assistance'? The AAT said:

Whatever may be said of the adequacy of the amount of age pension payable under the Act, or of the financial need of persons who receive no income other than age pension, or of the minimum income that may be received without affecting the quantum of such pension, I do not see how it can be said, of an applicant who is in receipt of an amount of income approximating the amount actually paid to age pensioners in Australia who have no other income or at least income limited to \$30 per week, that he is in 'special' need of financial assistance. He is receiving the amount that the Australian system of social security regards as adequate for a person with no, or little other, income. In saying this I have not overlooked the fact that, as previously stated, if the applicant resided in Australia and received the same income as

he presently does, he would receive age pension of nearly \$54 per week. But that seems to me to be nothing to the point when the question posed by s.21A is whether there is a 'special' need for financial assistance. In my opinion it could not be said, as at the point when the applicant's pension was cancelled, nor can it now be said, that he was or is in such 'special' need.

(Reasons for Decision, para.10.)

The AAT also declared that, in assessing 'special need of financial assistance', it should look at capital as well as income, despite the fact that capital was ignored under the income test used for Australian resident pensioners.

Cancellation or suspension?

However, the AAT decided that Hanahoe's pension should have been suspended and not cancelled. A s.21A pension, once cancelled, could not be revived or re-granted: s.83AF(2). 'In this particular case,' the Tribunal said, 'it may be that the applicant's financial situation could deteriorate. He should have the opportunity to put his case again if that occurs, and this will be possible if the pension is merely suspended': Reasons for Decision, para. 12.

Formal decision

The AAT set aside the decision under review and, in substitution, decided that Hanahoe's age pension should be suspended from 23 October 1980.

Age pension: family trust and 'deprivation of income'

ROBERTSON & ROBERTSON and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. Q82/37 and Q82/38)

Decided: 14 January 1983 by J.B.K. Williams, J. Howell and I. Prowse

In February 1980, McIntosh Robertson and his wife Lillian Robertson applied for age pensions. In their application they indicated that they had recently transferred \$107 651 to the 'M. & L. Robertson Family Trust'. The DSS decided that the trust's income should be treated as

income of the applicants and so reduce (indeed, eliminate) the rate of age pension payable to the applicants.

The Robertsons applied to the AAT for review of that decision.

The legislation

Section 47(1) of the *Social Security Act* provides:

47. (1) If, in the opinion of the Director-General, a claimant or a pensioner has directly or indirectly deprives himself of income in order to qualify for, or obtain a pension,

or in order to obtain a pension at a higher rate than that for which he would otherwise have been eligible, the amount of the income of which the Director-General considers the claimant or pensioner has so deprived himself shall be deemed to be the income of the claimant or pensioner.

(Section 47(2) makes a similar provision for the spouse of a claimant or a pensioner.)

The trust fund: its establishment and operation

The Tribunal found that, in 1979, Mr. Robertson had discussed his eligi-