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 futher 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-

bility for age pension with a DSS officer and realised he had no entitlement for an age pension because of the income from his assets.

On 4 February 1980 he executed a deed which established the Robertson Family Trust. The deed appointed Mr and Mrs Robertson as the trustees, with absolute discretion to pay the income from the trust fund to the beneficiaries of the trust. The beneficiaries were identified in the deed as Mr and Mrs Robertson, and any child, grandchild or other descendant of Mr Robertson.

The trust fund consisted of $10 provided by another person and the $107 651 transferred to the fund by the Robertsons.

On 28 February 1980, the Robertsons made their applications for age pensions.

Records kept by the trust fund showed that its income had been 'appropriated to' (but not paid over to) the Robertsons' grandchildren; this income had been retained in the trust fund. Mr Robertson said that he had received payments of about $3000 a year from the trust fund – but this was, he said, a 'part repayment of loans made to the fund' and not income. In answering questions before the Tribunal, Robertson showed some initial confusion:

> I live off the income [of the trust] now. It pays all my debts. I am sorry, I retract that – I live off the capital loaned to the trust. It pays all my debts.

The intention behind the trust fund: a critical question

The Tribunal agreed with the argument put on behalf of the Robertsons that s. 47 of the *Social Security Act* caught only those transactions in which a claimant or pensioner (or spouse) deprived herself or himself of income with the intention of qualifying for pension or obtaining a pension at a higher rate. If the intention had nothing to do with pension eligibility (e.g. to provide for the future welfare of children), s. 47 would not apply: Reasons for Decision, p.7.

In this case, the AAT said, 'the trust was created in circumstances where a prime objective of the applicants was to maximise that rate of pension payable to them'. It followed that the Robertsons' transaction was caught by s. 47 and that the income of the trust should be treated as their income.

Formal decision

The AAT affirmed the decision under review.

Rehabilitation: recovery from compensation settlement

SHERIFF and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. T82/19)

Decided: 14 February 1983 by A.N. Hall

Kevin Sheriff injured his back at work in 1967 and aggravated that injury in 1979. He brought a worker's compensation claim against his employer in July 1980.

In June 1981, Sheriff's claim was settled by agreement. This agreement provided for the dismissal of his claim and the payment of $20 600 to Sheriff, 'in full settlement and satisfaction of all future claims for future compensation benefits or damages . . .' The agreement also noted that the employer wished to finalise all questions connected with its 'potential liability' to pay compensation or damages in the future and did not intend to pay for 'any past incapacity'.

The DSS, which had provided Sheriff with rehabilitation training (the result of which had been to place him in permanent employment), decided that the cost of this rehabilitation should be paid by Sheriff. He applied to the AAT for review of that decision.

Legislation

Section 135R(1A) provides that a person, who has received rehabilitation treatment and training and who receives compensation from another person, is 'liable to repay the Director-General an amount equal to the cost of the treatment or training'. 'Compensation' is defined in s.135R(1) as:

> any payment that is by way of compensation or damages, or is, in the opinion of the Director-General, in the nature of compensation or damages, in respect of the disability by reason of which the treatment or training has been or is being provided . . .

On behalf of Sheriff, it was argued that the compensation paid under the June 1981 agreement did not fall within this definition of 'compensation', largely because that compensation was paid for future incapacity.

However, the AAT agreed with the DSS that s.135R did apply. Having pointed out that the only work-caused disability which Sheriff had alleged against his employer was the back injury caused in 1967 and 1979, the AAT said:

> Notwithstanding the form which the settlement of the applicant's claim for compensation took the sum of $20,600 paid to the applicant was, in my view, plainly a payment "by way of" or "in the nature" of compensation which related to and was thus "in respect of" his allegedly work caused or work aggravated back condition. There was no other credible reason for his former employer paying him such a substantial sum plus the costs of his ostensibly unsuccessful action.
> (Reasons for Decision, para. 17).

The Tribunal also concluded that the disability for which Sheriff sought (and was paid) compensation was exactly the same as the disability for which he was given rehabilitation training. The Tribunal observed:

> 19. For the rehabilitation costs to be recoverable it is not necessary that there be any temporal relationship between the period of time in respect of which the rehabilitation costs were incurred and the period of incapacity in respect of which compensation was subsequently recovered by the worker (cf. the former s.115 of the Act – now repealed). In other words, it is irrelevant for the purposes of s.135R that in the present case the compensation paid was expressed to be in respect of some undisclosed (and, one might have thought, highly improbable) future potential liability. So long as it related to the disability by reason of which the rehabilitation training was provided, the definition of 'compensation' is satisfied.

Formal decision

The AAT affirmed the decision under review.

[**Comment**: The Tribunal noted that the DSS had not attempted to recover, from the compensation settlement, sickness benefit payments of $4575. Section 115, as it then stood, allowed recovery of sickness benefit payments only when a compensation settlement covered the same period as the sickness benefit payments. The settlement agreement was obviously drafted to exploit that restriction.

The new s.115B may overcome that restriction: that is, the DSS may, since 1 August 1982, be able to look behind the terms of agreements (such as that involved in Sheriff's case) and treat all of the compensation settlement as available for DSS recovery of sickness benefits. This question is explored in a comment in the October 1982 *Reporter*: 9 *SSR* 91-2.]