SOCIAL SECURITY

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Administrative Appeals Tribunal decisions

Age pension: residence

FREMDER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V82/343)

Decided: 16 August 1983
by I.R. Thompson

Chaim and Ruchla Fremder resided in Australia from 1929 to 1971. They became Australian citizens in the 1930's. In 1968 Chaim Fremder retired from his business and in 1971 they went to stay in Israel with their youngest son. They returned to Australia in October 1975 and applied for an age pension. This was granted. They left for Israel again in 1976. They returned to Australia in June 1980.

The DSS cancelled their age pensions in January 1980 on the basis that as they were persons who at the time of their application for a pension "formerly resided in Australia" and had left Australia again within 12 months of returning they were not qualified to receive age pensions during their period of absence from Australia. Thus the Department claimed an overpayment of $7,847.60 from each of them and decided to recover that amount from their respective pensions under s.140(2) of the Act. The applicants applied to the AAT for review of that decision.

The legislation

Section 83AD reads:

(1) . . . where –

(a) a person who formerly resided in Australia has returned to Australia or a person who formely resided in an area that was, at the time of the residence, an external Territory but has never resided in Australia has arrived in Australia;

(b) before the expiration of the period of 12 months that commenced on the date of his return to, or his arrival in, Australia, that person has lodged a claim for a pension; and

(c) that person leaves Australia (whether before or after his claim is determined) before the expiration of that period, any pension granted as a result of that claim is not payable in respect of any period during which the pensioner is outside Australia.

Part III of the Act deals with qualifications for age and invalid pensions.

Section 20, contained in that part reads:

. . .

(2) For the purposes of this part, a claimant shall be deemed to have been resident in Australia –

. . .

(b) during a period of absence from Australia during which the claimant was a resident of Australia within the meaning of an Act relating to the imposition, assessment and collection of a tax upon income in force during that period.

Were the applicants resident though absent from Australia?

For section 83AD to apply the Fremders must have been 'formerly residing' in Australia. They contended that their residence was not broken by their absence between 1971 and 1975. If this was the case they could not be regarded upon their return as persons who 'formely resided' in Australia. (see *Varga* (1982) 9 *SSR* 89).

Though the applicants maintained no home in Australia during their absence the AAT appeared to lay some emphasis on their reason for going to Israel. That was because their youngest son had moved there and he married prior to their return in 1975. The applicants continued to submit income tax returns to the Australian Taxation Department during their stay in Israel. They had two other chil-

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dren remaining in Australia and the AAT was satisfied that the applicants intended to return to Australia. Thus they had not lost their acquired domicile in Australia by October 1975.

Having regard to section 20(2)(b) of the *Social Security Act* the Tribunal then turned to the *Income Tax Assessment Act* 1936 for a definition of resident. Section 6 of that Act reads:

> 'resident' or 'resident of Australia' means –
> (a) a person, other than a company, who resides in Australia and includes a person –
> (i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia . . .

In the absence of any evidence of the satisfaction of the Commissioner of Taxation that the applicants had their permanent place of abode outside Australia at any time between 1971 and 1975, the AAT concluded that as their domicle was in Australia during that period they were to be regarded as residents for that period.

Reference to Commissioner of Taxation: Fairness

The DSS requested that a certificate be sought from the Commissioner of Taxation so as to ascertain whether or not he is satisfied that the Fremders' permanent place of abode was outside Australia during the relevant period.

The AAT thought it would be unfair to do so in this case.

> . . . Chaim Frender is now 85 years old . . . The applicant is having the whole of his age pension withheld in order to recover the overpayment; so any further delay is a period during which he will continue to receive no income from the age pension . . . [I]t would be unfair to ask the Commissioner to give a certificate at this stage after the effluxion of so much time and with the knowledge that the certificate is being given not for purposes related to liability for income tax but for the purpose of these proceedings . . .

(Reasons, para. 15).

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with a direction that the applicants were resident in Australia during their absence from 1971 to October 1975, that s.83AD is not applicable to them and that therefore no overpayment of pension was made to either of them before the cancellation of their pensions in January 1980.

POLDY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/60)

Decided: 30 May 1983 by G.D. Clarkson.

Mr Poldy came to Australia from Germany in 1939. In 1946 he became naturalised. Unable to practice as a dentist in Australia he left in April 1947 and did not return until May 1981. Upon his return he applied for, and was refused, an age pension on the grounds that he had not satisfied the residence requirement in s.21 of the *Social Security Act*. He applied to the AAT for review of that decision.

The legislation

The relevant parts of s.20 and s.21 of the *Social Security Act* read:

> 20 (1) For the purpose of this Part, a claimant shall be deemed to have been resident in Australia during a period of absence from Australia–
> (a) if the Director-General is satisfied that, during that period, the claimant's home remained in Australia; and
> (b) if the Director-General is satisfied–
> (i) in the case of a married man–
> that, during his absence from Australia, he maintained his wife and such of his children as were under the age of sixteen years . . .
> (2) For the purposes of this Part, a claimant shall be deemed to have been resident in Australia–
> . . .
> (b) during a period of absence from Australia during which the claimant was a resident of Australia within the meaning of an Act relating to the imposition, assessment and collection of a tax upon incomes in force during that period,
> . . .
> 21 (1) Subject to this Part, a person who is not receiving an invalid pension and–
> (a) being a man, has attained the age of sixty-five years, or, being a woman, has attained the age of sixty years; and
> (b) is residing in, and is physically present in, Australia on the date on which he lodged his claim for a pension and has at any time been continuously resident in Australia for a period of not less than ten years, shall be qualified to receive an age pension.
> (2) where
> (a) a claimant has had more than one period of residence in Australia;
> (b) the longest of those periods is less than ten years but is not less than five years; and
> (c) the aggregate of those periods exceeds ten years, the period specified in paragraph (b) of the last preceeding sub-section shall, in relation to that claimant, be deemed to be reduced by the excess.

Residence

Poldy argued that as his home was in Australia during his period of absence he should be deemed to have been resident at that time pursuant to s.20(1)(a). The AAT rejected that argument.

> Nothwithstanding his keen desire to return to Australia, his active preservation of Australian contacts by correspondence and through people who visited him, and his taking Australian citizenship, the fact is that the applicant raised a family elsewhere. For some thirty-four years, the centre of his family was elsewhere. I have no doubt that he desired otherwise, but in fact his home was not in Australia.
> (Reasons, Page 7)

The AAT also rejected an argument that the applicant came within s.20(2)(b) which deems a person to be resident who is a resident for the purpose of income tax Acts. Poldy in fact paid withholding tax on interest earned in Australia by a non-resident and was not called upon to pay tax on his professional income as a resident.

The conclusion was therefore that Poldy's qualification for pension had to be determined under s.21.

Formal decision

The AAT affirmed the decision under review.

Income test

HOY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/256)

Decided: 16 August 1983 by I.R. Thompson

Dorothy Hoy separated from her husband on 13 January 1980. On 15 February 1980 she applied for special benefit. This was approved and benefit was paid from 25 February 1980. On 31 March 1980 Hoy informed the DSS that she had been awarded maintenance by the Magistrates' Court totalling $90 for herself and her two children.

The DSS in calculating the rate of her special benefit took into account the payments made to her as maintenance, pursuant to the court order. The applicant contended that these payments should not be regarded as "income" as they were being applied to mortgage repayments.

An SSAT upheld her appeal against this decision but a delegate of the Director-General affirmed the original decision. Hoy applied to the AAT.

The legislation

Section 125 of the *Social Security Act* reads:

> The rate of a special benefit payable to any person shall be such rate as the Director-General, in his discretion, from time to time determines, but not exceeding the rate of the unemployment benefit or the sickness benefit which could be paid to that person if he were qualified to receive it.

Thus a recipient of special benefit is subject to the income test in s.114 of the Act. 'Income' is determined in s.106 of the Act to mean:

> . . . any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever, within or outside Australia, and includes any periodical payment or benefit by way of gift or allowance, . . .

Were the maintenance payments 'income'?

To be income the payments thus had to be 'for her own use or benefit'.

The AAT concluded that the applicant was obligated to apply the money towards the repayment of the mortgage. This arose on equitable principles which, given the intention of the parties to use the money in that manner, prevented