genic hyperventilation, the exact cause of which was unclear.

Permanency

The Tribunal decided that, insofar as his incapacity arose from his respiratory problems, it was very likely it would persist indefinitely. Insofar as his incapacity was the result of depression, for treatment to be effective the applicant would need to return to employment. Given Juraga's age and the depressed labour market, that was virtually impossible. Therefore, the Tribunal found that Juraga's incapacity was permanent for the purpose of s.24 of the Act.

The Tribunal went on to consider the possibility of rehabilitation:

> A scheme may be introduced one day for people like the applicant, under which they are placed in jobs made available specially to enable them to re-establish their self-esteem and to recreate in them a feeling that they have some economic worth in the community and to themselves. If such a scheme is introduced, it may then be possible for the applicant to be cured of his depression. So I would certainly not rule out the possibility that at some time in the future it may be reasonable for the Director-General to require the applicant to undertake treatment or training; but, as I have observed, on the evidence that is before the Tribunal today, I think that without some such developments it would not be reasonable for him to require the applicant to do so.

(Reasons, para. 24)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Juraga was qualified to receive an invalid pension since July 1981.

Pensions outside Australia

BUTTIGIEG and DIRECTOR-GENERAL OF SOCIAL SECURITY

Decided: 5 October 1983 by R. Balmford.

Anthony Buttigieg was born in Malta in 1899. He lived in Australia from April 1922 to December 1954, when he returned to Malta to stay.

On 20 February 1980 he lodged an application for either an invalid or age pension. After rejection of this claim, Buttigieg sought review from the AAT.

Age pension outside Australia

Section 21A of the *Social Security Act* provides for payment of an age pension to a person outside Australia. To qualify, a person must have resided in Australia for at least 30 years, have left Australia before 7 May 1973, and have reached 65 years of age (if a man) within five years of leaving Australia.

That last requirement defeated Buttigieg who had left Australia in 1954 and turned 65 in 1964.

Invalid pension outside Australia

Section 24A of the Act sets out the qualifications for invalid pensions for persons outside Australia:

> 24A. Subject to this Act, a person above the age of 16 years who is not receiving an age pension and—
>
> (a) is permanently incapacitated for work or is permanently blind;
> (b) has not resided in Australia at any time since 7 May 1973;
> (c) became permanently incapacitated for work or permanently blind while in Australia or during a temporary absence from Australia; and
> (d) [repealed]
> (e) is a person who, in the opinion of the Director-General, is in special need of financial assistance,
>
> is qualified to receive an invalid pension.

The AAT said that Buttigieg met most of the requirements of s.24A. He was permanently incapacitated for work, he had left Australia before 7 May 1973, and his incapacity should be treated as having developed in Australia. This last requirement (spelt out in s.24A(c)) was satisfied because his incapacity was well established when Buttigieg left Australia. So, it had either developed in Australia or before his arrival in Australia. If it had developed before his arrival, s.25(2) had the effect of 'deeming' it to have occurred in Australia, because Buttigieg had been continuously resident in Australia for at least ten years: see *Nathanielsz* in this issue of the *Reporter*.

However, the critical question was whether Buttigieg met the requirements of s.24A(e) of the *Social Security Act*: was he 'in special need of financial assistance'?

Evidence of the cost of living in Malta was provided to the Tribunal as was some evidence of Buttigieg's needs. (His income was from a Maltese age pension and, apart from the evidence that he lived in a house jointly owned with his two sisters, there was no evidence as to his living conditions).

Concluding that 'special need' required some need which was 'exceptional in character, quality or degree', the AAT found that Buttigieg was not 'in special need of financial assistance':

> He is receiving a pension from the government of the country where he lives, which appears to be comparable with other pensions paid in that country. It must be assumed that that pension is calculated at a rate which would give the recipient an adequate income to provide a standard of living at least beyond what could be described as being 'in special need', in terms of the definition of 'special' above cited.

Thus the applicant failed to satisfy the requirements of s.24A(e) and was not qualified to receive an invalid pension.

Formal decision

The Tribunal affirmed the decision under review.

Pensions: 'continuous residence in Australia'

NATHANIELSZ and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/60)

Decided: 30 September 1983 by R. Balmford.

Sheila Nathanielsz was born in Sri Lanka in 1923. She and her husband arrived in Australia in December 1975. In November 1976 she was granted permanent resident status and returned to Sri Lanka with her husband in December 1976 to 'tidy up their affairs'. She returned to Australia in March 1979.

In December 1980 she claimed an invalid pension but the DSS rejected the claim because her incapacity had not developed in Australia (as required by s.25(1)(b) of the *Social Security Act*) but pre-dated her arrival in 1975.

The DSS told Nathanielsz that she would qualify for invalid or age pension after she had completed 10 years continuous residence in Australia. Ignoring the period 1976–79 (when she was in Sri Lanka), the DSS calculated that Nathanielsz would complete that 10 years in August 1988.

Nathanielsz asked the AAT to review the DSS decision that she had not been resident in Australia during her absence from Australia between 1976 and 1979. In practical terms, she argued that she would be qualified for invalid or age pension in December 1985 rather than August 1988. (She did not challenge the DSS decision that her incapacity predated her arrival in Australia.)

'Continuously resident' in Australia

Section 25(2) of the *Social Security Act* provides that a person, whose incapacity developed outside Australia, will qualify for invalid pension after 10 years continuous residence in Australia.

Section 21 of the Act provides that a woman who has reached 60 years of age and has been continuously resident in Australia for 10 years is qualified for age pension (so long as she is present and resident in Australia when she lodges her claim).

Section 20 sets out the meaning of 'resident' and reads (so far as is relevant):

> (1) For the purposes 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; . . .
> (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.

The evidence before the Tribunal was that Mrs Nathanielsz and her husband had come to visit their children in Australia. When Mr Nathanielsz was offered a position in an Australian church, they applied for and were granted permanent residence. They then returned to Sri Lanka to tidy up their affairs, as they had not left there with the intention of settling in Australia. Their departure from Sri Lanka was then delayed by currency controls in that country.

The AAT observed that Nathanielsz had decided to make Australia her home before returning to Sri Lanka; and this return 'can be understood completely in the context of that decision'. There was 'an essential similarity' with *Danilatos* (1981) 3 *SSR* 29, where the AAT had decided that the applicant's home remained in Australia during her absence in Greece: Reasons, para. 41.

However, the AAT said, it was not necessary to decide whether Nathanielsz's home had remained in Australia, as s.20(1) put it, because she could be 'deemed' resident in Australia under s.20(2).

Section 20(2) imported s.6 of the *Income Tax Assessment Act* into the *Social Security Act*. Section 6 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 [of Taxation] is satisfied that his permanent place of abode is outside Australia.

The applicant, said the AAT, had acquired a domicile of choice in Australia by residing in Australia with the intention of continuing to reside there indefinitely:

> They had established a domicile of choice in Australia, and although they returned to Sri Lanka, their domicile of origin, they never ceased to have the intention of returning to Australia as their permanent home, and thus their domicile of origin did not revive to displace their domicile of choice.

(Reasons, para. 47)

There was no evidence that the Commissioner of Taxation had even considered the question of the applicant's 'place of abode [being] outside Australia'. Therefore, the applicant satisfied the test of residency in the *Income Tax Assessment Act* and so was 'resident in Australia' during her absence from 1976 to 1979.

Jurisdiction

Counsel for the DSS argued that there was no jurisdiction to hear the case: as there was no present entitlement to a pension, the applicant was only seeking an advisory opinion.

The jurisdiction of the AAT is defined, in s.25(1) of the *AAT Act* and s.15A(1) of the *Social Security Act*, as a power to review a 'decision'; and s.27(1) allows a 'person . . . whose interests are affected by the decision' to seek review.

The Tribunal discussed the basis of its jurisdiction at length and in particular the meaning of 'decision'. It concluded:

> The fact that the decision will not actually operate until December 1985 is not, in my view, significant. Mrs Nathanielsz must arrange her affairs, and conduct herself generally, on the basis of her actual and potential income as it is known to her . . . Thus her interests are affected, now, by the decision which she seeks to have reviewed and her application is accordingly an application made by 'a person whose interests are affected by a decision' in terms of sub-section 27(1) of the *Administrative Appeals Tribunal Act*.

(Reasons, para. 22)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that the applicant was, from 10 December 1976 to 6 March 1979 'resident in Australia' for the purposes of Part III of the *Social Security Act*.

Federal Court Decision

Widow's pension: 'residing in Australia'

KOON LIN HO v DIRECTOR-GENERAL OF SOCIAL SECURITY
Federal Court of Australia
Decided: 28 November 1983 by Fox J.

This was an appeal from the decision of the AAT in *Koon Lin Ho* (1983) 11 *SSR* 105, where the Tribunal had decided that the applicant was not qualified to receive a widow's pension on the basis that she was no 'residing permanently in Australia' as required by s.60(1) of the *Social Security Act*.

The facts

The applicant's husband had migrated to Australia in 1970, leaving his wife and daughters in China. Early in 1980, the applicant and her daughters were granted permanent resident status by the Australian government and they left China on 2 March 1980, to travel to Australia via Hong Kong. Her husband was killed in a car accident (in Australia) on 23 March 1980 and the applicant and her daughters arrived in Australia on 4 April 1980. She applied for a widow's pension in June 1980.

The legislation

Section 60(1) of the Act provides that a widow with the custody of a child is qualified to receive widow's pension if she is residing in, and is physically present in, Australia, when she lodges her claim and if:

> (d) In the opinion of the Director-General, she and her husband . . . were, on the occurrence of the event by reason of which she became a widow, residing permanently in Australia . . .

'Residing permanently': akin to home

Unlike the AAT, the Federal Court found a 'great variety of concepts concerning residence in the relevant sections' (ss.60-61). There appeared to be no coherent scheme contained in them. Thus the deeming provisions of s.61 did not apply directly to the concept of 'residing permanently' in s.60. (Section 61 extends the scope of the residence requirements by treating a person as resident, though absent from Australia, where the claimant's home remained in Australia or where a person was a resident for the purposes of the *Income Tax Assessment Act*.)

The Court concluded that 'residing permanently' in s.60 'means something akin to home; the place with which she had her family or domestic ties': Judgment, p.6.

Intention is relevant to 'residence', said the Court. However, Mrs Ho's intention to reside in Australia – clear as it was – would not be sufficient (by itself) to enable her to be treated as 'residing permanently' in Australia at the time of her husband's death. The Court added however:

> The significant additional factor to my mind is that her husband clearly had established a home in Australia, and that it was at the relevant time, also her home. His presence in Australia, and the existence of the family home here is sufficient to support a conclusion in her favour. She had abandoned her place of residence in China, and plainly acknowledged that her home was with her husband in Australia. This is not to say that a wife's residence is necessarily that of her husband. They plainly can reside in different places, by mutual arrangement, or otherwise. Whatever the nature of the arrangement which led to her remaining in China when her husband left, this had come to an end. Her intent to return to live with him was clear, it was mutually agreed that she should do so, and she had taken an unequivocal course to that end.

(Judgment, pp.7-8)

Mrs Ho was therefore residing permanently in Australia at the time of her husband's death.

Formal decision

The Federal Court allowed the appellant's appeal with costs and set aside the decision of the AAT, substituting a decision that the appellant is entitled to a widow's pension.