business; and, given his reduced capacity for work, such a small business would probably be beyond him.

On the other hand, if his reduced capacity for work made it necessary for him to delegate many of the tasks involved in a business, it would have to be established that the running of a business with several employees was within his managerial capacity.

In the present case, the Federal Court pointed out, the AAT had not addressed these questions and, accordingly, its decision had involved an error of law and should be set aside.

Formal order

The Federal Court allowed the appeal, set aside the decision of the AAT and remitted the matter to the AAT to be heard and decided again.

KOUTSAKIS v DIRECTOR-GENERAL OF SOCIAL SECURITY (Full Court of Federal Court of Australia)

Decided: 1 November 1985 by Northrop, Morling and Wilcox JJ.

This was an appeal against a decision of a single judge of the Federal Court (*Koutsakis* (1985) 26 *SSR* 322), which had upheld a decision of the AAT, which in turn had affirmed a DSS decision to cancel Koutsakis' invalid pension.

The AAT had concluded that, although Koutsakis was incapacitated for work because of an anxiety state and depression, this incapacity was not permanent because there was treatment available for Koutsakis' condition. Koutsakis had refused to undergo that psychiatric treatment because he insisted that his incapacity had a physical basis. The AAT had said that the treatment available to Koutsakis offered prospects of rehabilitation and his objections to undertaking the treatment were groundless and unreasonable.

In a unanimous judgment, the Federal Court said that 'the mere failure of a person to undertake medical or other treatment which is recommended to him does not disentitle him from receiving a pension or an award of compensation': Judgment, p.6. This much, the Court said, had been established in *Fazlic* v *Milingibi Community Inc.* (1982) 38 ALR 424 and *Dragojlovic* (1984) 18 *SSR* 187.

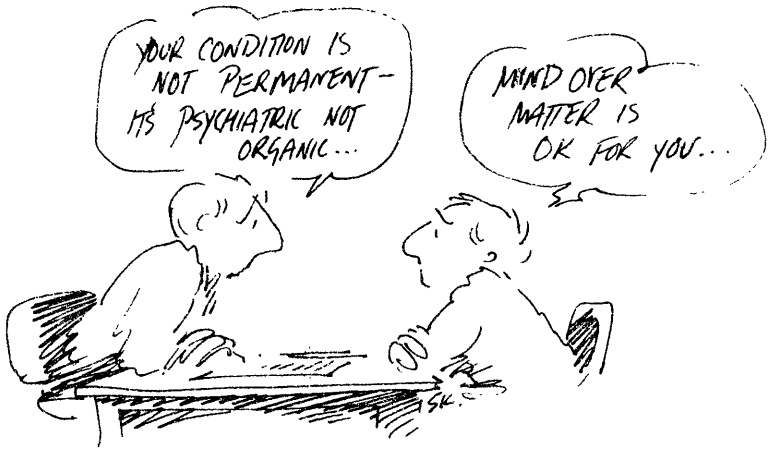
The Court said that, where a person entertained real fears or other objections to a course of medical treatment, the person's refusal to undergo medical treatment should be regarded as genuine even though the person's objections might (objectively) be regarded as irrational or groundless:

> '[G]iven a finding that the appellant does have fears, it is difficult to see how there could be a concurrent finding that they are not genuine. They may well be irrational and groundless, but that is not to say they are not genuine.'

(Judgment, pp.8-9)

Formal order

The Court allowed the appeal and ordered that the AAT's decision be set aside and the matter remitted to the AAT for determination.



Legislation

WAR RESTITUTION PAYMENTS

The *Social Security (Reparation for Persecution) Bill* 1985 will, when passed by Parliament, specifically exempt, from the definition of 'income' in the *Social Security Act*, West German compensation and restitution payments paid to victims of Nazi persecution. This amendment will settle the doubts left by the AAT decisions in *Artwinska* (1985) 24 *SSR* 287, *Kolodziej* (1985) 26 *SSR* 315 (which decided that the restitution payments were not 'income') and *Teller* (1985) 25 *SSR* 298 (which came to the opposite conclusion).

NEW PORTABILITY RULES

The Commonwealth Government has foreshadowed a new system for the payment of pensions overseas. This structure is to be based on amendments to the *Social Security Act* contained in the *Social Security (Proportional Portability of Pensions) Bill* 1985, introduced in the House of Representatives on 20 November 1985.

Social Security Minister Howe described the objective of the new system as the provision of 'improved social security assistance to people who move between countries'. But the terms of the Bill suggest that the real concern of the Government is to reduce entitlement to payment of pensions overseas.

Subject to provisions which protect the position of persons resident in Australia on 8 May 1985 (s.83AC(5)), full rate pensions and supporting parents' benefits will only be payable outside Australia to those persons who have accumulated 25 years residence in Australia (between the ages of 16 and 65 years): s.83AC(1) and (3). Persons who leave Australia (for more than 12 months) with a shorter period of accumulated residence will only qualify, while outside Australia, for a proportional pension or supporting parent's benefit.

An indication that the Government's real concern is to reduce expenditure, rather than to address the problems of Australia's immigrant community, lies in the retention of s.83AD of the *Social Security Act*. In his second reading speech, The Social Security Minister accurately identified, as one of the problems with the existing system, the difficulties faced by former immigrants to Australia who return to their countries of origin before qualifying for an Australian pension. These difficulties are caused by such provisions as s.21(1) (which requires presence and residence in Australia at the time of claiming an age pension) and s.83AD (which requires a former Australian resident who returns to Australia and claims a pension to spend at least 12 months here before her or his pension can be paid overseas: see *Dracup* in this issue of the *Reporter*). But the 1985 Bill contains no clauses which would displace these requirements.