Administrative Appeals Tribunal decisions

Residence in Australia: absence overseas

VALLANI and SECRETARY TO DSS (No.W85/105)
Decided: 24 January 1986 by G.D. Clarkson.

Thelma Vallani appealed against a DSS decision to refuse to grant her an age pension because of her failure to fulfill the residence requirement.

Vallani was born in Australia in 1915. She left Australia for South Africa in November 1948. She returned to Australia in February 1972, and stayed until May 1972 when she went back to South Africa and applied for an age pension on 26 February 1983.

The legislation

Vallani could only qualify for age pension under s.21A of the *Social Security Act*. Under this section, a woman over 60 years of age would qualify for age pension if she had not resided in Australia since 7 May 1973; she had ceased to reside in Australia 'on a date not earlier than 5 years before attaining [60]'; she had resided in Australia for a total of at least 30 years; and was 'in the opinion of the Secretary ... in special need of financial assistance'.

An Australian residence?

The critical question was whether Vallani could meet the requirements of s.21A(c), that is, had she ceased to reside in Australia not earlier than 5 years before reaching the age of 60? If she was residing in Australia prior to her departure for South Africa in May 1972, she would meet this requirement.

On the inward passenger card for her trip to Australia in 1972, Vallani had stated that she was coming to Australia for a 2-month holiday. On her outward passenger card, she had said that she was departing permanently from Australia and that her last permanent residence was South Africa.

Vallani told the AAT that she had returned to Australia in 1972 with the idea of settling permanently. She had brought all her personal possessions with her and had closed all her South African bank accounts. She explained the entries on her passenger cards by stating that, if she had said she was leaving South Africa permanently, she would have found it impossible to re-enter that country because of her age and financial status.

Consequently, she had said she was going for a holiday and had bought a return ticket to 'keep the door open', although she had hoped to stay in Australia. She had then returned to South Africa because she had been unable to find work in Australia.

Her sister originally told a DSS field officer that Vallani had come to Australia for a holiday, but later said that she was mistaken. Vallani said that, when she had stayed with her sister in 1972, her sister had assumed she had come for a holiday and Vallani had found it impossible to disabuse her. Three of Vallani's friends confirmed her evidence, stating that Vallani's relationship with her family was not good, and that she had told them of her intention to look for work and remain in Australia.

The AAT accepted Vallani's evidence, and concluded that she was a person who had ceased to reside in Australia not earlier than 5 years before attaining the age of 60 years.

In need of financial assistance?

In order to be eligible for the age pension, Vallani also had to fall within s. 21A(f). The Tribunal did not have the information to decide whether she is in special need of financial assistance. The mater was therefore remitted to the Secretary to investigate.

Formal decision

The Tribunal set aside the decision under review and ordered that the application be dealt with on the basis that Vallani had ceased to reside in Australia not earlier than 5 years before attaining the age of 60 years.

STRID and SECRETARY TO DSS (No.V85/275)
Decided: 14 February 1986 by H.E. Hallowes.

Frode Strid asked the AAT to review a DSS decision refuse him an age pension, on the ground that the had not fulfilled the residence requirement.

Strid had migrated to Australia in August 1967 with his wife and son. The family decided to return to Sweden in March 1971, and he had indicated on his embarkation card that the was departing permanently from Australia. They sold the household furniture, emptied the bank account and returned to Sweden.

Strid obtained employment in Sweden in 1973. In October 1975 he applied for a visa to return to Australia. In March 1977 he returned to Australia, describing himself on immigration records as a migrant whose country of residence was Sweden (rather than a resident returning to Australia). (Strid later told the AAT he had been advised to do this by the Australian Embassy.)

The legislation

Section 21(1) of the *Social Security Act* provided that a man who is aged 65 years, and is residing and physically present in Australia, is qualified for an age pension if he 'has at any time been continuously resident in Australia for a period of not less than 10 years'.

Section 21(2) relaxes the continuous residence requirement through a complex formula which gave credit for the total of separate periods of residence. in Strid's case, this formula would allow him to qualify if he could show a continuous residence of 9 years and 1 month.

At the time of the decision under review, s.20(1)(a) deemed a person resident in Australia if his home remained in Australia. And, under s.20(2)(b), he would be deemed resident in Australia if he remained a 'resident of Australia' within the *Income Tax Assessment Act*. That Act defined a 'resident of Australia' as a person domiciled in Australia, unless the Commissioner of Taxation was satisfied that the person had a permanent place of abode outside Australia.

Residence and absence

On the date of his claim for age pension, 18 July 1984, Strid had satisfied all the requirements of s.21, except that of continuous residence in Australia. Strid argued that he came within the deeming provisions in the then s.20. Either he had remained a resident of Australia during his time in Sweden, or he should be deemed to be a resident of Australia from October 1975, when he had applied to migrate for the second time.

The AAT had to consider the meaning of the word 'home' (s.20(1)(a)) and 'domicile', the relevant provision in the *Income Tax Assessment Act* (s.20(2)(b)).

The AAT took the definition of 'home' from *Kyvelos* (1981) 3 *SSR* 30: home means'the place in which one's domestic affections are centred' or the 'centre of of gravity of one's life'. It concluded that the centre of Strid's life and affections between 1971 and 1977 had been Sweden.

The Tribunal then considered whether Strid had been 'domiciled' in Australia for that period. To do this it had to decide whether Strid had abandoned his domicile of origin (Sweden) by coming to Australia with the intention of remaining permanently in 1971. The Tribunal adopted the meaning of 'permanent' from *Hyland v Hyland* (1971) 18 FLR 461:

> 'The person's intention is one which, when formed, is to remain as a resident of the country of choice for a period then regarded by him as unlimited in point of time and without having addressed the question of giving up such residence and leaving the country of his choice upon the happening of some particular and definite event in the foreseeable future notwithstanding that he may entertain ... a floating intention to return at some future period to his native country.'

The Tribunal concluded that in 1967 Strid had intended to remain permanently in Australia: he had purchased a home, furniture and a car, taken out life insurance, and had stable employment. It then applied the same test to decide that, when he returned to Sweden in 1971, he intended to remain there permanently.

The evidence was conflicting, but the AAT noted that 'there was no particular or definite event in the foreseeable fu-

ture by which the applicant had set a date for his return' to Australia. All his family, possessions and livelihood were in Sweden between 1971 and 1977, and he had told the Tribunal that there was a possibility that the family would remain permanently in Sweden. Hence his domicile reverted to his domicile of origin and he did not re-acquire domicile in Australia when he applied to migrate again in October 1975 because he was not 'lawfully in Australia' at the time.

Formal decision

The Tribunal affirmed the decision under review.

WARREN-MERCER and SECRETARY TO DSS (No.N85/295)

Decided: 30 January 1986 by R. Balmford.

Mrs Warren-Mercer had been born in 1913 and migrated to Australia from the United Kingdom with her husband in 1969. She became an Australian citizen in 1974 but, in 1976, she and her husband left Australia for the United Kingdom. They sold their house in Australia and her husband resigned from his employment.

On their return to the United Kingdom, they purchased a flat and her husband regularly consulted with medical advisors for his heart condition. (Warren-Mercer later told the AAT that they had returned to the United Kingdom so that her husband could seek medical treatment which was not available in Australia.)

In September 1981, Warren-Mercer and her husband decided to return to Australia and sold their flat; but her husband suffered a fatal heart attack the day after the sale. Warren-Mercer withdrew the sale of the flat for a year and eventually returned to Australia in October 1982.

On her arrival in Australia, Warren-Mercer bought a house and applied for a pension. The DSS granted her a widow's pension but, when Warren-Mercer left Australia in March 1984 the DSS refused to pay that pension overseas and decided to 'cancel' her widow's pension.

Warren-Mercer asked the AAT to review that decision.

The legislation

The central question before the AAT was whether Warren-Mercer had qualified for either age or widow's pension by virtue of her Australian residence. If so, any pension granted to her would have been payable overseas under s.83AB of the *Social Security Act*.

However, if she had qualified for age or widow's pension under the Social Services (Reciprocity with United Kingdom) Regulations - that is, by virtue of her residence in the United Kingdom - then any pension granted to her was 'not payable in respect of any period during which the pensioner [was] outside Australia': s.83AE of the Act.

There were a number of residence requirements which Warren-Mercer needed to meet in order to qualify for age pension by virtue of Australian residence:

1. To qualify for age or widow's pension she had to be 'residing in Australia' at the time when she claimed the pension.
2. To qualify for widow's pension she had to meet one of the second requirements as to prior residence - to show either that she and her husband were resident in Australia at the time of his death; or that she had been continuously resident in Australia for 10 years at any time or for 5 years immediately before claiming the pension.
3. To qualify for age pension, Warren-Mercer had to meet the second requirement as to prior residence - to show that she had been continuously resident in Australia for not less than 10 years at any time.

In meeting the requirements as to prior residence, Warren-Mercer might be able to take advantage of the deeming provisions: she could be deemed to be resident in Australia during any period when her home remained in Australia or while she was a 'resident of Australia' within the *Income Tax Assessment Act*.

Under the Tax Act, a 'resident of Australia' was a person who was domiciled in Australia, unless the Commissioner of Taxation was satisfied that the person's 'permanent place of abode' was outside Australia.

No power to cancel

The AAT first observed that the DSS had described the decision under review as a cancellation of Warren-Mercer's pension. This decision had been made under s.135TJ(1) of the Act which allowed the Secretary to cancel or suspend a pension 'having regard to any matter that affects the payment of the pension'.

The AAT pointed out that, if Warren-Mercer's pension had been granted under the Reciprocity Regulations, s.83AE of the Act simply declared that the pension was 'not payable' while Warren-Mercer was outside Australia. This provision, the AAT said, did not enable or require cancellation of the pension and the decision under review was a decision to suspend payment of rather than to cancel Warren-Mercer's pension. The AAT emphasized that this was an important distinction because her suspended pension would revive if she were to return to Australia.

Age or widow's pension?

The AAT said that, as a widow who was over 50 years of age, Warren-Mercer was potentially eligible for widow's pension - s.60(1); and as a woman over 60 years of age, she was potentially eligible for age pension - s.21(1).

Although the DSS claimed that it was normal practice to grant the 'most appropriate' pension, the AAT noted that the rates of age pension and widow's pension were the same and the question of which pension Warren-Mercer should receive only became relevant if she was entitled to either pension.

The residence requirements

The AAT said that Warren-Mercer met the first requirement as to residence for both age and widow's pensions - that is, she was 'residing in Australia' at the time of her claim for pension.

The Tribunal adopted the approach put forward in *Galati* (1984) 21 *SSR* 235 and said that, at the time of her claim for pension in 1982, Warren-Mercer had adopted an abode in Australia 'voluntarily and for settled purposes as part of the regular order of [her] life for the time being'.

However, the AAT said, Warren-Mercer had not been 'residing permanently in Australia' at the time of her husband's death. Nor had she been 'continuously resident in Australia for a period of not less than 10 years' because, during her absence from Australia between 1976 and 1982, she had not intended to treat Australia as her home - the approach adopted by the Federal Court in *Hafza* (1985) 26 *SSR* 321. For the same reason, the AAT said, Warren-Mercer could not be treated as having deemed 'continuously resident in Australia for not less than 5 years' immediately before her claims for pension.

Deemed residence

The AAT then turned to the question whether Warren-Mercer could have meet the requirements as to prior residence by virtue of the deeming provisions in ss.20(1) and 61(1) of the *Social Security Act*.

First, the AAT said, she had not established that her 'home [had] remained in Australia' during her time in the United Kingdom because there was no evidence to suggest that her domestic affections had been centred anywhere other than in the United Kingdom during that period - the approach adopted in *Kyvelos* (1981) 3 *SSR* 30.

It followed that, if Warren-Mercer was to qualify for age or widow's pension, otherwise under the Social Services (Reciprocity with United Kingdom) Regulations, she would have to establish that, during at least part of the period between 1976 and 1982, she had been a 'resident of Australia' within the *Income Tax Assessment Act*. This would require her to show that, during that period, she had been domiciled in Australia, unless the Commissioner of Taxation was satisfied that, during that period, her permanent place of abode was outside Australia.

The AAT pointed out that, during almost all of this period, Warren-Mercer's domicile depended (under common law rules) upon the domicile of her husband. There was insufficient evidence before the Tribunal to establish the domicile of her husband, the AAT said. Accordingly, the AAT directed that inquiries should be made of the Commissioner of Taxation to determine whether the Commissioner was satisfied that, during the relevant period, Warren-mercer's 'permanent place of abode' was outside Australia. If the Commissioner was not so satisfied, a further hearing of the matter should be arranged so as to receive evidence on the question of the domicile of Warren-Mercer's husband after he left Australia in 1976.

Formal direction

The AAT found that, apart from the provisions of the Reciprocity Regulations, Warren-Mercer's entitlement to an age or widow's pension depended upon her domicile for all or part of the period of her absence from Australia and upon the satisfaction of the Commissioner of Taxation as to her 'permanent place of abode'.

The Tribunal directed that inquiries be made of the Commissioner of Taxation; and, if the Commissioner were not satisfied that her 'permanent place of abode' was outside Australia during this period, a further hearing should be arranged to consider the question of the domicile of Warren-Mercer during her absence from Australia.

Special benefit: secondary students

MT, KM, NT and JT and SECRETARY TO DSS
(Nos N85/545, 550, 551, 559)
Decided: 30 January 1986 by R.K. Todd, G.R. Taylor and G.P. Nicholls.

These were 4 applications for review of decisions by the DSS to reject applications for special benefit lodged by the applicants, each of whom was a secondary student.

The facts

In 1985, **MT** was enrolled in year 11 of secondary school. She left home in February that year because of difficulties in her family situation. She lived by herself for some time and then boarded with a family until mid-November 1985, when she returned to live with her mother. Throughout the period from February to November 1985, MT's only income came from an allowance paid under the Secondary Assistance Scheme (SAS), totaling $1202 and a few occasions of casual employment. She applied to the DSS for special benefit on 19 April 1985; but her application was rejected on the ground that she was receiving the SAS allowance.

During 1985, **NT** was also enrolled in year 11 and had been obliged, because of family difficulties to leave home. She shared a flat with 2 other people. During 1985, NT received $960 by way of SAS allowance, a small amount of income from part-time work and, between October and December 1985, payments of $83 a fortnight from the NSW Department of Youth and Community Services. Some time before 21 February 1985 she attended at a DSS regional office and attempted to apply for special benefit but was told that she was not eligible. On 9 September 1985 she lodged a written claim for special benefit, but the DSS rejected this claim on the ground that she was receiving SAS allowance.

During 1985, both **KM** and **JT** were enrolled in year 9 of secondary school. Each of them had been obliged to leave home because of family breakdown and was living in a hostel for homeless young people. The hostel received payments from the NSW YACS Department for each of the children living at the hostel under s.27A of the *Child Welfare Act* 1939 (NSW). From this money, the management of the hostel gave KM and JT $20 a week each to allow them to pay for their own clothing, fares and personal needs. (According to the hostel rules, residents of the hostel who had income were required to pay 20% of that income to the hostel. It was understood that, if KM and JT were to be granted special benefits, they would be obliged to pay 20% to the hostel.) KM and JT claimed special benefit on 13 August 1985 but the DSS rejected their claims on the basis that they were receiving the benefit of payments made under State welfare legislation.

The legislation

Section 124(1) of the *Social Security Act* gives the Secretary a discretion to grant special benefit to a person where the Secretary is satisfied that the person is 'unable to earn a sufficient livelihood'.

The DSS conceded that each of the applicants was eligible for the payment of special benefit because they were 'unable to earn a sufficient livelihood' but argued that the discretion to grant a special benefit should not be exercised in their favour.

This argument was set out in amendments to the DSS Manual, which had been introduced following the AAT decision in *Spooner* (1985) 26 *SSR* 320. These amendments declared persons eligible for SAS allowances were 'not eligible for special benefit'; but that special benefit could be paid to full-time secondary students at year 10 level or below who had experienced a complete breakdown in family relationships.

The amended DSS guidelines also declared that the discretion to grant special benefit could be exercised where a secondary student was not being supported by a responsible adult, was not receiving support through a State welfare authority, and was not eligible for an education allowance or other form of income support.

The Secondary Assistance Scheme was established by the Commonwealth Government under a ministerial directive. A policy manual, issued under the authority of the minister, described the basic aim of the scheme as 'to assist parents with limited income to maintain their children at school for the final 2 years of secondary education (i.e. years 11 and 12)'. The scheme also could be used to provide 'direct assistance to students to assist them with their own support'. Under the scheme, a student must have access to additional cash resources of at least $1800 a year; but the means of the student or the student's family should not exceed a prescribed ceiling. The maximum rate of SAS allowance in 1985 was $1202, payable in three equal amounts at the beginning of each school term.

'Unable to earn a sufficient livelihood'

The AAT said that each of the applicants was unable to earn a sufficient livelihood during the relevant period because he or she was attending school and because his or her commitments to school work meant that he or she was not available for full-time or substantial part-time employment. On this point, the AAT followed the decision in *Spooner* (above).

In particular, the AAT accepted that the reference in s.124(1) to earning a livelihood referred to the person's ability to engage in full-time or substantial part-time employment and not to question whether the person was receiving some form of (perhaps gratuitous) support. On this point, the AAT acknowledged, some of the comments made in the earlier decision in *Beames* (1981) 2 *SSR* 16 had been mistaken.

The DSS guidelines

The AAT said that, although the DSS guidelines were necessary for the administration of a large department with widespread responsibility and although the AAT should not attempt to exercise broad discretions (such as the discretion in s.124(1)) in a vacuum without regard to such guidelines, the amended guidelines issued in September 1985 and relied on by the DSS in the present case were 'fundamentally flawed'.

The discretion

The AAT said that the structure of the Secondary Assistance Scheme made it