Age pension: residence test

DESAI and SECRETARY TO DSS
(No V85/257)
Decided: 7 March 1986 by J.R. Dwyer, G. Brewer and L. Rodopoulos.

Dhirubhai Desai was born in India in 1915. He worked in East Africa from 1938 to 1970, when he left Tanzania to visit his family in India.

In 1974, he migrated to Australia to join his eldest son who had lived here for 2 years. Over the next ten years, Desai spent a total of 2 years and 4 months in Australia and 7 years and 7 months out of Australia. He spent extended periods in India, caring for his elderly parents and (attending to family business), the United States of America (staying with his second son) and in Lesotho (visiting his elder daughter). In May 1979 he obtained permanent resident status in the United States of America.

In August 1984, Desai returned to Australia from the United States and applied for an age pension, claiming that he had been continuously resident in Australia during the period from 1974 to 1984. While this application was being considered, Desai told a DDS officer that, when his age pension was granted, it was to be paid overseas. (In fact, Desai departed from Australia again in September 1985.) When the DSS refused to grant him an age pension, Desai asked the AAT to review that decision.

The legislation

Section 21(1)(b) of the *Social Security Act* provides that a person must have 'been continuously resident in Australia for a period of not less than 10 years' in order to qualify for an age pension.

Section 20(2)(b) deems a person to be resident in Australia while the person is 'an absent resident'. That term is defined in s.6(1) as -

> 'a person outside Australia who is -
> (a) a person whose domicile is in Australia, not being a person whom the Secretary is satisfied is a person whose permanent place of abode is outside Australia . . .'

Section 10 of the *Domicile Act* 1982 (which came into operation on 1 July 1982) provides that:

> 'The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.'

A question of domicile

The AAT said that the pattern of Desai's residence in Australia and elsewhere could not be described as 'continuous residence' in Australia if those words were given their normal meaning. Accordingly, he could only meet the residence requirements if he could take advantage of deeming provision in s.20(2)(b) - that is, if his domicile was in Australia during the 10 year period in question.

The first question was whether Desai had come to Australia in 1974 with the intention of making Australia his permanent home so that he could be said to have acquired a domicile of choice in Australia at that time. The AAT said that it was likely that Desai had an Indian domicile of origin at the time when he came to Australia and pointed out that -

> 'The cases indicate that it may be more difficult to establish acquisition of a domicile of choice if that entails abandoning a domicile of origin than if it is simply in substitution for an earlier domicile of choice [*Fremlin* v. *Fremlin* (1913) 16 CLR 212].'

(Reasons, para.24)

The AAT noted that Desai had entered Australia in 1974 as a migrant, that he had lodged Australian tax returns for all of the years in question and that he had taken out Australian citizenship. On the other hand, he had spent over 7-1/2 years after his first arrival in Australia out of Australia on extended trips; had obtained permanent resident status in the United States and had told the DSS officer that his pension when granted would be paid overseas. Desai had also made the following statement in a letter to the AAT:

> 'In accordance with our way of life and tradition, a son's or a daughter's home is also the parent's home.'

It followed from this, the AAT said, that Desai could be regarded as having a home in Australia, in the United States of America and in Lesotho.

After pointing out that a person who asserted that there had been a change of domicile carried the burden of proving the change, the AAT concluded as follows:

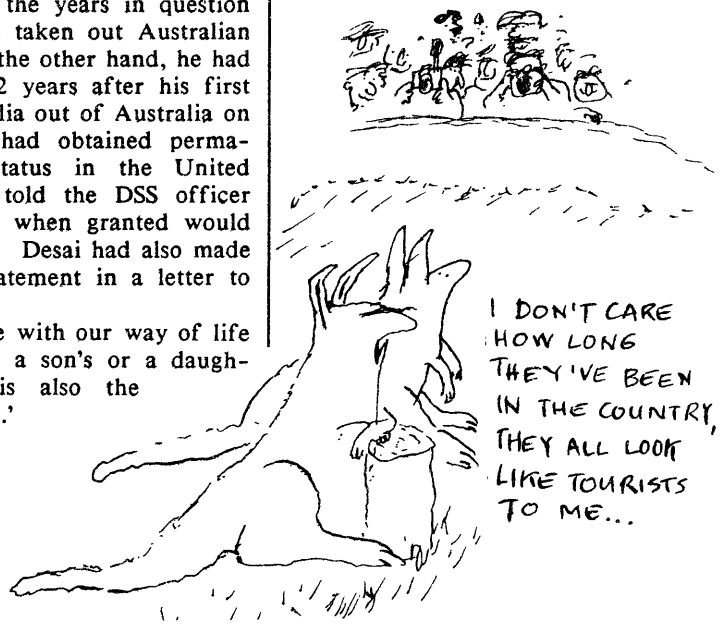
> 'The evidence of declarations of intention, acts and conduct taken together fall short of satisfying us that Mr Desai acquired a domicile of choice in Australia in 1974.'

(Reasons, para.29)

The AAT then indicated that the evidence raised the possibility that, even if Desai had acquired an Australian domicile in 1974, he may have lost that domicile and acquired a domicile of choice in the United States of America, through the operation of s.10 of the *Domicile Act* 1982. However, the AAT said that it was not necessary to consider this question. Similarly, it was unnecessary to consider the question whether Desai might have had a permanent place of abode outside Australia during his absences from Australia (which would have prevented him being treated as an 'absent resident'.)

Formal decision

The AAT affirmed the decision under review.



Widow's pension: residence test

WONG and SECRETARY TO DSS
(No.Q85/62)
Decided: 21 February 1986 by J.R. Dwyer, W.A. DeMaria and H.M. Pavlin.

Lam Kiu Wong had migrated to Australia from Hong Kong in January 1978, 5 years after the death of her husband. She joined her 2 married daughters here but left her 3 sons in Hong Kong. In February 1979, Wong returned to Hong Kong for 2 years, apparently because one of her sons had asked her to visit him.

Wong came back to Australia in January 1981 but returned to Hong Kong again in September 1981, where she remained until march 1984. It appeared that Wong's second trip to Hong Kong was undertaken at the request of one of her daughters, with