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:

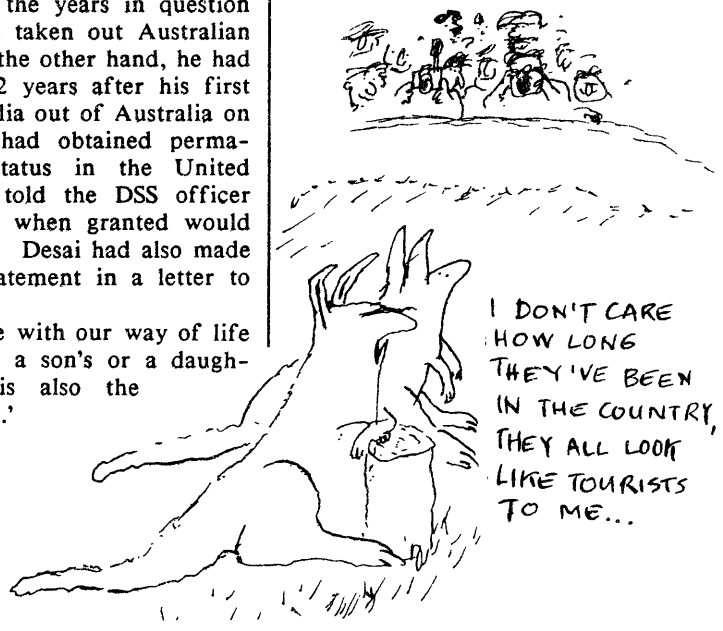
> 'The evidence of declarations of intention, acts and conduct taken together fall short of satisfying us that Mr Desai acquired a domicile of choice in Australia in 1974.'

(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

whom she had been living in Australia and who was moving from Adelaide to Brisbane.

During her second stay in Hong Kong, Wong lived with the youngest of her sons in a flat which she had retained since her initial migration to Australia. Her youngest son made arrangements to migrate to Australia and he and Wong travelled to Australia together in March 1984, at which time Wong gave up the lease of her Hong Kong flat.

In January 1985, Wong lodged a claim for a widow's pension and, when the DSS rejected that claim, she asked the AAT to review that decision.

The legislation

At the time when W applied for a widow's pension, s.60(1) of the *Social Security Act* required that an applicant for a widow's pension establish that she had either 'been continuously resident in Australia for a period of not less than 5 years' immediately before claiming the pension or 'been continuously resident in Australia for not less than 10 years'.

At that time, s.61(2)(b) provided that a claimant should be deemed resident in Australia while 'an absent resident'.

Section 6(1) defines an 'absent resident' as including 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 . . .'

Not an 'absent resident'

The central issue before the AAT was whether Wong had been an 'absent resident' during the periods of her absence from Australia. It was common ground that, unless she was an 'absent resident' and accordingly deemed resident in Australia during her absences from Australia, she could not possibly qualify for widow's pension. The longest continuous period of actual residence in Australia which she had accumulated before January 1985 was only one year and 24 days; and her continuous actual residence in Australia immediately before claiming the pension was only 9 months and 27 days. Accordingly, she needed to have some or all of her absences in Hong Kong treated as residence in Australia through the operation of s.61(2)(b).

The majority of the AAT, **Dwyer and Pavlin**, decided that Wong had not been an 'absent resident' during her absences from Australia. They said that Wong originally had a domicile in Hong Kong and she would have acquired a domicile in Australia only if, at the time when she came here, she had intended to reside in Australia permanently.

Wong and the daughter with whom she had lived when she came to Australia told the AAT that Wong had come to Australia in 1978 with the intention of living here permanently. Information provided by the Department of Immigration showed that Wong had entered Australia in 1978 as a migrant and that each of her departures from Australia (in 1979 and 1981) had been recorded as the temporary departure of an Australian resident.

But the majority of the Tribunal believed had entered Australia in 1978 with the idea of possibly staying here permanently but that her intention was not unequivocal. The facts that she was coming to a very different culture, that she had no idea how she would settle here and that she was leaving 3 children in Hong Kong made it difficult, the majority said, to accept that she came here with a fixed intention to reside here permanently': Reasons, para.30.

The majority continued:

> 'When we then consider the fact that Mrs Wong spent 2 lengthy periods, each of approximately 2 years, in Hong Kong and only 2 shorter periods of one year or less in Australia during the 6 years following her first arrival here, we cannot accept that Mrs Wong acquired a domicile of choice on her first arrival in Australia.'

(Reasons, para.30)

The majority said that, if it had been necessary to decide the question, they would not have been satisfied that Mrs Wong had intended to stay in Australia indefinitely at the time of her second arrival (in January 1981); and that she had not formed this intention until the time of her third arrival in Australia (in March 1984). They said that Wong had come to Australia in 1978 with the intention of staying here if she found living in Australia congenial and that she had only made a final commitment to staying here in 1984. Accordingly, her domicile in Australia was dated from 1984 and she could not be treated as an 'absent resident' during any earlier period.

On the other hand, one member of the AAT, **DeMaria**, dissented. He said that the evidence was sufficient to establish that, on her migration to Australia in 1978, Wong had abandoned her domicile in Hong Kong and had acquired a domicile of choice in Australia. He said that it was important to take account of the pressures which migration placed upon extended families:

> 'Rarely do extended families migrate in toto. Single people, couples or families may do so. Usually part of the extended family stays behind. Migration always breaks up such groupings and it would be cruel to insist that such ties be cut as proof of intent of living indefinitely in a new country.' (Reasons, p.14)

He said that Wong's return trips to Hong Kong should not be taken as indicating that she had maintained her previous domicile in Hong Kong but as personal responses in the context of family obligations and family conflicts. In his view, Wong had acquired an Australian domicile in 1978 and, during her absences from Australia, she was an 'absent resident' and had therefore accumulated the necessary 5 years' residence prior to her claim for widow's pension in January 1985.

A 'permanent place of abode outside Australia'?

The majority of the Tribunal, **Dwyer and Pavlin**, said that, because Wong had not acquired an Australian domicile in 1978, it was unnecessary to decide whether she had a 'permanent place of abode' in Hong Kong during her absences from Australia.

They said that, when that question did arise in another case, it would be necessary to decide whether to follow the interpretation given to an identical phrase in the Income Tax Assessment Act in such cases as *Applegate* (1979) 38 FLR 1 and *Jenkins* (1982) 59 FLR 467 - cases in which taxpayers who had gone to other countries for relatively short and definite periods had been treated as having a 'permanent place of abode' in those other countries.

On the other hand, the dissenting member, **DeMaria** said that, once he had decided that Wong had a domicile in Australia,

> 'that is where the matter ends unless the Secretary did turn his mind to the question of permanent residence outside Australia.'

(Reasons, p.17)

[The dissenting member appeared to proceed on the basis that it was not open to the AAT to consider whether a person domiciled in Australia had a 'permanent place of abode' outside Australia - surely a mistaken reading of the *Social Security Act*, as it now stands, and such earlier decisions as *Nathanielsz* (1983) 17 *SSR* 178, which had been concerned with a previous version of the Act and with the state of mind of the Commissioner of Taxation, not the Secretary to the DSS.]

Formal decision

The AAT affirmed the decision under review.