they calculated that Miller would receive 26 fortnightly payments of her superannuation pension amounting to $17 589 and also took into account the amount she received as arrears of this pension giving an estimated taxable income of $20 873.88. (At the time of the AAT hearing her 1988/89 assessment was available and showed an income of $20 818.)

The AAT concluded that the DSS had correctly applied the legislation, even though this led to a reduction in fortnightly FAS from $144 between July and December 1988 to $18.76 and Miller's financial circumstances had remained constant over the period.

The AAT noted that some attempt had been made in the legislation to deal with such anomalies: s.74B(3) of the *Social Security Act* effectively provides that, if a person's taxable income drops or is likely to drop 25% in a subsequent year, then that year's income can be used to calculate eligiblilty for FAS.

However, this provision did not assist Miller. The only way it could have helped her would have been if the lump sum was included in the 1987/88 tax year rather than the 1988/89 year. The AAT said that if taxable income had not been defined as the amount shown in a person's income tax assessment, it would have included the arrears of pension in Miller's 1987/88 tax year, as it represented payment due in that year and it was 'derived' in that year.

The Tribunal drew attention to the criticisms of the amendments to FAS in *Meadows* (1989) 52 *SSR* 693 and concluded:

> 'If the legislation is to be reviewed as a result of the decison in *Meadows*, I would urge those who carry out the review to take into account the present circumstances. The 25% rule is not a satisfactory basis for the exercise of discretion. It is, in itself, inflexible.'

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Residence in Australia

SEGEDIN and SECRETARY TO DSS
(No. 5714)
Decided: 22 February 1990 by B J McMahon.

Kate Segedin's husband was granted an age pension in 1975. He returned to Yugoslavia in 1975 and married Segedin there in 1977. In 1982 they both returned to Australia for two months. Segedin applied for a wife's pension then, but her application was refused on the ground that she was not residing in Australia.

Segedin's husband continued to receive the age pension paid at the standard (single) rate. They returned to Australia in May 1985 and Segedin reapplied for a wife's pension. This was granted relying on her statement that she was residing in Australia.

In April 1986, Segedin applied to have the wife's pension paid in Yugoslavia as she intended to return there. At this point her pension status was reviewed, and her wife's pension cancelled and the DSS determined that her pension should never have been granted.

The legislation

Section 31(1) of the *Social Security Act* provided that a woman who was not herself and age or invalid pensioner, but was married to an age or invalid pensioner, and 'who is residing in, and is physically present in' Australia on the date on which she lodges a claim for a wife's pension, was qualified to receive a wife's pension.

Residence in Australia

The Tribunal relied on the Federal Court decision of *Hafza* (1985) 26 *SSR* 321, which had considered the meaning of 'residence'. There Wilcox J had said residence had two elements — 'physical presence in a particular place and the intention to treat that place as home: at least for the time being, not necessarily forever'. The Court had further noted that once a home is established in a particular place, absence from that place does not necessarily mean a person ceases to be resident there though whether he or she does so depends on intention.

In applying *Hafza*, the AAT concluded that Segedin was not a resident of Australia when she applied for the wife's pension. When Segedin applied for wife's pension in 1982, she had stated that she and her husband owned their own home in Yugoslavia and they would be staying in Australia with relatives. In 1985, at the time of the second application, she and her husband were staying at the same address and she had stated that they were not paying rent, but were contributing to household expenses. This, together with the fact that their first visit was for two months and their second for 11 months, indicated that they had merely a temporary connection with the Australian address.

Further, Segedin's passport indicated that she had entered Australia in 1985 on a visitor's visa which was edorsed 'employment prohibited' and had made no application to become a permanent resident as at April 1986. Segedin had also come to Australia in 1985 on a return ticket and, if she had stayed in Australia beyond April 1986, she would have had to pay an extra $3000 for her airfare.

The Tribunal concluded that Segedin was not a resident of Australia when she applied for the wife's pension.

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Age pension: portability

SCHRODERS and SECRETARY TO DSS
(No. 5704)
Decided: 6 December 1988 by R.A. Hayes.

(Written reasons provided 16 February 1990)

Constanta and Gerarda Schroders appealed against a DSS decision to cancel their age pensions from 27 November 1986 on the ground that they had left Australia before the expiration of the 12-month period provided in the then s.83AD [see now s.62] of the *Social Security Act*. If the Schroders had stayed in Australia until 1 June 1987, they would have been eligible to have their pensions paid overseas.

The SSAT had recommended that the Schroders' pensions be restored, but the DSS had rejected this recommendation and affirmed the original decision.