The DSS relied on an earlier AAT decision, *Re McMaugh and Telecom* (1990) 22 ALD 393. In that case, the AAT held that a claim of legal professional privilege could be made out for a medical report obtained from a specialist for the purpose of proceedings before the AAT; but, because the report was a document relevant to the decision under review and was in the possession of the decision-maker, such a claim could not frustrate an order made under s.37(2) of the *AAT Act* 1975, directing the respondent to produce the report to the AAT, which could then provide a copy of the report to the applicant for review.

The AAT accepted that the medical report in question, having been obtained for the purpose of the review proceedings, was protected by legal privilege. That claim was not displaced by any of the provisions of the *AAT Act*, the AAT said.

The decision in *McMaugh*'s case was of no assistance to the DSS, as s.37 of the AAT Act authorised the AAT to require production of documents in the possession of the 'person who has made a decision that is the subject of an application for review by the Tribunal'. In *McMaugh's* case, the respondent (Telecom) had made the decision under review and was attempting to withhold a medical report in its possession. Here, Loknar, who was in possession of the medical report, was not the decision-maker.

The AAT observed that the General Practice Direction and the Medical Practice Direction made by the AAT's President required parties to exchange medical reports. However, the AAT said, 'There is nothing in any of that... which can defeat a claim of legal professional privilege when it is properly made': Reasons, para. 22.

Formal ruling

The AAT ruled that the Ker report was protected by legal professional privilege and that the application for discovery by the DSS should be denied.

[P.H.]

Age pension: Australian resident?

GOODFELLOW and SECRETARY TO DSS

(No. 8296)

Decided: 8 October 1992 by S.A. Forgie, T.R. Gibson and A.M. Brennan.

Ronald Goodfellow applied to the AAT for review of a DSS decision, which was affirmed by the SSAT, that he had not become an Australian resident until, at the earliest, 23 April 1988. As a consequence he would not complete 10 years as an Australian resident and subject to meeting the other requirements, be entitled to an age pension before 1998. Goodfellow lodged an application for age pension on 5 September 1990. By the time the DSS made the first decision, the 1947 Act was repealed and the *Social Security Act* 1991 enacted. It came into force on 1 July 1991 and the AAT applied the law that was in force at the date of the hearing.

Goodfellow and his wife came to Australia on 29 March 1982 to visit their daughter and determine whether they liked the environment. They held a resident return visa issued on 20 January 1982. On arrival they were given a permit to enter and remain for residence. They intended to establish a home in Australia, return to England to sell their house and then return to reside permanently in Australia. In June 1982 they returned to England because their son was drafted for the Falklands war. It was accepted that they intended to return to Australia and a resident return visa was issued to them on 27 April 1982 authorising them to return before 26 April 1983.

In 1983 they put their house in England on the market and returned to Australia on 15 April 1983. They then returned to England on medical advice. Both became ill in England and Goodfellow was admitted to hospital on 7 occasions between October 1983 and October 1986. They were unable to return to Australia until 23 April 1988 because of ill health and because they could not sell their house. Throughout the relevant period they intended to return to Australia and did so on 23 April 1988. Mrs Goodfellow had died by the date of the hearing.

Mrs Goodfellow had received a pension from the United Kingdom as she had worked for 19 years in the diplomatic corps. Under the reciprocal agreement between the United Kingdom and Australia she received payments in Australia. Goodfellow was not entitled to receive an Australian pension under the reciprocal agreement because his entitlements from the United Kingdom exceeded the age pension. If he was entitled to an age pension in his own right under the 1991 Act rather than under the agreement, his income from the United Kingdom pensions would be treated as income and it was possible that he would be entitled to a portion of the Australian pension.

The legislation

For a man to be entitled to an age pension he must satisfy the requirements of s.43 of the 1991 Act which provides that he must have turned 65 years of age and have had 10 years' qualifying Australian residence.

'Qualifying Australian residence' is defined in s.7(5) which provides that he must have been an Australian resident for a continuous period of not less than 10 years, or have been an Australian resident during more than one period and at least one of those periods is 5 years or more; and the aggregate of those periods exceeds 10 years.

Australian resident is defined in s.7:

'(2) An Australian resident is a person who -

(a) resides in Australia; and

(b) is one of the following -

(i) an Australian citizen;

(ii) a person who is, within the meaning of the Migration Act 1958, the holder of a valid permanent entry permit;

(iii) a person who has been granted, or who is included in, a return endorsement, or a resident return visa, in force under that Act;

(iv) a person who:

(A) is, for the purposes of that Act, an exempt non-citizen; and

(B) is likely to remain permanently in Australia.'

Section 7(3) provides:

'(3) In deciding for the purposes of this Act whether or not a person is residing in Australia, regard must be had to:

(a) the nature of the accommodation used by the person in Australia; and

(b) the nature and extent of the family relationships the person has in Australia; and

(c) the nature and extent of the person's employment, business or financial ties with Australia; and

(d) the nature and extent of the person's assets located in Australia; and

(e) the frequency and duration of the person's travel outside Australia; and

(f) any other matter relevant to determining whether the person intends to remain permanently in Australia.'

The decision

The AAT was satisfied that Goodfellow had been residing in Australia pursuant to s.7(2)(a) for a continuous period of 10 years. It also found that he had been an Australian citizen since 3 August 1990 and thus satisfied s.7(2)(b).

In considering the period prior to August 1990, the AAT found that Goodfellow held either a valid permanent entry permit or a resident return visa from 15 April 1983 until 31 January 1984, a resident return visa from 8 March 1988 that was valid for multiple return journeys, and that remained valid until he became an Australian citizen. For the period between those dates, 1 February 1984 to 7 March 1988, he did not hold either a valid permanent entry permit or a resident return visa. It was possible he held a resident return visa for part of that period; but the 2 which might have covered this period were cancelled. The AAT concluded that Goodfellow satisfied the requirements of s.7(2)(b) during the period from 15 April 1983 to 31 January 1984 and from 8 March 1988 to the present.

As to the question whether Goodfellow was 'a person who resides in Australia', the AAT referred to its decision in *Steficek* (1989) 52 *SSR* 688, which had considered the cases of *Kyvelos* (1981) 3 *SSR* 30, and *Hafza* (1985) 26 *SSR* 321. Both cases considered s.20 of the 1947 Act, when it defined 'resident of Australia' as including a person whose domicile is in Australia unless the Taxation Commissioner was satisfied that his permanent place of abode was outside Australia.

The AAT said that the word 'resides' must be considered in the context of the current Act. The word should be given its ordinary or popular meaning. The concept of residence differs from that of domicile which has acquired a specific meaning and which was adopted in social security legislation in earlier times. A person having a domicile in one country may stop living in that country and move to another country but still retain domicile in the first. However, the person ceases to reside in that country when he or she sets up home in another country.

A person may be temporarily absent from a place but still be resident in it: *Judd v Judd* 75 WN (NSW) 147, in which Brereton J said that 'what is required is residence in a place with some degree of continuity apart from accidental or temporary absences'. There was nothing in the *Social Security Act* 1947 which indicated that a temporary absence should be regarded as interrupting a period of residence.

Section 7(4) of the 1991 Act sets out a number of matters to which regard must be had in determining whether a person is an Australian resident. Paragraphs (a) to (e) accord with the law as set out in the cases referred to and sit naturally with the concept of considering whether a person resides, as specified in the definition of 'Australian resident' in s.7(2).

The AAT was satisfied that, at all times since 1983, Goodfellow intended to live in Australia permanently and make it his home. Australia was his usual or settled place of abode until he returned to England in 1983. The AAT decided that, having returned to England, Goodfellow did not reside in Australia again until his return to Australia on 23 April 1988. That is when he established his usual or settled place of abode here.

Formal decision

The AAT set aside the decision dated 19 December 1991 and affirmed by the SSAT on 25 February 1992 and substituted a decision that Goodfellow had been an Australian resident within the meaning of s.7(2) of the *Social Security Act* 1991 between 15 April and 30 July 1983 and from 23 April 1988.

[B.W.]

Age pension: residence: absence from Australia

WYBROW and SECRETARY TO DSS

(No. 8321)

Decided: 19 October 1992 by B.J. McMahon.

Wybrow, who was 75, had been living in Japan since 1984. Since then he had spent 4 weeks in Australia in July 1991 when he lodged a claim for age pension. The claim was rejected on the basis that he was not residentially qualified and the SSAT affirmed that decision.

The facts

Wybrow was a barrister who had served in World War 2 as judge advocate and counsel in the war crimes trials which followed. He developed a special interest in Japanese affairs and in 1968 was appointed as the New South Wales Government adviser in Japan. He served in that capacity until 1972 and became interested in a charity, Pacific Asia Social Service (PASS), which cared for 'mixed blood' children left behind by Australian soldiers following the war.

Wybrow returned to Japan from Australia in 1984, planning to write a book about the war crimes trials and PASS. He separated from his wife who continued to live in their matrimonial home in Australia which was the subject of proceedings in the Family Court. He also suffered from a medical condition and attributed a remission in symptoms to living in Japan. PASS provided him with an office where he slept when he did not stay at a friend's house. He had no property in Japan and ate meals at a local restaurant paid for by PASS. He had neither a bank account nor a car in Japan and had never paid tax in that country as he never earned a salary or other income there. For taxation purposes he was a resident of Australia. His superannuation was eroded by the October 1987 stock market crash and he needed financial assistance to live.

Wybrow said that he could not return to Australia at present because the President of PASS had become a member of the Japanese Cabinet and had little time to perform normal functions of President and Wybrow carried out this work. He said that he had made