(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

it clear at all times to his associates that his intention was to return to his home in Australia.

The legislation

The requirement of residence is contained in s.51 of the *Social Security Act* 1991:

> 'A claim by a person is not a proper claim unless the person is —
>
> (a) an Australian resident; and
>
> (b) in Australia;
>
> on the day on which the claim is lodged.'

'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 . . .
>
> (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 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 SSAT had relied upon the case of *Shah v Barnet London Borough Council* [1983] 1 All ER 226, which dealt with the meaning of the phrase 'ordinarily resident'. The AAT said that concept had no relevance to the Australian legislation and residence must be determined by reference to the *Social Security Act* 1991. The AAT also derived little assistance from the meaning of resident in the *Income Tax Assessment Act*. Although Wybrow was a resident for taxation purposes, there were special requirements involving the necessity for continuous or intermittent physical presence, unless the taxpayer's 'usual place of abode' was outside Australia and he did not intend to take up 'residence' in Australia.

The Tribunal said that s.7 of the *Social Security Act* now requires that an applicant who is an Australian citizen must reside in Australia. In *Hafza v Director-General of Social Security* 60 ALR 674, 26 *SSR* 321, Wilcox J was concerned with the test of 'usual place of residence' which appeared in s.3 in the 1947 Act. He identified 2 elements; physical presence in a particular place and the intention to treat that place as home. Physical presence and intention will coincide for most of the time but residence does not cease merely because a person is physically absent. A person may also be resident in more than one place at a time. The factors to be taken into account by s.7(3) are not exhaustive and do not detract from Wilcox J's general observations. The definition does, however, compel a decision-maker to pay some regard to the enumerated factors.

The first factor was the nature of the accommodation and the AAT accepted that Wybrow lived with his wife in a substantial house in a Sydney suburb before moving to Japan in 1984, indicating a clear residential connection.

In considering the nature and extent of family relationships in Australia, the Tribunal accepted that Wybrow had Australian roots as he had a wife, children and grandchildren here.

The nature and extent of his employment, business or financial affairs was also accepted as being extensive in the past and his present work with PASS had a particular connection with Australia. Although this work could not be described as business or financial activities, it was recognised by the Australian Government as having relevance to Australia's interests.

It also appeared that Wybrow was paying tax in Australia and the evidence was that he had no assets in Japan.

The frequency and duration of his travel outside Australia was 'not illuminating' as he had been outside Australia for 8 years except for one brief period. The AAT accepted that Wybrow intended to remain permanently in Australia as there was no evidence to the contrary.

In considering whether residence is established, the Tribunal said, a court considers a man or woman's whole environment, especially in relation to their spouse or family, and not merely a person's physical situation. The importance of a claimant's intentions is emphasised in *Menai* (1984) 6 ALN N320; 22 *SSR* 255; and *Issa* (1985) 8 ALN N177; 27 *SSR* 331; and none of the observations made in those two cases is contradicted by the new statutory formula for residence.

The Tribunal cited with approval the annotations to the *Social Security Act* by Sutherland and Johnson that the statutory factors are not exhaustive and it is just as important to consider the converse of these factors in relation to the applicant's circumstances outside Australia. Factors such as accommodation, family relationships, employment or financial ties and property overseas all produced a negative result in Wybrow's case.

The Tribunal decided that Wybrow should be considered as resident in Australia at the time he made his application for pension.

Formal decision

The decision under review was set aside and the matter remitted to the DSS with a direction that, at the time of the application, Wybrow was an Australian resident.

[B.W.]

Recovery of overpayment: waiver in 'special circumstances'

SECRETARY TO DSS and McKENZIE

(No. 8405)

Decided: 3 December 1992 by S.A. Forgie, G.S. Urquhart and A.M. Brennan.

Kerri-Anne McKenzie received an overpayment of sickness, unemployment and special benefits between 1988 and 1991. The DSS decided to raise and recover an overpayment of $9542.96. On review, the SSAT varied that decision by deciding to waive recovery of the outstanding balance of the debt. The DSS appealed to the AAT.

The legislation

The AAT said that the question of waiver must be considered under s.1237 of the 1991 Act and in accordance with the Minister's Directions of 8 July 1991, being the Directions in