When he left Australia he left a bank account with about $1500 in it, and all his belongings and household goods with his brother and sister. Those possessions were returned to him when the family returned, and he still had them. He sold his house here to finance his fares, and lived on the balance of the proceeds. He still owns a flat in Macedonia, because he has been unable to sell it, and had to borrow from his brother to pay the fares back to Australia.

While in Macedonia he made special arrangements for his children to be taught English.

Domicile

After quoting from the *Domicile Act* 1982 (Cth), the AAT decided that Mr Dimitrievski acquired a domicile of choice after he came to Australia in 1968. Moreover, it decided that Mr Dimitrievski did not acquire a domicile of choice in Macedonia. His intention at all times during his absence was to return to Australia and not to remain indefinitely in Macedonia. Therefore, the AAT found that he retained his Australian domicile during his absence from this country. Further, under the *Domicile Act*, the children were, throughout the period, domiciled in Australia.

After consideration of the decisions in *Hafza v DGSS* (1985) 26 *SSR* 321 and *Issa* (1985) 27 *SSR* 331, the AAT stated that it was satisfied that during their absence from Australia, Mr Dimitrievski and his children's usual place of residence was Australia and their absence was temporary only. Thus his permanent place of abode was not outside Australia. This was because they left Australia for the fulfilment of two 'specific passing purposes' (using the language of Issa). The first was the return to Macedonia of his wife's body, and the second was the need to have help with the care of his children while they were young, and for them to get over their shock and fear. As time passed, this purpose was fulfilled, and he returned to Australia bringing with him his new wife who could help care for the children and who was clearly prepared to join her husband in this country, in which he had made his home.

The AAT pointed out that the matter was governed by the intention of Mr Dimitrievski, whose intention it found 'never wavered'.

In respect of the period 1 October 1987 to 18 May 1989, the AAT had no direct evidence as to whether Mr Dimitrievski was an Australian citizen or complied otherwise with the definition of Australian resident, but considered that that was manifest from the account of his movements into Australia.

The AAT also considered some conflicting statements in forms signed by him but pointed out that they had been completed by another person, due to his lack of English. They found his evidence at the hearing credible, and were reluctant to place reliance on apparently inconsistent statements contained in documents not written by him. Moreover, they noted that in another Entitlement Review form completed in Macedonia in July 1989, Mr Dimitrievski had said that he expected to return to Australia when the children became adult, which is consistent with his evidence to the AAT.

Finally, the AAT pointed out that as of 18 May 1989, family allowance ceased to be payable if the children had been outside Australia for more than three years. Therefore, the AAT decided that throughout the period Mr Dimitrievski and his four children met the requirements of the 1947 Act so that, apart from the operation of s.83, family allowance was payable to him in respect of those children. Accordingly, the decision under review was varied by deciding that the allowance was payable from 24 May 1984 to 18 May 1989 inclusive.

[R.G.]

Invalid pension: no decision to cancel

WILKS and SECRETARY TO DSS

(No. 8758)

Decided: 4 June 1993 by M.D. Allen.

Gregory Wilks was granted invalid pension in 1986. In November 1989, Wilks sold his house and placed the proceeds in a bank account while waiting to buy a new house.

The DSS ceased to pay invalid pension to Wilks in January 1986, on the ground that the interest on his bank account was income and, as such, was too high to permit payment of pension.

After purchasing a new house, Wilks re-applied for pension, which was granted by the DSS in September 1990. However, the DSS decided that Wilks' 'new' pension was subject to a preclusion period under s.1165 of the *Social Security Act* 1991, because of a lump sum payment of compensation received by Wilks.

Wilks appealed to the SSAT; and, when the SSAT affirmed the decision of the SSAT, he appealed to AAT.

The legislation

Section 1165(2) of the *Social Security Act* provided that invalid pension was not payable during a lump sum preclusion period. However, s.1163(5)(b) excludes pensions claimed before 1 May 1987 from the effect of s.1165.

No cancellation

The AAT examined the DSS records. The original document which purported to evidence the cancellation did no more than suggest that the pension be cancelled – the document did not recommend that course nor did it record any decision. Further, there was no evidence that the person who had signed the document as 'determining officer' was a delegate of the Secretary.

The AAT noted that, in January 1990, a delegate could have chosen between cancelling and suspending Wilks' pension while his income was above the prescribed level. After noting that Wilks had remained qualified on medical grounds, the AAT said that, even if there had been a cancellation, Wilks could have challenged the cancellation on the basis that suspension was the correct or preferable decision.

In any event, Wilks' invalid pension having been claimed before 1 May 1987 and not cancelled in January 1990, was protected from preclusion under s.1165 by s.1163(5)(b) of the 1991 Act.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions that:

(a) Wilks' pension had not been cancelled in January 1990; and

(b) the Secretary was to assess Wilks' entitlement to pension on the basis that he was in receipt of pension before 1 May 1987.

[P.H.]