of the parties, and hence eliminate situations whereby the spouse and/or children receive nominal maintenance payments over a long time period, resulting in payments of social security benefit which are not justified.'

In the present case, the AAT said, Smith had mistakenly understood, when agreeing to the consent order, that the child maintenance payment would be 'once and for all'. She had since lost contact with her former husband.

However, the AAT said that, in view of the income of Smith's husband at the time of the consent order ($300-400 a week), child maintenance of $40 a week for each child had been reasonable.

Although Smith was in a difficult financial situation (because her sole parent pension had been reduced on the assumption that she was receiving $80 a week child maintenance income), the AAT said that it was open to Smith to attempt to locate her former husband and have the consent order altered.

The AAT concluded by observing that the DSS had failed to inform Smith of the full implications of the maintenance income test at the time of its introduction; however, Smith had been advised by the DSS when first granted supporting parent's benefit in 1987 that maintenance payments were treated as income; and said that, in view of that advice,

> 'it was the responsibility of the respondent to make her own inquiries of the Department . . . to satisfy herself that the receipt of a payment of lump sum child maintenance would not affect her pension'.

(Reasons, para. 30)

Formal decision

The AAT set aside the decision of the SSAT and decided that the capitalisation period for the child maintenance received by Smith was the period specified in the consent order, 5 years.

[P.H.]

Income test: market-linked and accruing return investments

SECRETARY TO DSS and EGAN

(No. 8239)

Decided: 10 September 1992 by D.W. Muller.

Armyne Egan received a profit of $6519 from a superannuation scheme in August 1991 when she redeemed her lump sum payment from the fund on turning 70. This profit had accumulated since 30 June 1983.

In October 1991, the DSS decided that the profit should be treated as income for the 12 months following receipt when calculating her rate of age pension.

The SSAT subsequently decided that only the profit accrued after 8 January 1991 should be taken into account in assessing her income. The DSS asked the AAT to review the SSAT's decision.

The legislation

Section 1075(1) of the *Social Security Act* 1991 provides:

> 'If—
>
> (a) a person has made or acquired, at any time before 1 January 1988, an accruing return investment; and
>
> (b) the investment is:
>
> (i) an investment with a friendly society; or
>
> (ii) an investment of a kind where a return is not available:
>
> (A) until the end of a period of at least 12 months after that investment was made or acquired; or
>
> (B) until full realisation of that investment; and
>
> (c) the person realises the investment and receives an amount by way of return on that investment;
>
> the person is, for the purposes of this Act, to be taken to receive one fifty-second of that amount as ordinary income of the person during each week in the period of 12 months starting on the day on which the person realises the investment and receives an amount by way of a return on the investment.'

Section 1081(1) provides that, where an original investment is converted into an accruing return investment, then the accruing return investment is deemed to have been made on the date the original investment was converted and the original investment is deemed to have been realised on that date.

Section 1082(1) states:

> 'if a person realises a market-linked investment that was made or acquired before 9 September 1988 and receives an amount by way of return, the person is, for the purposes of this Act, taken to receive one fifty-second of that amount as ordinary income of the person during each week in the 12 months commencing on the day on which the person realises the investment.'

Section 9 defines an 'accruing return investment' as

> 'an arrangement by a person that consists of or includes an investment of money, being an investment:
>
> (a) that produces:
>
> (i) a fixed rate of return, whether or not that rate varies from time to time; or
>
> (ii) a rate of return that may be reasonably approximated; and
>
> (b) the value of which from time to time is unlikely to decrease as a result of market changes.'

A 'market linked investment' is defined to include 'a superannuation benefit vested in a person and held in a superannuation fund (unless a superannuation pension funded by that benefit is presently payable to the person)'.

Application of the legislation to the investments

The Tribunal applied the legislation to Egan's investments.

The superannuation fund in which she had invested her money changed its name (and practices) a number of times. The original investment from June 1983 to December 1987 was with the Westpac Superannuation Fund. This was a market-linked investment as this fund invested mostly in shares, real estate and some fixed interest deposits. From December 1987 to 5 August 1991 the fund became known as the Westpac Superannuation Savings Fund. This was an accruing return investment as this fund invested in highly secure short term securities and a small amount of property.

Based on this analysis of the investments, the AAT simply determined the profit from the market-linked investment which was realised on 30 December 1987 when it was converted to an accruing return investment according to s.1081. This profit was $3217 and, by applying s.1082(1), Egan's income for the following 12 months must be increased by 1/52 of $3217 per week. This meant that she had probably received an overpayment of age pension in 1988.

The accruing return investment was made before 1 January 1988 and realised on 5 August 1991. The profit from this investment was $3302. According to s.1075, Egan must be taken to receive as income the sum of 1/52 of $3302 per week for the 12 months following 5 August 1991.

Formal decision

The AAT set aside the decision of the SAT and substituted a decision that Egan had received $3217 by way of return on a market-linked investment on 30 December 1987, a further $3302 by way of return on an accruing return investment on 5 August 1991, and the matter remitted to the DSS for recalculation of her pension for 1988 and for the 12 months following 5 August 1991.

[B.S.]

Wife's pension: residence

RAPTIS and SECRETARY TO DSS

(No. 8362)

Decided: 6 November 1992 by M.T.E. Shotter.

Mrs Raptis was granted wife pension with effect from 15 March 1979.

Some time after 1 July 1991, after the commencement of the *Social Security Act* 1991, Mrs Raptis was advised that her pension was to be cancelled as she had been absent from Australia for more than 12 months and, in that event, wife pension could only continue to be paid to women living overseas if they had lived in Australia for 10 years or more.

Raptis was advised that her pension was to be cancelled as she had only lived in Australia for 9 years and 6 months. In making this decision, the DSS declined to treat as residence for this purpose a period from 27 August 1988 to 17 January 1989 during which time Raptis had returned to Australia. The Department had decided that due to the short nature of her visit, she could not be treated as a 'person who resides in Australia' within the meaning of s.7(2) of the 1991 Act.

After an unsuccessful appeal to the SSAT, Raptis wrote to the AAT from Greece asking that tribunal to review the decision.

The legislation

Wife pension is dealt with in Part 2.4 of the 1991 Act.

Section 147(1) sets out the general qualification (being the partner of an age or disability support pensioner, or a person receiving rehabilitation allowance).

Section 147(2) limits qualification by subjecting the payment to the portability provisions (ss.1215-1216B) and imposing requirements for pre-departure certificates (ss.1218 and 1219).

Section 1216 provides that (subject to s.1216B), if a woman has been an Australian resident and been outside Australia for 12 months' continuously and is not in Australia at the end of 12 months, she loses her qualification for the pension.

Section 1216B(1) provides that a woman's qualification for, *inter alia*, wife pension will not be affected by her being outside Australia if she is an 'entitled person'.

An 'entitled person' is defined (s.1216B(2)) as including (a) a woman who was an Australian resident for at least 10 years, or (c) a woman who was or is the partner of a man who was the subject of a recommendation by an allegation authority that resulted in payment of an amount of compensation by the Commonwealth to her or her partner. (The AAT noted that para (b) was not relevant here.)

An 'allegation authority' is defined as including the Commission of Inquiry established by Letters Patent in 1984 'to investigate matters known as the Greek conspiracy'.

Finally, s.7 of the Act deals generally with Australian residence.

Section 7(2) defines an Australian resident as a person who resides in Australia and is either a citizen, a permanent resident or the holder of some other specified residence status, and is likely to remain permanently in Australia.

Section 7(3) sets out a number of factors to which regard must be had when determining whether or not a person is residing in Australia. And, by s.7(5), 10 years' qualifying residence can include aggregated periods, so long as one of these is 5 years or more.

The 'Greek conspiracy'

In a statement forming part of Mrs Raptis' application for review, she stated that 'we are also victims of the so called Greek conspiracy of that time and we had a lot of troubles'.

She went on to list a number of them and, in order to determine whether s.1216B(2)(c) applied to Mrs Raptis, the AAT wrote to the Secretary to DSS seeking information about her claims made in the documents lodged with the AAT.

In a lengthy reply from the Principal Adviser, Legal Services, the Department concluded that no compensation had ever been offered or paid to Mr or Mrs Raptis as a person affected by the conduct of the Commonwealth in the so-called 'Greek social security conspiracy case' and therefore she was not an 'entitled person' under s.1216B(2)(c).

Australian resident for 10 years?

The final relevant exemption referred to a person who had been an Australian resident for at least 10 years. On the information before the AAT, it was found that the applicant had been in Australia for 2 periods: the first was from 1970-1980 for 9 years, 6 months and 13 days while the second was for a period of 4 months and 22 days from August 1988 to January 1989. This came to a total of 9 years, 11 months and 4 days. However, the DSS and the SSAT on review had not considered the second period as 'residence' for these purposes.

The AAT then considered s.7 of the Act dealing with Australian residence.

The AAT had written to the DSS asking for information on some of the matters listed in s.7(3) to which regard must be had in making a determination about residence (e.g. details of employment and property holdings in Australia; passport and visa details; where Raptis stayed whilst in Australia and any written statements made by her) and noted that the Department's reply had been to the effect that it had no information as to these matters. Nor had the DSS been notified of her 1988/1989 visit.

The AAT had 'some difficulty' with the decision that the period in 1988/1989 did not constitute residence, given that the DSS had undertaken no research to satisfy the requirements of s.7(3) of the Act.

Having regard to s.1217(2) which deals with 'a temporary return' to Australia being sufficient to constitute residence for the purposes of s.1216 and s.1216B, the AAT found that the time in Australia in 1988/1989 was a period of residence, thereby bringing the combined period of residence to 9 years, 11 months and 4 days.