However, the issue remained as to whether Raptis had been resident for at least 10 years. The AAT noted that, under s.1221, some rounding up is possible. However, this section had no application to Raptis unless she met the criteria in s.1216B, i.e., unless she was an 'entitled person'. As she was not an entitled person under s.1216B, it was not possible to round her period of residence up to 10 years, and therefore s.1216 operated to disqualify her from receiving wife pension.

**Formal decision**

The AAT affirmed the decision under review.

**[R.G.]**

# Invalid pension: incapacitated while Australian resident

**SECRETARY TO DSS and RAIZENBERG**

**(No. 8410)**

**Decided:** 13 December 1992 by D.F. O'Connor, D.P. Breen and T.R Gibson.

Amanda Raizenberg was born in Canada in 1973 and migrated to Australia in 1988. She claimed an invalid pension in November 1989, when she turned 16, but the DSS rejected her claim on the basis that Raizenberg's incapacity for work had arisen before she became an Australian resident.

On review, the SSAT set aside the DSS decision. The DSS appealed to the AAT.

**The legislation**

The AAT decided that the 1991 Act should be applied to the issue.

Prior to the replacement of invalid pension with disability support pension in November 1991, the time of Raizenberg's claim for invalid pension, s.94(1) of the *Social Security Act* 1991 provided that invalid pension was payable to a person who was at least 85% permanently incapacitated for work, where at least 50% of that incapacity was directly caused by a physical or mental impairment and the person was an Australian resident when the person first satisfied those requirements (or had 10 years' qualifying residence).

**When does incapacity for work arise?**

Raizenberg was born suffering from cerebral palsy. It was this condition which rendered her permanently incapacitated for work. The DSS argued that, because Raizenberg suffered from the condition before she came to Australia, she had not first satisfied the requirements of having an impairment and being incapacitated for work when she was an Australian resident.

The AAT noted that there was a conflict between two earlier decisions. In *Mancer* (1989) 19 ALD 58; 53 *SSR* 703, the AAT decided that a similar provision in the 1947 Act did not prevent a young person, severely disabled at the time of her arrival in Australia as a child, from qualifying for invalid pension when, as an Australian resident, she turned 16 — although the young person had been impaired before taking up Australian residence, her incapacity for work did not arise until she turned 16, the age at which she could legally enter the workforce.

In *Abaroa* (1991) 13 AAR 359, the AAT had adopted a different approach and decided that a person born in Australia with cerebral palsy could qualify for invalid pension even though he had not been an Australian resident between the ages of 4 and 27: the incapacity for work had arisen at the time of the person's birth.

The AAT noted that, in *Panke* (1981) 4 ALD 179; 2 *SSR* 9, the Tribunal held that incapacity for work required an assessment of the extent to which an impairment affected a person's ability to engage in paid work, and was concerned with the economic effects of a disabling medical condition. *Panke* had been approved by the Full Federal Court in *Annas* (1986) 8 ALD 520; 29 *SSR* 366.

The AAT decided that it would follow *Mancer*:

> 'The correct view of the term "incapacity for work" is that expressed by the Tribunal in *Panke* and *Mancer*, i.e. the inability to engage in paid work. A child under 16 has no capacity for work that is measurable because they are not capable of engaging in paid work. It follows that a child under 16 cannot be incapacitated for work. As [the respondent] was under 16 when she came to Australia she was not incapacitated for work at the time. She became incapacitated for work on her 16th birthday when the economic consequence of her disability manifested itself in the form of inability to undertake paid work. The fact that consequences described as "eccentric" by the Tribunal in *Abaroa* could flow from such an interpretation is in the Tribunal's view, a natural by-product of any arbitrary age limit.'

(Reasons, para. 14)

The Secretary's argument, the AAT said, had confused the concept of impairment with permanent incapacity for work:

> 'It may be necessary where a person has lost their capacity for work, to assess the permanence of that loss in order to determine their entitlement to invalid pension. In such a case it may be relevant to look at a person's impairment before the age of 16. However that is not to assess whether they were incapacitated for work at that time but rather to assess the degree of permanence of their current incapacity for work. On the other hand a person may be permanently disabled but in such a way as not to affect their capacity for work. In such a case the degree of permanence is irrelevant because the economic consequence of their disability is not incapacity for work.'

(Reasons, para. 15)

**Formal decision**

The AAT affirmed the decision of the SSAT.

**[P.H.]**

# Legal professional privilege

**LOKNAR and SECRETARY TO DSS**

**(No. 8399)**

**Decided:** 1 December 1992 by D.P. Breen.

Josip Loknar applied to the AAT for review of a decision cancelling his disability support pension. Loknar's solicitor arranged for a medical report to be prepared by a Dr Ker on Loknar's prospects of rehabilitation.

At a directions hearing before the AAT, the DSS sought direction from the Tribunal that Loknar produce the Ker report for inspection by the DSS. Loknar's solicitor claimed legal professional privilege for the report.