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.

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