

Greece which she used in March 1993. Clifopoulos returned to Australia in June 1994.

Clifopoulos' eldest son owns a house in Australia. He had built a self-contained unit in the back yard for his parents to use when they came to Australia. Clifopoulos had serious medical problems and was undergoing chemotherapy in Australia. The AAT heard evidence that one son would probable return to Australia to live and the other son might also return.

#### The law

When Clifopoulos applied for the age pension she had to be in Australia and an Australian resident. It was conceded by the DSS that Clifopoulos satisfied all requirements to be granted the age pension, except she was not an Australian resident when she lodged the claim. To be an Australian resident a person must be residing in Australia (s.7(2) *Social Security Act 1991*). Section 7(3) codifies the criteria that the courts have decided are relevant when deciding this issue. The AAT described these criteria as being there 'to guide the decision-maker in determining the person's intention as to the place of residence': Reasons, para. 17. The AAT referred to the Federal Court decision of *Hafza v Director-General, DSS* (1985) ALR 674, 26 SSR 321, and noted that the intention was to treat the place as home at least for the time being. The decision-maker was also entitled to decide the converse of each criterion set out in s.7(3).

#### Residing in Australia

##### (a) nature of accommodation

The AAT found that Clifopoulos' decision to sell her house in Australia was understandable, as it was necessary to provide a stable home environment for her two younger sons in Greece. Because Clifopoulos' eldest son had built self contained accommodation for his parent in his back yard, Clifopoulos continued to retain continuous accommodation in Australia.

##### (b) family relationships in Australia

Clifopoulos' eldest son and his family continue to live in Australia, as well as Clifopoulos' two brothers and a sister. Her two youngest sons and other relatives live in Greece. The AAT found that Clifopoulos enjoys a close relationship with her family no matter where they live.

##### (c) employment and business ties

Clifopoulos has no employment ties in Australia as she is retired. The income her husband earns from his property in Greece is small and irregular.

##### (d) nature and extent of person's property in Australia

The AAT found that Clifopoulos' sale of her house in Australia to buy a flat in Greece was understandable, and of less significance because of her need to provide for her two younger sons. Because of the accommodation provided by her eldest son, Clifopoulos retained a continuous link with Australia.

##### (e) frequency and duration of person's travel

The AAT found that the time spent by Clifopoulos in Greece could be explained by her need to assist her sons and her deteriorating health.

##### (f) other relevant matters

Clifopoulos lived for a long period in Australia where she brought up her children, worked, and became an Australian citizen.

The AAT referred to an earlier statement made by Clifopoulos to the DSS, which illustrated that Clifopoulos was equivocal about where her 'home' was. The AAT decided that it preferred Clifopoulos' oral evidence at the hearing. The AAT stated that it must take a global view based on the totality of the evidence.

'This may involve, in a multi-cultural society, an appreciation of factors which may attract people to spend some extended time in their country of origin, while still regarding Australia as home.' (Reasons, para.24)

#### Formal decision

The AAT set aside the decision under review and sent the matter back to the Secretary with directions that the applicant was an Australian resident on the date of her claim.

[C.H.]

## Sole parent pension: living separately and apart ✪

SECRETARY TO DSS and CLASENER

(No. 9762)

**Decided:** 30 September 1994 by A.M. Blow.

The SSAT had affirmed a decision of the DSS to cancel Clasener's sole parent pension (SPP) on the basis that, as at 7 September 1993, she was not living separately and apart from her husband.

Clasener had been receiving SPP since 2 August 1988. She claimed that she satisfied s.241(1)(a)(iii) of the *Social Security Act 1991* in that she was 'a member of a couple who is living separately and apart from . . . her partner'.

Clasener and her husband gave evidence at the hearing, both maintaining that they had at all times since August 1988 lived separately and apart. The AAT accepted their contention, although it found that 'generally neither of them could be relied upon to tell the truth'.

Clasener's husband had been a frequent visitor to her home, staying overnight every second weekend. They maintained that the purpose of the visits was to enable the husband to see their son, Tony. They denied that any sexual relations took place.

The husband had given Clasener's address as his own address for various purposes, but the AAT accepted that this was because he lacked a fixed place of abode. He led a 'fairly slippery existence', using different addresses to evade his many creditors. Clasener continued to receive mail and telephone messages for her husband in connection with his business, an arrangement that the AAT said was not necessarily inconsistent with them living separately and apart.

They continued to operate a joint cheque account until March 1994. Clasener said that it was convenient for her to use the joint account as she had never established a cheque account of her own. She said that she reimbursed her husband for any amounts drawn by her. The AAT said: 'She and her husband are so unbusinesslike that her explanations could all be true'.

The AAT found that there was a

history of violence by Clasener's husband against her, and that 'this is a factor in her tolerant behaviour towards him in relation to his frequent visits to Tony at her home, his failure to pay regular maintenance, his use of her address, and his use of her to take telephone messages for him'.

Clasener had been on an IVF program for two years preceding the cancellation of her pension, and had told the hospital that she was living with her husband. Her explanation was that she wanted to have another child, one not fathered by her husband, and had said she was living with him only because the hospital would not otherwise admit her to the program.

In weighing the evidence, the AAT had regard to the list of indicia of a marriage-like relationship set out in s.4(3), although the subsection did not, strictly speaking, apply to s.241(1)(a)(iii). The AAT attached most significance to the attitude of Clasener and her husband to each other, an attitude that was characterised by hostility, disrespect and the absence of any continuing commitment to each other. They had more contact with each other than most estranged couples, but this was due to the husband's interest in his son and his 'unusual lifestyle'.

#### Formal decision

The AAT set aside the decision under review and substituted a decision that the applicant was qualified for SPP on and after 7 September 1993.

[P.O'C.]

## Disability support pension: continuing inability to work

KEMP and SECRETARY TO DSS  
(No. 9719)

**Decided:** 7 September 1994 by M.T. Lewis, J.D. Campbell and I.R. Way.

Kemp sought review of the DSS decision to cancel his disability support pension (DSP) made on the 22 February 1993. Kemp had been a recipient of invalid pension since 1988 and in 1991 he was transferred to DSP.

Kemp had his right leg amputated below the knee after a motorcycle accident in 1983. He had worn a knee amputation prosthesis since that time.

#### The issues

The DSS conceded that Kemp had a physical impairment of 30% but contended that he did not have a continuing inability to work as defined by s.94(2) of the *Social Security Act 1991*.

#### Work and education history

Kemp finished school at 15 but had been regularly missing school from the age of 12 so he could go potato picking. After he left school he worked in a variety of jobs including labouring and cleaning. After the motorcycle accident in 1983 he did not return to work until mid-1985. Between 1985 and 1987 he worked for the Electricity Commission but was put off at the end of 1987. He had not been in employment since 1987.

#### Medical evidence

Much medical evidence before the AAT related to Kemp's mobility throughout 1988 to 1990. Several doctors addressed Kemp's use of crutches for this period whilst his prosthesis was problematic and aggravated his amputated stump and concluded that he was 'permanently incapacitated for active work'. He could 'manage office work but has no aptitude or training for this kind of work': Reasons, para.12. In 1992 Kemp's treating doctor, Dr P.J. Ashley opined that although there was improvement in both balance and mobility he 'would still remain unfit for work indefinitely': Reasons, para. 15.

In 1993, Dr J.B. Westphalen, the Commonwealth Medical Officer, examined Kemp to review his continuing eligibility for DSP. As a result of this review, Dr Westphalen commented that the stump had healed and that all trauma associated with the accident had resolved. He also described Kemp as 'comfortably self sufficient', 'static' and that the prosthesis was now 'performing well': Reasons, para. 16. His recommendation was that Kemp would be able to work for 30 hours per week in light semi-skilled or unskilled work. He further recommended that Kemp's impairment would not prevent him from undertaking educational or vocational training.

Kemp was then examined by Dr D.

Dowda on 24 November 1993. Dr Dowda found that Kemp had 'shown a good ability to cope with a variety of labouring tasks on his own' and that:

'his impairment would not prevent him from undertaking educational or vocational training over the next two years, and that such training would be likely to equip him for work for which he is currently unskilled.'

(Reasons, para 18.)

Kemp gave evidence to the AAT that he suffered from chest pain, lower back pain and tiredness throughout the day. Dr Dowda had noted in his report that Kemp had complained of angina pains. Notwithstanding, the AAT found that the chest pain was undiagnosed and that 'the back problems experienced by the applicant were not sufficiently serious to preclude light sedentary or semi-sedentary work': Reasons, para.21. Further the AAT found that the difficulty sleeping 'has not prevented him from leading a reasonably active lifestyle': Reasons, para.23.

#### Unwillingness to be retrained

Kemp gave evidence to the AAT that he did not wish to be trained and stated:

'I probably have got a capacity to work in an office or something but I am not trained to do that and I have never wanted to be trained for that and I don't see why I've got to be trained for that . . . I don't want to be any of them things.'

(Reasons, para.24)

There was no evidence that Kemp had undertaken any retraining or rehabilitation and the AAT held that the work at the Electricity Commission 'should not be characterised as rehabilitation since it seems that there were no real attempts to rehabilitate or retrain the applicant at that time': Reasons, para.27.

#### Discussion of evidence

The AAT found that the opinion that Kemp had no aptitude for office work 'was not borne out by the facts': Reasons, para.28. The AAT found that on the medical evidence Kemp was unable to do his usual work as a labourer. The AAT then considered the decision of *Locknar and Secretary to DSS* (1993) *SSR 1103*, in which the AAT stated that 'the fact that subpara 94(2)(a)(ii) refers to work for which the person is currently skilled rather than any other work would seem to imply that a person's skill levels are relevant when determining a continuing inability to work'. Thus the AAT found that Kemp was able to 'undertake light