

Gnisios worked in various casual positions in Greece between 1975 and 1995, he did not accrue any right to be granted a Greek pension on retirement. He renewed his Australian passport a number of times and voted in two Australian federal elections in 1975 and 1977. His close relatives lived in Greece, including his wife, daughter, grandchildren, mother-in-law and a brother, although there were some relatives residing in Australia. Neither Mr or Mrs Gnisios owned property in Australia, but they had an interest in an olive grove in Greece.

On 25 March 1995, Gnisios returned to Australia on a one-way ticket. He applied for age pension on 24 April 1995, the day after his 65th birthday. He told the AAT that he intended to live in Australia permanently and that his sole purpose for returning to Australia was to obtain an age pension. At the time of his claim he lived with a relative and as at the date of the AAT hearing he had a 6-month lease on a rented flat. It was intended that his wife would join him when her health permitted, but, if she was unable to come, Gnisios intended to remain living in Australia alone.

The meaning of resident

The issue before the AAT was whether Gnisios was an Australian resident for the purposes of s.7 of the *Social Security Act 1991*. The AAT noted that the criteria set out in s.7(3) which were to be taken into account when considering whether or not a person is a resident are not exhaustive, and that the relevance and importance of each of the factors set out in that subsection vary in each case.

It was argued on behalf of Gnisios that because of his stated intention to remain in Australia permanently and despite his association with Greece, that he had broken his residence in Greece. The AAT considered Gnisios' stated intention in the light of corroborating material, such as family ties, residency, duration of stay in and out of Australia, assets and financial situation. In addition, the AAT took into account the fact that Gnisios had allowed his Australian passport to expire in 1990, and did not renew it until 1995. Although he had voted in two Australian federal elections, he had ceased to do so after 1977. As he had told the AAT that he had returned to Australia for the sole purpose of obtaining income support, the AAT did not accept that he had broken residence in Greece.

The AAT noted the decision of *Re Schlageter and Secretary, DSS* (1985) 26 SSR 317 in which the Tribunal found that 'for a person to be residing in a country, he must have a settled home in that country. It need not be his only home, but it

must have some degree of permanence.' The AAT did not accept the accommodation arrangements made by Gnisios to be either settled or permanent. The Tribunal also found that Gnisios' close family ties were in Greece, that on the evidence before it there seemed little likelihood of Mrs Gnisios joining her husband in the foreseeable future, and that Gnisios had no employment, business or financial ties in Australia. He had a long-term and continuing commitment to Greece, and had not formed a commitment to live in Australia. Therefore he was not a resident within the meaning of s.7 of the Act.

Formal decision

The AAT affirmed the decision under review.

[A.T.]



Age pension: qualification, provisional commencement day and the making of a 'proper claim'

KALOGRIS and SECRETARY TO DSS
(No. 19853)

Decided: 4 April 1996 by J.R. Dwyer.

Kalogris's claim for age pension was rejected because he was not an Australian resident at the time he lodged his claim. This decision was affirmed by an authorised review officer and the SSAT.

The facts

Kalogris lived and worked in Australia from 1960 to 1978 when he returned to live in Greece. He was not an Australian citizen. As he was only entitled to a small Greek pension, enquiries were made by Kalogris's brother in Australia as to his entitlement to age pension. Kalogris's brother gave evidence at the AAT hearing that he had been told by the DSS that his brother would need to return to Australia to lodge a claim. This Kalogris did in April of 1995, travelling on a 6-month's visitor's visa. On his arrival he lodged a claim for age pension which was subsequently rejected. He made some enquiries about applying for permanent

residency in Australia, but did not do so and returned to Greece in July of 1995.

The legislation

The AAT considered the following legislative provisions governing entitlement to age pension:

43.(1) A person is qualified for an age pension if the person:

- (a) has reached pension age; and
- (b) has 10 years qualifying Australian residence, or has a qualifying residence exemption for an age pension.

...

45. An age pension is not payable to a person before the person's provisional commencement day (identified under section 46).

46.(1) Subject to subsections (2), (3) and (4), a person's provisional commencement day is the day on which the person claims the age pension.

...

48.(1) Subject to subsection (3), a person who wants to be granted an age pension must make a proper claim for that pension.

...

51. A claim by a person is not a proper claim unless the person is:

- (a) an Australian resident; and
- (b) in Australia;

on the day on which the claim is lodged.

The AAT found that Mr Kalogris, at the time of claim, satisfied the qualification provisions in s.43(1). It also found that the claim lodged was not a 'proper claim' because Mr Kalogris was not an Australian resident as defined in s.7 of the Act. The Department argued that as the claim was not a proper claim, there could be no 'provisional commencement day' under s.46, and that therefore Mr Kalogris, despite satisfying the qualification provisions for age pension, was not entitled to payment.

The AAT noted that s.46 provides that a person's provisional commencement day is the day on which the person lodges 'a claim' rather than 'a proper claim' for age pension. Despite this, the AAT considered that it was clear from ss.48 and 52 of the Act that the intention of the legislature was to maintain some residential qualification for age pension, similar to that existing under the 1947 Act. The AAT concluded that it would be inappropriate to attempt to apply ss.43, 45 and 46 of the Act without reference to ss.48 and 51. As a result it was determined that Mr Kalogris was not entitled to an age pension.

Formal decision

The AAT affirmed the decision under review.

[A.T.]