Federal Court

Age pension: Australian residence and contributions to Italian pension

SECRETARY TO THE DSS v FERLAT
(Federal Court of Australia)

Decided: 21 July 1997 by Heerey J.

Background

Ferlat was Italian born, and lived in Australia from 1960 to 1969, becoming an Australian citizen in 1964. After returning to Italy in 1969, she worked and made contributions to an Italian pension fund known as INPS between 1974 and 1980. In June 1980 she changed employment and made contributions to another fund known as CDPEL. When she retired in 1992, her contributions to the INPS fund were transferred to CDPEL and she commenced receiving a pension from that fund. In July 1995 she claimed an Australian age pension, which was rejected by the DSS on the grounds that Ferlat did not meet the qualification criteria, specifically she did not have 10 years Australian residence. The AAT determined that Ferlat met the residence qualification criteria, and the Secretary to the DSS appealed to the Federal Court.

The legislation

One of the requirements for age pension is that the claimant have 10 years Australian residence. However, the *Social Security Act 1991* also provides for reciprocity of entitlement to pensions between Australia and some other countries. Section 1208(1) provides for a 'scheduled international agreement' to have effect despite anything in the Act. The agreement between Australia and Italy provides in Pt III, Article 7(1) for a period of Australian residence and a period of credited contributions in Italy (that is, contributions which would qualify the person for an Italian benefit), to be added together for the purposes of determining whether a claimant meets the Australian residence criteria.

The issue

Ferlat had just under 9 years Australian residence and the issue was whether she could add to that the period in which she had contributed to INPS, a period of 5 years. It was assumed that the CDPEL contributions were not contributions used to acquire a benefit under the social security laws of Italy.

Totalisation of periods of residence

The DSS argued that, at the time of Ferlat's application for an Australian pension there was no period of credited contributions in respect of INPS because her contributions had been transferred to CDPEL in 1992. This was rejected by the Court. The Court said that the international agreement is not concerned with the amounts of contribution, but the historical period during which contributions are credited. Article 7(1) provides for the accumulation of periods of time, on the one hand a period of residence in Australia and, on the other hand, a period of credited contributions in Italy. This meant that the period of Ferlat's contributions to INPS should be added to her period of Australian residence for the purpose of determining eligibility for an Australian age pension.

Formal decision

The application was dismissed with costs.

[A.T.]

Claim in writing: whether requirement mandatory or directory

RUSSO v SECRETARY TO THE DSS
(Federal Court of Australia)

Decided: 1 August 1997 by Ryan J.

Russo claimed supporting parent benefit in 1984. He contended that he was entitled to that benefit from 1981 to 1984 as he had dependent children in his care during that period.

The issue

Russo was unable to show that he had made a claim for supporting parent benefit prior to 1984, but argued that the DSS was aware of his circumstances, through the receipt by him of family allowance, and should have prompted him to apply. For Russo, to succeed would have required that ss.135TA and 135TB of the *Social Security Act 1947* be construed as directory rather than mandatory. Section 135TA provided that a grant or payment of benefit 'shall not be made except upon the making of a claim for that . . . benefit', while s.135TB provided that 'a claim shall be in writing in accordance with a form approved by the Director-General . . .'

Claim must be made in writing

The Court adopted the reasoning set out in *Formosa v Secretary to the Department of Social Security* (1988) 45 *SSR* 586 in which the Court concluded that the requirement in s.159(1) of the 1991 Act, the counterpart of s.135TB, that the claim be in writing, was mandatory.

Even if such a claim had been made, Russo was not eligible for supporting parent benefit for the whole of the period 1981 to 1984 because, for parts of that period, he had received unemployment benefits.

Formal decision

The application was dismissed and Russo was ordered to pay the respondent's costs.

[A.T.]