

Age pension, carer pension: resident of Australia

MR AND MRS MRKONJIC and SECRETARY TO THE DSS (No. 12898)

Decided: 15 May 1998 by J. Handley.

The Mrkonjics requested review by the AAT of a SSAT decision that both the Mrkonjics' pensions be cancelled because Mrkonjic was not a resident of Australia when he applied for the age pension. Mrkonjic's wife had been paid the carer pension.

The facts

Mrkonjic was born in Croatia, migrated to Australia in 1959 and became a citizen in 1967. He returned to Croatia in 1968 and later came back with his wife and children in 1978. The family left for Croatia in 1985 'due to family problems'. They sold their home and investment flats in Australia, and bought a home in Croatia. Mrkonjic told the AAT that they had expected to stay in Croatia for a few months only, but they had remained because his wife's parents were ill and they did not want to interrupt their children's schooling.

The Mrkonjics returned to Australia on a one way ticket on 23 May 1996 leaving their daughter, who was still dependent, with family in Croatia to finish her Year 8 studies before joining them. They deposited \$4000 in a Westpac account and boarded with friends. Mrkonjic turned 65 on 18 May 1996, and applied for age pension on 28 May 1996. His wife claimed carer pension on 7 June 1996 on the basis she needed to care for Mrkonjic. Both carer and age pension were granted.

In August 1996 the Mrkonjics heard that a family friend had attempted to rape their daughter, and so they applied to have their pensions paid in Croatia. They left Australia on 8 September 1996. They have not returned because of Mrkonjic's poor health. Part of their property in Croatia has been sold, and some of the proceeds put into their Westpac account. Their pensions were cancelled on the basis that Mrkonjic was not a resident at the time he applied for the age pension.

The law

Section 51 of the *Social Security Act 1991* provides that a claim for age pension is not a proper claim unless the person is an Australian resident and in Australia on the day on which the claim

is lodged. Subsection 7(2) defines 'Australian resident' as including a person who resides in Australia and is an Australian citizen. Subsection 7(3) provides:

'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
- (d) the nature and extent of the person's assets located in Australia; and
- (e) the frequency and duration of the person's travel outside Australia; and
- (f) any other matter relevant to determining whether the person intends to remain permanently in Australia.'

A resident of Australia

The AAT referred to *Hafza v Director-General of Social Security 26 SSR 321* where Wilcox J said the test for residency 'is whether the person has retained a continuity of association with the place . . . together with an intention to return to that place and an attitude that that place remains "home"'. The AAT found the Mrkonjics were not Australian residents when they had claimed their respective pensions, because they did not make any attempt to establish a home in Australia, and their home remained in Croatia. They had not made any attempt to buy or rent a place of their own, and they had not brought their personal possessions from Croatia. They had bought only the barest necessities in Australia; and they did not arrange for their daughter to join them when her studies were finished. They had a house in Croatia where they lived with their son and daughter; and they had not attempted to sell that house. Their immediate family and relatives remained in Croatia.

Carer pension

The AAT referred to s.198(1) and found that Mrkonjic's wife was not entitled to carer pension because her husband was not entitled to the age pension.

Formal decision

The AAT affirmed the decision under review.

[K.deH.]

[Contributor's Note 1. Portability was refused because the Mrkonjics were not residentially qualified when their pensions were granted. Otherwise it would have been difficult to avoid finding that their reasons for leaving within 12 months arose from circumstances that could not be reasonably foreseen when they arrived (see s.1220).]

Carer payment: severely handicapped person; whether constant care

SECRETARY TO THE DSS and RETALLACK (No. 12978)

Decided: 11 June 1998 by J. Kiosoglous.

The background

Retallack's daughter Anastasia was born in July 1981 with Down's Syndrome. In July 1997 when Anastasia turned 16 years, Retallack's supporting parent pension was cancelled and she began receiving newstart allowance. She applied for carer payment (formerly carer pension) on 7 May 1997, citing evidence that Anastasia required personal care, attention and supervision on a daily basis. On 17 June 1997 the DSS rejected her claim, but this was set aside by the SSAT on 13 August 1997.

Retallack had borne responsibility for the total care of her daughter since her birth. Anastasia attended school each day, other than religious holidays or when ill, and the evidence was that her school year was similar to the normal school year. Six weeks before the AAT hearing, Retallack commenced part-time work visiting elderly clients for a total of 5 hours per week, during school hours. Her evidence was that in a usual week she was freed from constant care of her daughter from 9 a.m. until 2.30 p.m. each weekday. She had previously worked as an enrolled nurse but had been able to do so only because of the practical support of another parent who took Anastasia to school.

The issue

It was not in dispute that Retallack's daughter was a 'severely handicapped person' nor that other requirements of s.198(1) of the *Social Security Act 1991* were met. The sole area of dispute was whether Retallack provides constant care for her daughter.

The law

Section 198(2AA) of the Act provides:

'If:

- (a) a person is personally providing constant care for a severely handicapped person;

and

- (b) the person ceases to provide that care in order to undertake training, education, un-