

## Age pension: international agreement and residency

THE SECRETARY TO THE DSS v  
FERLAT

(Federal Court of Australia)

**Decided:** 17 March 1998 by Black CJ,  
Foster & Mansfield JJ.

The DSS appealed against the judgment of Heerey J (1998) 3(1) SSR 12 that Ferlat had 10 years' residency in Australia according to the provisions of the International Agreement between Australia and Italy. This meant that Ferlat satisfied the residency requirements for the age pension.

### The facts

Ferlat was born in Italy and lived in Australia between May 1960 and April 1969, a period of 9 years. She became an Australian citizen in 1964. After she returned to Italy in 1969, Ferlat worked between 1974 and 1980 and made contributions to the Italian Pension Fund (INPS). In 1980 Ferlat transferred employment and made contributions to another pension fund (CDPEL). Ferlat continued making contributions to CDPEL until 1992 when she retired. Her contributions to the INPS were transferred to CDPEL on retirement, and Ferlat was paid a pension. She applied for the Australian age pension in July 1995. A requirement to be paid the age pension is that the person has 10 years residence in Australia.

### The international agreement

Pursuant to s. 1208 (1) of the *Social Security Act 1991*, there is reciprocity of entitlements to pensions between Australia and other nations if there is a scheduled international social security agreement. There is such an agreement between Australia and Italy.

Article 7(1) of the Agreement provides that if the period of residence in Australia is less than is required, then:

'Where a person to whom the Agreement applies has accumulated:

- (a) a period of residence in Australia that is:
  - (i) less than the period required to qualify him or her, in respect of residence, under the social security laws of Australia for an Australian benefit; and
  - (ii) . . .
- (b) a period of credited contributions that is: . . .
- (c) for the purposes of a claim for that Australian benefit, the last-mentioned period of credited contributions shall be deemed to be a period in which that person was residing in Australia.'

The term 'period of credited contributions' is defined in Article 1 as one or more periods of contributions under the social security laws of Italy.

### The issue

Ferlat lived in Australia for just under 9 years and made contributions to the INPS scheme for 5 years. It was agreed that contributions to the INPS scheme were contributions to acquire a benefit under the social security laws of Italy. The issue was whether those contributions could be taken into account because they had subsequently been transferred to the CDPEL scheme, and Ferlat was being paid a pension under that scheme, and not the INPS scheme. It was agreed that the CDPEL scheme was not a specified fund in accordance with the administrative arrangements between Australia and Italy.

### The contributions

The DSS argued that at the time Ferlat claimed the age pension, there were no contributions to her credit in the INPS fund. Therefore, there was no relevant period of credited contributions in Italy within the meaning of Article 7(1). The DSS submitted that the phrase 'used to acquire a benefit' must be read as 'currently capable of being used to acquire a benefit'. Ferlat had accumulated her contributions, and then expended them when they were transferred to the CDPEL fund.

Heerey J had stated that the focus should be upon the historical period of contributions, and that the period of credited contributions continued, even though the amount had been transferred. The Full Court agreed with this analysis:

'The phrase "used to acquire a benefit" does not bear the extended meaning contended for. The phrase serves no purpose in the definition, in our view, other than to qualify in a completely adjectival way the word "contributions" . . . In fact, it is the character of the contributions which is the focus of the definition.'

(Reasons, p.5)

The Full Court rejected DSS's submission that the contributions must be presently capable of providing eligibility for a pension. The Court stated 'that Article 7 deals with periods of time and aggregations of periods of time': Reasons, p.5. The period of the contributions continues even if those contributions are later transferred to a different pension fund.

The DSS also argued that the AAT was not entitled to go behind the documents provided to the DSS by the INPS fund in response to the DSS's inquiries. The INPS had provided a document in which it appeared to state that Ferlat had made no contributions to the INPS fund at any time. The Court noted that the evidence before the AAT had shown quite clearly that Ferlat had made contributions to the INPS fund. There was no dispute on that fact. The DSS referred the court to Article 20, part of which stated that unless there were reasonable grounds for believing otherwise, information provided by the INPS should be accepted. It was noted that there were reasonable grounds for believing otherwise in this case.

### Formal decision

The Full Court dismissed the DSS appeal.

[C.H.]