

## Age pension: resident of Australia

RAAD and SECRETARY TO THE  
DFaCS  
(No. 2000/387)

**Decided:** 18 May 2000 by  
S.M. Bullock.

Raad had 10 years qualifying residence and satisfied s.51(1) of the *Social Security Act 1991* (the Act), but his age pension claim was rejected on the basis that he was not an Australian resident on the day his claim was lodged as required by s.51 of the Act. Section 7(2) required a person to reside in Australia to be an Australian resident, and s.7(3) stated:

7.(3) 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.

### The evidence

Raad was born in Lebanon on 3 August 1933, the eldest son in a family of two brothers and two sisters. After attending school from 1943 to 1953, he worked for two or three years in an office. He migrated to Australia in 1968, and found work after a month. From 1972 he worked for the (now) Urban Transit Authority (UTA) in Sydney, initially as a bus conductor and later as a bus driver.

When Raad arrived he had no family members in Australia, but his younger brother also came to Australia in 1970. Initially Raad lived in a boarding house, but later he lived with friends. In 1972 he began living in rented accommodation.

While on leave from the UTA, Raad visited Lebanon from July to August 1974 for a short holiday, and to see his ill father who died soon afterwards.

Raad went to Lebanon again in February 1982. He said he went at the request of his mother who was very ill, and his younger brother went with him. He had felt a great responsibility as the eldest male child since his father had died.

He stayed for eight or nine months, longer than intended but his mother had insisted. He was not employed in Lebanon but helped his mother in her orchard during the summer months. He survived on income from the orchard and some funds he had taken from Australia. He had to resign from the UTA as he was away longer than anticipated, but he successfully reapplied for his old job after returning to Australia in November 1982.

Raad resigned from the UTA in 1986. He said this was because he was unable to carry out his duties due to prostate problems. He went to Lebanon again with his brother in August 1986, taking approx. \$4500 from superannuation that he used to live on. One reason for going was that his brother had become depressed and aggressive, and insisted on returning to Lebanon. The other was that his mother was exerting considerable pressure for him to return. He had no idea how long he would be required by his brother and mother to remain. Raad and his brother had lived in rental accommodation in Australia until then. Before leaving he had sold his furniture and household items as no friends could store them and he could not afford to pay storage fees. By February 1992 his mother's health had slightly improved. She gave him permission to return to Australia, which he did, leaving his brother, whose health had remained poor, with his mother.

In Australia, Raad lived with a cousin and his young family. At his mother's request to return as she was not well, he went to Lebanon again in May 1993 and returned in December 1995. He stayed with his mother and brother, living on income from the orchard and loan repayments from a brother-in-law.

Once more in Australia, Raad stayed with his cousin. He said he was unable to find employment because of his age.

Raad said that early in 1996 he received a message from his brother that his mother was very ill and that he should return to Lebanon immediately. He did not have the funds to buy an airline ticket immediately, and when he arrived in June 1996 he found out that his mother had died and his family had not told him. He stayed until November 1998, tending to his mother's orchard and looking after his brother. Raad said that it was difficult for him to leave because of the war in Lebanon. Eventually he asked one of his sisters to care for their brother and she agreed. After his mother's death Raad had unsuccessfully tried to mediate a dispute between his

siblings over a piece of land. Nothing had been done to distribute his mother's house and land between the children, and he did not know when or if it might happen. His Australian passport had expired in 1997 and he could not afford to renew it until 1998.

Raad returned to Australia on 7 November 1998, and he lodged the age pension claim on 9 November 1998. He lived again with his cousin until July 1999 when his cousin purchased a new home and there was no room for Raad. He was offered accommodation with a long-standing friend whom he had known in Australia since 1970 and before in Lebanon. He had enquired about Department of Housing accommodation soon after arriving, and he was told he could not apply as he did not have any income.

Raad explained that he had been unaware of certain occurrences in Australia while he was in Lebanon, not because he was not interested but because it was difficult to regularly obtain news about Australia.

Raad said he had lodged an Australian tax return in 1985/86 after resigning from the URT but the Australian Taxation Office had indicated that it had no tax records from him since 1981.

When claiming pension Raad had signed a statement written on his behalf on 16 November 1998 indicating that he was going to stay in Australia for seven months and then return to Lebanon to care for his sick mother. Raad told the AAT that he had initially refused to sign this untrue statement, but had been told by the departmental officer that he would certainly not get any pension if he did not sign it. He had denied the statement in another written statement on 3 December 1998 in which he described his feelings on 16 November 1998 of being 'nervous and confused' and 'not concentrating'.

Raad had written, in a further statement on 11 January 1999, that he did 'not intend to return to Lebanon now' but he did 'eventually plan to go back overseas to Lebanon'. He said that it had been and was his intention to stay in Australia, but that he may visit Lebanon at a later date. He denied that the statement indicated he would be returning to Lebanon.

Raad told the AAT he loved Australia, its people and its way of life, and he considered it his home. He was an Australian citizen and had worked here for over 18 years. In Australia he had an extended family of cousins, nieces and

nephews who he visited regularly or who visited him, and he considered his cousin to be like a brother. He had been a member of the Lebanese Moslems Association since 1970, and this contact provided him with social activity and support, as well as meeting his spiritual requirements. He believed that in Australia his health, financial situation and emotional support would be better provided for, and his future was more secure. With the death of his mother his connection with Lebanon through family responsibility had ceased, and he intended to stay and die in Australia. That was not to say that he would not visit his family in Lebanon for a holiday.

### The findings

The AAT noted the statement of 16 November 1998 was clearly incorrect, as Raad's mother had died two years earlier. Afterwards he had consistently denied its correctness, and he had described the circumstances in which he had signed it. The AAT could not see any possible benefit Raad might have derived from making the statement, and concluded that it would never know the precise reasons for the statement being written. The AAT did not consider this early statement to be indicative of a man with little credit, but rather of some confusion about the matters in hand.

From the cases cited on behalf of the parties the AAT considered that while it must apply the criteria in s.7(3) of the Act, the factors therein were not exhaustive. A determination of residency involved a consideration of why Raad was absent from Australia and the purpose for such lengthy absences against a backdrop of his other connections with Australia or Lebanon, both in a physical and emotional sense.

Raad had adopted a practice of living with relatives and friends in Australia because he liked living with people, and because he was not able to afford rental accommodation. In Lebanon he had always stayed in his mother's home and he had no accommodation there.

In Australia Raad had lived with his brother and later with the family of his cousin with whom he had a particularly close relationship. He had other friends and connections with the Moslem community. His siblings in Lebanon had their own families. The main factors causing him to return were his family responsibilities, particularly as the eldest son. After his parents died and his sister agreed to look after his brother, the reasons for his frequent trips to Lebanon had receded. Raad then returned to

Australia, as was his pattern, although he need not have done so. At the time he claimed pension the more meaningful family relationships were in Australia and Raad intended to reside here. That was not inconsistent with returning to Lebanon for holidays.

Raad no longer had employment, financial or business ties, and no assets, in Australia in November 1998, nor did he have any in Lebanon. The AAT accepted that he had had no option but to sell his furniture and household items when he left Australia in 1986. His mother's property in Lebanon had still not been divided.

The AAT did not consider Raad's lack of knowledge of events in Australia while he was in Lebanon indicated he had a lack of interest in Australian affairs and did not have an intention to reside in Australia. It could not make any finding in relation to Raad's intention to reside in Australia from the inconsistent evidence about his tax returns.

Also taking into account the facts that Raad was an Australian citizen who had been resident in Australia for over 10 years, had an Australian passport and a Medicare card, the AAT considered that he was residing in Australia on 9 November 1998.

### Formal decision

The decision to reject the claim was set aside and substituted with a decision that Raad qualified for age pension from the date of claim.

[K.deH.]



## **Lump sum payment: compensation part of a lump sum; special circumstances**

**WOLFE and SECRETARY TO THE DFaCS**  
(No. 2000/367)

**Decided:** 12 May 2000 by  
K.L. Beddoe.

### The issue

The issue in contention here was whether any portion of a lump sum settlement amount should be treated as compensation in respect of economic loss where the recipient was in fact un-

employed at the time of accident which gave rise to the settlement.

### Background

Ms Wolfe in April 1992 suffered an accident at a council car park. At the time she was not employed and the accident did not occur in relation to any employment. Owing to the accident she was unable to work for 8-9 weeks while her leg was in plaster. She also gave evidence that prior to the accident she had been unable to work from February 1991 (owing to, she alleged, harassment — an issue which the Tribunal accepted but found to be irrelevant to the issues presented to it) and did not resume work until March 1996. She sued the local council for \$40,000 which was said to be the limit of the Magistrates' Court jurisdiction, although her claim quantified expenses and economic losses totalling \$82,1232 (including \$74,400 for post accident and future economic loss). She settled the action for an amount of \$25,000 by way of general and special damages, plus legal costs.

The Department in determining Ms Wolfe's eligibility for disability support pension payments determined that 50% of the \$25,000 should be treated as compensation in respect of lost earnings, and calculated a non-payment period on this basis. Ms Wolfe contended that there was no element of economic loss in the settlement figure (and that therefore the whole of the settlement amount should be disregarded). In the alternative, she argued that the portion of the settlement that was in respect of economic loss was so small that it would be harsh to treat 50% of the settlement amount as being the compensation portion.

### The law

The *Social Security Act 1991* (the Act) provides by s.17(3) that the compensation part of a lump sum compensation payment is to be 50% of the payment. The compensation part of a lump sum, in turn, is used to determine any lump sum preclusion period — that is, a period during which Department payments cannot be paid to the recipient of the lump sum (s.1165). Under s.1184(1) of the Act the whole or part of a compensation payment may be treated as having not been made if it is considered appropriate to do so in the special circumstances of the case.

### Discussion

The Tribunal accepted that Ms Wolfe was effectively unemployed at the time of her accident, and remained so for at least two years after the accident. The Tribunal noted that the formal claim for damages included claims for post acci-