January 1993 on a valid visitor's permit. As Weldemichael satisfied all the other requirements of s.623A(5) he was not required to serve the two-year waiting period.

Health care card

At the date of Weldemichael's claim, s.5BA of the *Health Insurance Act 1973* provided that a person who enters Australia after the commencement of the section, must serve a newly arrived residence waiting period of two years. Weldemichael entered Australia after the section commenced in 1997. He argued that he became a resident before that date and so was not subject to the waiting period. The AAT rejected this argument referring to s.7 of the Act, which defined Australian resident. Subsection 7(3) sets out the criteria the AAT can refer to when deciding whether a person is an Australian resident. The AAT concluded that Weldemichael's ties with Australia before 1997 had been of a *temporary and changing kind* (Reasons, para. 31). It was only after Weldemichael returned to Australia in 1999 that he demonstrated an intention to live in Australia permanently. He was not a refugee or exempt resident so he had to serve the two-year waiting period before being qualified for a health care card.

Formal decision

The AAT set aside the decision in relation to Weldemichael's claim for newstart allowance and decided that he did not have to serve a two-year waiting period. However, the AAT affirmed the decision that Weldemichael had to serve a waiting period in relation to his claim for a low income health care card.

[C.H.]

Age pension: portability; rate of payment

THI NHU THAI and SECRETARY TO THE DFaCS (No. 2002/322)

Decided: 8 May 2002 by J. D. Campbell.

Background

The applicant was granted age pension from 20 March 1997. The applicant had arrived in Australia on 25 July 1990 and left Australia for a visit to Vietnam on 3 September 2000.

The applicant advised Centrelink of her intention to travel and a s.1219 certificate was issued.

Whilst in Vietnam, the applicant was hospitalised because of an exacerbation of rheumatoid arthritis, diabetes and Parkinson's disease. The applicant's son advised Centrelink on 26 February 2001 that his mother planned to remain in Vietnam as her health had deteriorated and she was immobile.

The Department decided on 9 August 2001 that the applicant's age pension could not be extended for 12 months past the date of departure from Australia. This decision was affirmed by an authorised review officer and the Social Security Appeals Tribunal.

The issue

The issue in this appeal was whether age pension could continue to be paid beyond the period of 12 months from the date of departure from Australia.

The law

The provisions of the Act considered by the AAT were those relevant to portability.

These included:

- Section 1217 which deals with the meaning of 'maximum portability period';
- Section 1218 C. which deals with extension of a person's portability period;
- Various transitional provisions contained within schedule 1A of the Act in clauses 128 and 130; and
- Sections 1220A and B and 1221 A1, B1 and C1 which deal with rate calculation.

The legal submissions

The applicant's son submitted to the Tribunal that his mother intended to return to Australia when she left in September 2000, but because of deterioration in her health and her inability to travel she remained in Vietnam. These circumstances justified exercising discretion to continue to pay age pension beyond the period of 12 months from the date of departure.

The Department argued that the relevant portability provisions of the Act were amended and took effect from 20 September 2000 with transitional provisions dealing with departures prior to this date. Consequently age pension was portable for a period of 12 months. After this time the rate of payment was calculated by using a statutory formula which was based on a person's working life residence in Australia.

As the applicant arrived in Australia at the age of 61 her working life residence in Australia was nil and therefore the rate of pension payable to her after 12 months was nil.

Findings

The Tribunal accepted that the applicant's health had deteriorated whilst in Vietnam and this had affected her inability to return to Australia. However, the statutory framework was such that although the applicant's maximum portability period was unlimited as per s.1217 of the Act, after a period of 12 months the rate of pension must be calculated under s.1221 of the Act.

This subsection set out a formula based on, amongst other things, the person's working life residence. The applicant's working life residence in Australia was nil as she did not arrive in Australia until 1990. Applying the rate calculator therefore gave a rate of nil. Consequently under s.44(2) of the Act age pension was not payable.

The Tribunal also noted that s.1218C allows a discretion to extend a person's portability period based on a list of events, however, given that age pension has an unlimited portability period, this discretion was of no effect.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Age pension: portability; short residence

YEOMANS and SECRETARY TO THE DFaCS (No. 2002/346)

Decided: 15 May 2002 by N. Isenberg.

Background

The applicant left Australia in 1987 to live in United States near his wife's family. He and his wife subsequently separated, but he remained close to one of his brothers-in-law (Fortunato). Fortunato was diagnosed with cancer of the hip in 1994/5. The applicant took a significant role in providing care for him.

The applicant returned to Australia in 20 April 1995, believing that Fortunato

had made a recovery. The applicant claimed age pension the following day and, on hearing that Fortunato was seriously ill, left Australia on 28 April 1995.

On 11 January 1996 his pension was cancelled by the Department on the grounds that the circumstances surrounding his departure from Australia within a 12-month period could have been reasonably foreseen. This decision was affirmed by the Social Security Appeals Tribunal.

The issue

The issue in this appeal was whether the applicant's pension was portable. To answer this it was necessary to decide whether the applicant's reasons for leaving Australia within 12 months from his return on 20 April 1995 were 'reasonably foreseen' by him.

The law

Section 1220 of the *Social Security Act* states that age pension is not portable where a claim is based on a short period of residence. Subsection (3) gives a discretion to the Department to grant portability if satisfied that:

> ... the person's reasons for leaving Australia before the end of the 12 month period arose from circumstances that could not be reasonably foreseen when the person returned to or arrived in Australia.

This section was amended on 20 September 2000. Amongst other changes, s.1220(3) was repealed.

The evidence

The applicant gave evidence of his close relationship with Fortunato and his role in caring for Fortunato. He told the Tribunal that in early April 1995 Fortunato was recovering from his cancer and that he believed that he was cured. At this time he was feeling homesick and decided to return to Australia to live permanently.

On arrival in Australia he stayed with friends and looked for properties in the area. He then received a phone call advising that Fortunato was seriously ill and that the doctors 'had missed cancer in one lung and a few other places in the chest cavity'. The applicant immediately returned to the United States and found a dramatic change in Fortunato's health. Fortunato died shortly after this.

He told the Tribunal that it was necessary for him to return as Fortunato's other relatives were working and could not provide the necessary care.

The applicant said that he could not return to Australia after Fortunato's death because he was needed to provide moral support to the extended family.

The Department argued that, given the nature of the illness, it was reasonably foreseeable that Fortunato's condition would worsen. The Department referred to five previous cases where the circumstances that caused departure from Australia were reasonably foreseeable.

The Department also argued that the discretion allowed under s.1220(3) was repealed on 20 September 2000 and that the applicant had requested a review after the introduction of this new legislation. Consequently the Tribunal had no power to exercise the discretion under s.1220(3).

Findings

The Tribunal found that the test in relation to whether circumstances were reasonably foreseeable is a subjective, not an objective test. Therefore it was necessary to consider whether 'it was reasonably foreseeable to the applicant that he might have to leave within 12 months of his arrival in Australia.'

The Tribunal also referred to the case of Re Burnet and Director-General of Social Services (1982) 4 ALN N79b, where the Tribunal considered it necessary:

> ... to take into account such matters as the sufficiency or reasonableness of the reason claimed by the person concerned to be the reason for his leaving, or wishing to leave, Australia, in addition to whether the reason arose from circumstances that could not reasonably have been foreseen at the relevant time.

(Reasons, para. 47)

The Tribunal found that the deterioration in Fortunato's health was not reasonably foreseeable to the applicant. The Tribunal noted that the applicant was not medically trained and information about Fortunato's health was based on his own observation and comments from friends and professionals.

The Tribunal also considered whether the deterioration was such that it required the applicant's immediate return to the United States. The Tribunal found that there was no other evidence concerning deterioration other than that provided by the applicant.

In relation to the possibility of care being provided by other relatives, the Tribunal accepted that the applicant was the primary carer and therefore it was reasonable for him to return.

The Tribunal then turned to the specific wording of s.1220(3), noting that '... s.1220(3) provides that the Secretary may exercise the discretion. Merely finding that the circumstances were not reasonably foreseeable is not, of itself, sufficient.'

The Tribunal considered various cases that dealt with the exercise of the discretion. The criteria raised by these cases included:

- the length of previous residence in Australia of the applicant and of his or her family;
- whether the applicant is entitled to social security benefits in another country;
- the length of stay in Australia following the 'return' to Australia; and
- inaccurate advice to the applicant from the Department or its officers.

(Reasons, para. 66).

The Tribunal also referred to the case of *Vaitoudis and Director-General of Social Security* (1984) 6 ALN N343, where it stated the issue as:

> ... whether the Applicant has such a connection with Australia as would impose a duty on the Australian tax-payer to support him ...

(Reasons, para. 71)

Applying these principles, the Tribunal found the applicant had a long-standing history as a taxpayer and that he generally met the criteria referred to by the case law, therefore it was appropriate to exercise the discretion in his favour.

In conclusion, the Tribunal also decided that the legislation to be applied was the legislation relevant at the time of the applicant's application for pension, rather than the legislation as amended from 20 September 2000.

Formal decision

The AAT set aside the decision and substituted its own decision that the applicant was entitled to be paid age pension from 21 April 1995.

[R.P.]

Overpayment: special circumstances waiver and write off

STEVENS and SECRETARY TO THE DFaCS (No. 2002/101)

Decided: 22 January 2002 by E. Christie.

The issue

The issue before the Tribunal was whether the debts owed by Mr and Mrs Stevens should be waived in whole or in part, due to special circumstances, and whether the debts could be written off.