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 Amongst other changes, s.1220(3) was repealed.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.

Background

Mrs Stevens had been in receipt of disability support pension (DSP) and Mr Stevens of carer payment and DSP in the period December 1997 to May 2000. He received a weekly compensation payment from December 1997. Mrs Stevens was sent a letter by Centrelink in June 1997 requiring her to notify if her combined family income of $4367 was incorrect, whilst Mr Stevens was sent a similar letter in July 1997. Both were sent three further notification notices between January 1998 and April 1999 requiring each of them to notify Centrelink if the combined family income of $8736 was incorrect.

Mr Stevens had attended his Centrelink Office in December 1997 and again in January 1998, each time providing a statement from his insurer regarding the compensation payment, which was photocopied by the Centrelink staffer. He told the Tribunal that he found the Centrelink information requirements confusing, but believed that he and his wife were receiving their correct entitlements as he had provided the relevant information about the compensation payment to Centrelink.

He gave evidence that he and his wife received only Centrelink and insurance payments, and they had no financial reserves for unexpected problems or expenses. Mrs Stevens had ongoing serious medical conditions and Mr Stevens was her full-time carer. There was no dispute that an overpayment had occurred. Centrelink contended that there were no special circumstances in their situation sufficient to justify waiver of the debts, and that there was nothing 'exceptional' in their financial position. Centrelink further contended that Mr and Mrs Stevens had not responded to the later letters sent to them, and that the payments made to them could not have been received in 'good faith' as Mr Stevens was aware that his Centrelink payments would decrease as a result of the compensation being paid.

The law

In relation to the issue of waiver of debts, s.1237AAD of the *Social Security Act 1991* (the Act) provides for waiver of a debt where '... there are special circumstances (other than financial hardship alone) that make it desirable to waive ...' provided that the person did not 'knowingly' make a false statement or representation or 'knowingly' fail to comply with a provision of the Act.

The Tribunal considered the seminal case of *Beadle and Director-General of Social Security* (1984) 6 ALD 1 which held that to be 'special' circumstances must be unusual, uncommon or exceptional. The Tribunal concluded that Mr Stevens had provided details of the compensation payments to Centrelink, on two occasions in December 1997 and January 1998. The information provided was sufficient to enable Centrelink to correctly calculate their entitlements, and hence Mr and Mrs Stevens were entitled to rely on Centrelink to correctly calculate their entitlements, and did not knowingly make a false statement or representation nor 'knowingly' fail to comply with a provision of the Act. The Tribunal thus concluded that 'special circumstances' could be said to exist. In addition, the Tribunal noted the comments in *Secretary, Department of Social Security and McAvoy* (1996) 23 AAR 543 that:

> Citizens are entitled to act upon the advice given to them by representatives of government through its departments and agencies. Citizens are also entitled to have confidence in the advice that they are given by persons in authority and who represent government agencies ...

The Tribunal concluded that 'special circumstances' existed for Mr and Mrs Stevens from December 1997 until May 2000. However, as neither Mr nor Mrs Stevens made any enquiry as to whether their payments were correct when they received notification notices in August 1998 and November 1998 respectively, the Tribunal concluded that special circumstances could not be said to apply after these dates. Hence waiver of their respective debts was limited to the debts arising before these two dates.

Regarding write off of the balance of the debts, the Tribunal noted the provisions of s.1236(1A) of the Act that write off may occur '... only if ... (b) the debtor has no capacity to repay the debt ...'

The Tribunal noted the decision in *L and Secretary, Department of Social Security* (1995) 21 AAR 412, and the factors referred to in *Director General of Social Services v Hales* (1983) 47 ALR 281 as summarised in *Waller and Secretary, Department of Social Security* (1985) 8 ALD 26. The Tribunal concluded that the overpayments to Mr and Mrs Stevens arose through innocent mistake, that their financial position was not desperate but allowed no latitude to meet unexpected future expenditures, that the prospects of recovery were extremely limited, and that to recover the residual balance of overpayments would cause such hardship as to be contrary to the beneficial nature of the Act. The Tribunal therefore concluded that the residual overpayment amounts should be written off.

The decision

The Tribunal decided to set aside the decisions under review and in lieu thereof determined to waive recovery of the overpayments to Mr and Mrs Stevens for the period December 1997 to August 1998 and to November 1998 respectively, and to write off in respect of both Mr and Mrs Stevens the residual debts through to May 2000.

[P.A.S.]

Assets test: definition of homeowner; 'reasonable security of tenure'

KOCH and SECRETARY TO THE DFaCS
(No. 2002/407)

Decided: 29 May 2002 by D.J. Trowse.

Background

Koch's claim for newstart allowance was rejected on the basis that her and her husband's combined assets exceeded the assets limit as a partnered homeowner. Since their marriage in 1984, Koch, her husband and their children, had progressively occupied homes located on the pastoral property owned by a proprietary company. The current home was one they built to their specifications. Since about 1990 Koch and her husband had traded as a farming partnership. The partnership used the rural lands owned by the company and paid an annual rental of $30,000. Koch and her husband were shareholders in the company as was a trustee company. The shareholders and only directors of the trustee company were Koch and her husband. The beneficiaries of the trust were Koch's children and any remoter issue of her mother-in-law and the spouses, widowers and widows or any such children and remoter issue.

The issues

The issue was whether Koch was a homeowner. In particular did she have 'reasonable security of tenure' in the residence she and her family occupied and which was located on farming land held by a proprietary company?

The legislation

The relevant legislation is contained in ss.611(1) and (2), 612, 11(4) and 11(8) of the *Social Security Act 1991* (the