

concurrence of Mr Kang. The AAT considered the occupancy to have the hallmarks of a tenancy at will, however considered that was not sufficient to give Kang a right in the Philip Street house. Even if it did, Kang would not have reasonable security of tenure as Mr Kang had an overriding ability to remove Vameze and replace it as trustee. Even if Mr Kang had no intention to remove Kang, Kang could not objectively be said to have any degree of security of tenure. The AAT therefore concluded Kang was not a homeowner from 21 June 1999.

In connection with the loans, the AAT stated:

In matters such as this where a family is involved in a number of companies and in which sums of money are moved between companies, often being recorded as loans, there will often be an element of doubt as to the true nature of the transactions in question. On the information provided by the applicant to Centrelink, at least the loan shown as due by The Korean Club to her is the result of moneys she paid to that company out of her share of the proceeds of the sale of the Sydney home. On balance I find that the various amounts shown in the company's books as a loan by the applicant to The Korean Club and First Union are assets of the applicant for the relevant periods.

(Reasons, para. 55)

Kang also argued that the loans ought to be treated as unrealisable. The AAT was satisfied that whether or not a loan can be repaid by the debtor has no relevance to the assets test and only becomes relevant if a person applies for consideration under the asset hardship provisions. As Kang had not made such a request, the AAT noted it had no jurisdiction, and in any event, those provisions could apply no earlier than six months before an application was made which meant any such application could have no relevance to the debt period.

Finally, the AAT considered waiver, and in particular, s.1237AAD. Whilst noting Kang's health and her considerable caring responsibilities for her disabled son, the AAT was not satisfied special circumstances existed to justify waiver.

#### Formal decision

The AAT set aside the decision, directing a recalculation on the basis that Kang was a homeowner for the period 31 October 1996 to 29 July 1998 only and that the resulting debt be recovered.

[S.L.]

## Assets test: property occupied by disabled son; is this an unrealisable asset?

SALEVIC and SECRETARY TO  
THE DFaCS  
(No. 2004/217)

Decided: 2 March 2004 by N. Isenberg.

#### Background

Mr and Mrs Salevic were both receiving age pension when they left Australia to live in Croatia. At the time they owned a house which was valued at \$450,000. Their pensions were cancelled on application of the assets test.

#### The issue

The issue in this appeal is whether the house owned by the Salevics could be treated as an unrealisable asset for the purposes of the hardship provisions in s.1129 of the *Social Security Act 1991*.

#### The law

The Tribunal considered the hardship provisions contained in s.1129. One of the criteria in this section is that 'the person or the person's partner has an unrealisable asset'.

The Tribunal referred to s.11(13) as follows:

For the purposes of the application of this Act to a social security pension ... an asset of the person is also an unrealisable asset if: (a) the person could not reasonably be expected to sell or realise the asset; and (b) the person could not reasonably be expected to use the asset as a security for borrowing.

#### The evidence

The parties conceded that the valuation of \$450,000 was a fair assessment. The main point of contention was whether this asset could be exempted on the basis of the hardship provisions.

Mr Salevic told the Tribunal that he and his wife lived permanently in Croatia with their daughter. His son lived in the house owned by them and had been receiving disability support pension since 1998 for a psychological/psychiatric condition.

It was argued that the Salevics could not sell the property because there was nowhere for their son to go.

Evidence was provided by the Salevics' son that he did not pay rent to his parents and just paid rates. He had first lived at the house when it was

purchased in 1970. Since that time he had had a number of lengthy periods where he lived at other premises, including periods overseas. He told the Tribunal that on these occasions he sought to be independent and that was why he lived in other houses. He was recorded as having told Centrelink that he was living in the house for financial reasons. At the hearing he told the Tribunal that there were also health reasons. He conceded in questioning by the Department that he could live in a property close by.

#### Reasoning

The Tribunal accepted that the Salevics' son had a disability, namely his psychological/psychiatric condition. However, the Tribunal was not convinced that there were specific care or mobility requirements which necessitated him remaining in the Salevics' property. The Tribunal stated:

I do not find a nexus between his continued presence at the Croydon property and his 'independent living'. He manages his finances with occasional loans from Mr Horwick. He was able to manage his medication, and has determined its benefit and has assessed this against side effects. He has a friend who comes to assist him but there was no evidence that he could not manage without his friend's input. He agreed himself that he could live in appropriate alternative accommodation close to the house. At the hearing I found him, for the most part, to be articulate although he did exhibit some occasional minor distress. He managed the purchase of the phonecards during the course of the hearing without apparent difficulty.

(Reasons, para. 33)

Since it would not be unreasonable to expect the Salevics' son to find other accommodation, the Tribunal found that it was not unreasonable for Mr and Mrs Salevic to access funds they had invested in the property. The property was therefore not an unrealisable asset.

#### Formal decision

The AAT affirmed the decision under review.

[R.P.]