> relating to the imposition, assessment and collection of a tax upon incomes in force during that period.

The evidence before the Tribunal was that Mrs Nathanielsz and her husband had come to visit their children in Australia. When Mr Nathanielsz was offered a position in an Australian church, they applied for and were granted permanent residence. They then returned to Sri Lanka to tidy up their affairs, as they had not left there with the intention of settling in Australia. Their departure from Sri Lanka was then delayed by currency controls in that country.

The AAT observed that Nathanielsz had decided to make Australia her home before returning to Sri Lanka; and this return 'can be understood completely in the context of that decision'. There was 'an essential similarity' with *Danilatos* (1981) 3 *SSR* 29, where the AAT had decided that the applicant's home remained in Australia during her absence in Greece: Reasons, para. 41.

However, the AAT said, it was not necessary to decide whether Nathanielsz's home had remained in Australia, as s.20(1) put it, because she could be 'deemed' resident in Australia under s.20(2).

Section 20(2) imported s.6 of the *Income Tax Assessment Act* into the *Social Security Act*. Section 6 reads:

> 'resident' or 'resident of Australia' means—
> (a) a person, other than a company, who resides in Australia and includes a person—
> (i) whose domicile is in Australia, unless the Commissioner [of Taxation] is satisfied that his permanent place of abode is outside Australia.

The applicant, said the AAT, had acquired a domicile of choice in Australia by residing in Australia with the intention of continuing to reside there indefinitely:

> They had established a domicile of choice in Australia, and although they returned to Sri Lanka, their domicile of origin, they never ceased to have the intention of returning to Australia as their permanent home, and thus their domicile of origin did not revive to displace their domicile of choice.

(Reasons, para. 47)

There was no evidence that the Commissioner of Taxation had even considered the question of the applicant's 'place of abode [being] outside Australia'. Therefore, the applicant satisfied the test of residency in the *Income Tax Assessment Act* and so was 'resident in Australia' during her absence from 1976 to 1979.

Jurisdiction

Counsel for the DSS argued that there was no jurisdiction to hear the case: as there was no present entitlement to a pension, the applicant was only seeking an advisory opinion.

The jurisdiction of the AAT is defined, in s.25(1) of the *AAT Act* and s.15A(1) of the *Social Security Act*, as a power to review a 'decision'; and s.27(1) allows a 'person . . . whose interests are affected by the decision' to seek review.

The Tribunal discussed the basis of its jurisdiction at length and in particular the meaning of 'decision'. It concluded:

> The fact that the decision will not actually operate until December 1985 is not, in my view, significant. Mrs Nathanielsz must arrange her affairs, and conduct herself generally, on the basis of her actual and potential income as it is known to her . . . Thus her interests are affected, now, by the decision which she seeks to have reviewed and her application is accordingly an application made by 'a person whose interests are affected by a decision' in terms of sub-section 27(1) of the *Administrative Appeals Tribunal Act*.

(Reasons, para. 22)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that the applicant was, from 10 December 1976 to 6 March 1979 'resident in Australia' for the purposes of Part III of the *Social Security Act*.

Federal Court Decision

Widow's pension: 'residing in Australia'

KOON LIN HO v DIRECTOR-GENERAL OF SOCIAL SECURITY
Federal Court of Australia
Decided: 28 November 1983 by Fox J.

This was an appeal from the decision of the AAT in *Koon Lin Ho* (1983) 11 *SSR* 105, where the Tribunal had decided that the applicant was not qualified to receive a widow's pension on the basis that she was no 'residing permanently in Australia' as required by s.60(1) of the *Social Security Act*.

The facts

The applicant's husband had migrated to Australia in 1970, leaving his wife and daughters in China. Early in 1980, the applicant and her daughters were granted permanent resident status by the Australian government and they left China on 2 March 1980, to travel to Australia via Hong Kong. Her husband was killed in a car accident (in Australia) on 23 March 1980 and the applicant and her daughters arrived in Australia on 4 April 1980. She applied for a widow's pension in June 1980.

The legislation

Section 60(1) of the Act provides that a widow with the custody of a child is qualified to receive widow's pension if she is residing in, and is physically present in, Australia, when she lodges her claim and if:

> (d) In the opinion of the Director-General, she and her husband . . . were, on the occurrence of the event by reason of which she became a widow, residing permanently in Australia . . .

'Residing permanently': akin to home

Unlike the AAT, the Federal Court found a 'great variety of concepts concerning residence in the relevant sections' (ss.60-61). There appeared to be no coherent scheme contained in them. Thus the deeming provisions of s.61 did not apply directly to the concept of 'residing permanently' in s.60. (Section 61 extends the scope of the residence requirements by treating a person as resident, though absent from Australia, where the claimant's home remained in Australia or where a person was a resident for the purposes of the *Income Tax Assessment Act*.)

The Court concluded that 'residing permanently' in s.60 'means something akin to home; the place with which she had her family or domestic ties': Judgment, p.6.

Intention is relevant to 'residence', said the Court. However, Mrs Ho's intention to reside in Australia – clear as it was – would not be sufficient (by itself) to enable her to be treated as 'residing permanently' in Australia at the time of her husband's death. The Court added however:

> The significant additional factor to my mind is that her husband clearly had established a home in Australia, and that it was at the relevant time, also her home. His presence in Australia, and the existence of the family home here is sufficient to support a conclusion in her favour. She had abandoned her place of residence in China, and plainly acknowledged that her home was with her husband in Australia. This is not to say that a wife's residence is necessarily that of her husband. They plainly can reside in different places, by mutual arrangement, or otherwise. Whatever the nature of the arrangement which led to her remaining in China when her husband left, this had come to an end. Her intent to return to live with him was clear, it was mutually agreed that she should do so, and she had taken an unequivocal course to that end.

(Judgment, pp.7-8)

Mrs Ho was therefore residing permanently in Australia at the time of her husband's death.

Formal decision

The Federal Court allowed the appellant's appeal with costs and set aside the decision of the AAT, substituting a decision that the appellant is entitled to a widow's pension.