FEDERAL COURT OF AUSTRALIA

Charan v Secretary, Department of Social Services [2016] FCAFC 175

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| Appeal from: | *Charan v Secretary, Department of Social Services* [2016] FCA 486 |
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| File number: | NSD 834 of 2016 |
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| Judges: | **COLLIER, KATZMANN AND FARRELL JJ** |
|  |  |
| Date of judgment: | 13 December 2016 |
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| Catchwords: | **ADMINISTRATIVE LAW** – eligibility for age pension – New Zealand nationals – husband and wife – whether they had achieved “10 years qualifying Australian residence” – consideration of the *Agreement on Social Security between the Government of Australia and the Government of New Zealand* – residence requirement not satisfied – appeal dismissed |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1)  *Social Security Act 1991* (Cth) ss 7(2), 7(5), 23, 43, 94(1)  *Social Security (Administration) Act 1999* (Cth) ss 11, 29, cl 4 of Sch 2  *Social Security (International Agreements) Act 1999* (Cth) ss 3, 4, 6, Arts 1, 2, 5, 12 of Sch 3 |
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| Cases cited: | *Charan v Secretary, Department of Social Services* [2016] FCA 486  *Charan and Secretary, Department of Social Services* [2015] AATA 760  *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous* (2013) 213 FCR 532; [2013] FCAFC 75  *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous (No 2)* (2012) 131 ALR 450; [2012] FCA 1275 |
|  |  |
| Date of hearing: | 2 November 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 65 |
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| Counsel for the Appellants: | The appellants appeared in person |
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| Counsel for the Respondent: | Mr T Reilly |
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| Solicitor for the Respondent: | Mills Oakley Lawyers |

ORDERS

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|  | | NSD 834 of 2016 |
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| BETWEEN: | ANURADHA CHARAN  First Appellant  SURESH CHARAN  Second Appellant | |
| AND: | SECRETARY, DEPARTMENT OF SOCIAL SERVICES  Respondent | |

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| JUDGES: | COLLIER, KATZMANN AND FARRELL JJ |
| DATE OF ORDER: | 13 December 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the respondent’s costs as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. The appellants are married. Both hold New Zealand passports. They arrived in Australia on Special Category (subclass 444) visas in 2014. In October 2014, they applied for the age pension. The applications were rejected by Centrelink on the basis that they did not satisfy the criteria for the grant of that pension. Applications for review by an Authorised Review Officer, the Social Security Appeals Tribunal (SSAT), and the Administrative Appeals Tribunal (AAT) were all unsuccessful.
2. This is an appeal from the judgment in *Charan v Secretary, Department of Social Services* [2016] FCA 486 and orders made on 11 May 2016. The primary judge dismissed the appellants’ “appeal” from the AAT’s decision on a question of law under s 44(1) of the ***Administrative Appeals Tribunal Act*** *1975* (Cth): see *Charan and Secretary, Department of Social Services* *(Social services second review)* [2015] AATA 760.
3. The appeal turns on the manner in which a 10 year period of qualifying residence should be calculated having regard to the interaction of the ***Social Security Act*** *1991* (Cth), the *Social Security (****International Agreements****)* ***Act*** *1999* (Cth) and the ***Agreement*** *on Social Security between the Government of Australia and the Government of New Zealand* which is in Schedule 3 of the *International Agreements Act*.
4. For the reasons which follow the appeal should be dismissed with costs.

# Background

1. Before the AAT, the appellants claimed to be entitled to an age pension because they were Australian residents (as defined in article 5(1) of the *Agreement*), theyhad each turned 65 years old, and their combined period of residence in New Zealand and Australia was or would soon be 10 years — in the case of Mrs Charan, on 1 January 2015, and in the case of Mr Charan, on 30 June 2015.

## Summary of AAT’s decision

1. The AAT made the following findings.
2. The appellants were born in Fiji, Mrs Charan on 27 January 1946 and Mr Charan on 22 February 1943. On 1 January 2005, shortly before she turned 59 years old, Mrs Charan moved to New Zealand. Mr Charan joined her on 30 June 2005, when he was 62 years old. At age 68, on 14 February 2014, Mrs Charan relocated to Australia; Mr Charan joined her on 4 April 2014, then aged 71.
3. Considering the *Social Security Act* alone, the appellants do not satisfy s 43(1) as they did not have 10 years “qualifying Australian residence” within the meaning of s 7(5) of that Act nor are they “Australian residents” within the meaning of s 7(2) as they are not Australian citizens, holders of permanent visas or holders of protected SCV visas.
4. Section 6 of the *International Agreements Act* operates to modify the operation of the *Social Security* *Act* to enable people like the appellants who would not otherwise qualify for social security benefits to do so where they are covered by certain international agreements. Where a provision of an international agreement is in force and affects provisions of the *Social Security Act*, the provisions of the agreement override the provisions of the Act: see *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous* (2013) 213 FCR 532; [2013] FCAFC 75 (***Mahrous* (FC)**) at [39].
5. Article 5(1) operates to extend the definition of “Australian resident” in the *Social Security Act* for the purposes of the *Agreement* to a person who does not hold a permanent visa but is “lawfully residing in Australia”. Article 5(1) does not deem all New Zealand residents to be Australian residents nor does it render all periods of residence in New Zealand as periods of residence in Australia: it clearly states that the extended definition of “Australian resident” applies to New Zealand citizens who are “*lawfully residing in Australia*”.
6. The appellants accepted that they must have “10 years qualifying Australian residence” to qualify for an age pension. The fact that they are currently “Australian residents” within the extended definition is not determinative of whether they satisfied it previously. To do that, they would have to satisfy for the required period the factors indicative of Australian residence in article 5(1). They resided in New Zealand from 2005 to 2014, living and working there permanently. They were not Australian residents before 2014.
7. The only period of residence in New Zealand which article 12(1) of the *Agreement* permits to be counted towards satisfying the “10 years qualifying Australian residence” requirement is “working age residence”. The appellants’ period of “residence in Australia” plus “working age residence” (between the ages of 20 and 64) in New Zealand (terms defined in articles 5(1) and 5(5) of the *Agreement*) was not in aggregate at least 10 years (120 months). At the date of their claim, Mrs Charan had approximately 73 months of working age residence in New Zealand and seven months “residence in Australia”, amounting to 80 of the necessary 120 months. Mr Charan had 32 months working age residence in New Zealand and five months of “residence in Australia”, giving him 37 of the necessary 120 months. They therefore did not qualify for an age pension.
8. When they made their applications in October 2014, the appellants sought payment of the age pension from a date in the future. Mrs Charan sought payment of the pension from 1 January 2015. In submissions filed with the AAT, Mr Charan sought to change the intended date of his application for the age pension from 1 January 2015 to 1 July 2015, being the date on which he would complete an aggregate of 10 years residence in New Zealand and Australia. Under clause 4(1)(c) of Schedule 2 of the *Social Security (****Administration****)* ***Act*** *1999* (Cth) a claim may only be made if, within the following 13 weeks, the claimant would have qualified to receive the payment. Therefore, even if Mr Charan’s interpretation of the *Agreement* had been accepted, on any view he was not qualified to claim the age pension because he would not have been entitled to a payment until 1 July 2015, approximately nine months after he lodged his application.

## Decision of primary judge

1. At [32]-[35] of his reasons, the primary judge summarised his decision as follows:
2. The grounds of appeal from the decision of the AAT formulated by the appellants did not identify any “question of law” with sufficient precision to satisfy s 44(1) of the *Administrative Appeals Tribunal Act*. Nevertheless a properly drafted notice of appeal could well have identified the questions which they sought to have resolved.
3. Regardless of how the questions may have been formulated, the arguments advanced by the appellants should be rejected. The AAT did not err in reaching its conclusions or in its construction and application of articles 5 and 12 of the *Agreement* and it did not fail to consider the claims made by Mr and Mrs Charan.
4. Although the question did need not be resolved, it seemed to follow that Mr Charan did not qualify for the age pension on 1 July 2015.
5. The primary judge dismissed the “appeal” with costs.

# Legislative Framework

## Social Security Act 1991 (Cth)

1. To qualify for an age pension a person must satisfy s 43 of the Social Security Act. Section 43 relevantly provides:

**Qualification for age pension**

(1) A person is qualified for an age pension if the person has reached pension age and any of the following applies:

(a) the person has 10 years qualifying Australian residence;

(b) the person has a qualifying residence exemption for an age pension;

…

(3) Subsection (1) has effect subject to subsection (3) of the *Social Security (International Agreements) Act 1999*.

1. A “qualifying residence exemption” is defined in s 7(6). It applies to a person who resides in Australia and who is or was a refugee and is therefore not presently relevant.
2. Section 7(2) defines the expression “*Australian resident*” as follows:

**An Australian resident is a person who:**

(a) resides in Australia; and

(b) is one of the following:

(i) an Australian citizen;

(ii) the holder of a permanent visa;

(iii) a special category visa holder who is a protected SCV holder.

1. It is common ground that the appellants are not Australian citizens, holders of permanent visas or protected SCV holders.
2. Section 7(5) further provides:

A person has 10 years ***qualifying Australian residence*** if and only if:

(a) the person has, at any time, been an Australian resident for a continuous period of not less than 10 years; or

(b) the person has been an Australian resident during more than one period and:

(i) at least one of those periods is 5 years or more; and

(ii) the aggregate of those periods exceeds 10 years.

1. Section 23 is the dictionary for the *Social Security Act*. “Social security law” is defined in s 23(1) by reference to subsections (17) and (18) which provide:

(17) A reference in this Act to the social security law is a reference to this Act, the Administration Act and any other Act that is expressed to form part of the social security law.

(18) A reference in this Act to a provision of the social security law is a reference to a provision of this Act, the Administration Act or any other Act that is expressed to form part of the social security law.

## Social Security (International Agreements) Act 1999 (Cth)

1. Section 4 provides that the *International Agreements Act* “forms part of the social security law”.
2. Section 3 provides:

**Interpretation**

1. Unless a contrary intention appears, an expression that is used in the *Social Security Act 1991* has the same meaning, when used in this Act, as in the *Social Security Act 1991*.
2. A reference in this Act (other than the reference in section 4) to the social security law is a reference to this Act, the *Social Security Act 1991* and any other Act that is expressed to form part of the social security law.
3. A reference in this Act to a provision of the social security law is a reference to a provision of this Act, the *Social Security Act 1991* or any other Act that is expressed to form part of the social security law.
4. Section 6 provides:

**Overriding of social security law by scheduled international social security agreements**

(1) The provisions of a scheduled international social security agreement have effect despite anything in the social security law.

(2) Subsection (1) applies to a provision of an agreement only in so far as the provision is in force and affects the operation of the social security law.

(3) If:

(a) immediately before he or she reaches pension age, a person is receiving a social security payment (other than age pension) solely because of the operation of a scheduled international social security agreement; and

(b) on reaching pension age, the person becomes qualified for age pension because of the operation of paragraph 43(1)(c) of the Social Security Act 1991;

the age pension is taken to be payable to the person under the agreement referred to in paragraph (a).

## Agreement on Social Security between the Government of Australia and the Government of New Zealand

1. Article 1 of the Agreement relevantly provides that, unless the context otherwise requires:

(a) “Australian resident” has the meaning given to it under Article 5;

…

(j) “New Zealand resident” has the meaning given to it under Article 5;

…

(m) “social security law”, in relation to a Party, means the laws of that Party specified in Article 2;

…

1. Article 2 relevantly provides:

**Legislative scope**

1. Except as provided under paragraph 2, this Agreement shall apply to the following laws, as amended at the date of signature of this Agreement, and to any legislation that subsequently amends, supplements, consolidates or replaces them:

(a) in relation to Australia: the Acts forming the social security law in so far as those Acts provide for, apply to or affect the following benefits:

(i) age pension;

(ii) disability support pension;

(iii) carer payment in respect of the partner of a person who is in receipt of a disability support pension; and

…

1. Article 5 provides:

**Residence Definitions**

1. "Australian resident" has the meaning given to that term in the social security law of Australia but for the purposes of the Agreement also includes a New Zealand citizen who is not the holder of an Australian permanent visa but is lawfully residing in Australia. In deciding whether a person is residing in Australia, regard must be had to the following factors:

(a) the nature of the accommodation used by the person in Australia;

(b) the nature and extent of the family relationships the person has in Australia;

(c) the nature and extent of the person's employment, business or financial ties with Australia;

(d) the nature and extent of the person's assets located in Australia;

(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;

and "residence in Australia" has a corresponding meaning.

2. "New Zealand resident" means, in relation to New Zealand, a person who has or had New Zealand as their principal place of residence except where that person was unlawfully resident or present in New Zealand or lawfully resident or present in New Zealand only by virtue of:

(a) a visitor's permit;

(b) a temporary work permit; or

(c) a permit to be in New Zealand for the purposes of study at a New Zealand school or university or other tertiary educational establishment;

and "residence in New Zealand" has a corresponding meaning.

3. "permanent resident" in relation to Australia means a person who is a citizen of Australia or who holds a permanent visa under the *Migration Act 1958* of Australia.

4. "third country residence" means a period of residence when a person was not either an Australian resident or a New Zealand resident.

5. "working age residence" in relation to a person means a period of residence between the ages of 20 and 64 years inclusive (being a maximum of 45 years) but does not include any period deemed pursuant to Article 8 or Article 12 to be a period in which that person was an Australian resident or a New Zealand resident.

1. Article 12 of the Agreement (as amended by agreement between the Governments of Australia and New Zealand in 2001) provides as follows:

**Totalisation for Australia**

1. Where a person to whom this Agreement applies has claimed an Australian benefit under this Agreement and has accumulated:

(a) a period as an Australian resident that is less than the period required to qualify that person, on that ground, under the social security law of Australia for a benefit;

(b) a period of working age residence in Australia equal to or greater than the period identified in accordance with paragraph 3; and

(c) a period of working age residence in New Zealand.

then:

That period of working age residence in New Zealand shall be deemed to be a period in which that person was an Australian resident only for the purposes of meeting any minimum qualifying periods for that benefit set out in the social security law of Australia.

2. Where a person’s period of working age residence in Australia and a period of working age residence in New Zealand coincide, the period of coincidence shall be taken into account once only by Australia for the purposes of this Article as a period as an Australian resident.

3. The minimum period of Australian working age residence to be taken into account for the purposes of paragraph 1(b) shall be as follows:

(a) for the purposes of an Australian benefit payable to a person residing outside Australia, the minimum period shall be one year of which at least 6 months must be continuous; but

(b) for the purposes of an Australian benefit payable to an Australian resident, there will be no minimum period.

4. No person shall be entitled to claim a disability support pension under this Agreement unless he or she has accumulated an aggregate of more than 10 years of residence in Australia and/or New Zealand.

5. A claimant for an age pension must be at least 65 years of age to be able to obtain the benefit of this Article.

# Appeal to the Full Court

1. On 1 June 2016, the appellants filed a notice of appeal which set out three grounds. They also filed a supporting affidavit sworn by Mr Charan. On 22 June 2016, however, they filed an amended notice of appeal ostensibly containing 13 grounds. The 13th simply referred to an attached copy of Flick J’s judgment. The 12 grounds are (as written):

1. That Flick J had erred in law in failing to take into account that the Appellants had claimed age pension under Article 12(5) of the Social Security (International Agreements) Act 1999 in interaction with the Social Security Act 1991, they had satisfied residency requirement under totalisation for Australia under Article 12(1) of the agreement in combining or totalizing periods of residence in Australia and New Zealand in satisfying 10 years of qualifying residence as evident in paragraph 17 of the decision of Flick J by virtue of s.6 of the International Agreement Act under Article 12(1) of the agreement, read with Article 5(1) and Article 12(5) effectively overriding s. 43(1)(7)(5) of the Social Security Act 1991. **Re *Secretary, Department of Families, Housing, Community and Indigenous Affairs v Mahrous [2012) FCA 1275, per Logan J at paragraph 35 and 37,*** and the decision ***of the Full Court of the Federal Court [2013) FCAFC 75*** *applied at paragraphs 59 and 63.*

2. That Flick J had erred in law holding that Mr and Mrs Charan having not been resident for qualifying period of 10 years and did not have a qualifying residence exemption for age pension (para. 18) could not satisfy s.43 of the Social Security Act; is contrary to the totalisation for Australia under Article 12(1) of the Social Security (International Agreements) Act 1999 allowing accumulation of 10 years of residence in Australia and New Zealand; is contrary to his finding in paragraph 17 of his decision that the Administrative Appeals Tribunal had accepted that his Table correctly set forth the period of residence in Australia and New Zealand for Mr and Mrs Charan, when figures in the Table add up to show ten years of residence each respectively.

3. That Flick J had erred in law in failing to take account that count of residence for age pension over the age of 65 years is not restricted by the language of Article 12(5) of the Agreement, but closes by an application for age pension, such as for Mrs Charan on 1 January 2015 and Mr Charan on 1 July 2015.

4. That Flick J had erred in law in misinterpreting Article 5(1) upholding decision of the Tribunal that the Appellants were not Australian residents before they moved to Australia in 2014 (para. 23) when meaning of Australian resident under Article 5(1) only applies to a New Zealand citizen residing in Australia (not in New Zealand).

5. That Flick J had erred in law in failing to take into account that the requirement for minimum working age residence under Article 12(3) of the Agreement has no effect on the Appellants because of amendment affected under Note 6 of the Part B of the Agreement imposing no minimum working age residence under Article 12(3)(b) for the purpose of an Australian benefit payable to Australian resident.

6. That Flick J had erred in law in holding that the Appellants could not satisfy count of residence in Article 12(1)(c) [para.29] contrary to the Appellants evidence that they were included in their residence from **1.1.2005** until Mrs Charan’s 65th birth date on **27.02.2011, totaling 6 years and 1 month,** and from Mr Charan’s entry in New Zealand on **30.6.2005** to his 65th birth date on **22.2.2008**, totaling to **2 years and 6 months, was** prohibited to counted them again under Article 12(2) of the Agreement.

7. That Flick J had erred in law in failing to take account that the language of Article 12(5) of the Agreement poses no restriction to count residence either before or after the age of 65 years for the claim of age pension under the Agreement.

8. That Centrelink (*Department Human Resrouces*), Authorised Review Officer, SSAT, AAT and Justice Flick had failed to justify why the Appellants could not count residence after their 65th birth dates (para.28) [27.1.2011 for Mrs Charan and 22.2.2008 for Mr Charan] when failing to justify is construed to an improper exercise of a power under ss 5 and 6 of the Administrative Decision (Judicial Review) Act 1977 when there is no evidence or other material to justify the making of the decision particularly when Article 12(5) of the Agreement does not include any reference to working age residence restriction.

9. That Flick J had erred in law in failing to consider Mr Charan’s joint application was under Article 13(4) for age pension with declaration that if his application was not approved he would reapply thereafter on 1 July 2015 on meeting 10 years of qualifying residence.

10. Instead the SSAT had erred in law in wrongly holding that any time after 22 February 2008 for Mr Charan and 26 January 2011 for Mrs Charan cannot be deemed to be a period in which they were Australian residents for the purposes of “meeting the minimum qualifying period of residence” for the age pension contrary to s. 7(5)(a) states that a person has, at **any time** been an Australian resident for continuous period of not less than 10 years qualify age pension.

11. That the Tribunal and Flick J had erred in law in failing to consider Mr Charan’s application for extension of time for age pension by virtue of section 6 of the scheduled international social security agreement applied on 6 July 2015 while both his application under Article 13(4) of the agreement and his appeal were alive beside the Tribunal asked the Secretary to file contentions 4 months after the time had expired.

12. That the Appellants further rely on the grounds set out in the affidavit of Mr Charan filed on 1st June 2016.

1. On 4 August 2016, the appellants filed an interlocutory application seeking leave to include the affidavit of Mr Charan filed on 1 June 2016 “*as grounds (12) and in support of appeal be included as Notice of Appeal in the appeal book, and/or in alternative this application be put before the full Court*”. Leave was granted. That affidavit covered much the same ground as that covered in the amended notice of appeal and written submissions filed by the appellants on 29 September 2016 and 24 October 2016. Of particular note are two paragraphs of Mr Charan’s 1 June 2016 affidavit which state (as written):

7. On hearing of appeal on 16 March 2016 I had answered issues raised by Justice Flick before submitting on residential status. I was still submitting on s.7(5) of the Social Security Act 1991 when I was stopped by his Honour to file a written submission.

8. I did file my submission on 22 March 2016 but it appears that his Honour had failed to consider my submissions. A copy of the submission dated 22 March is exhibited marked AS4 pages 25-52.

1. The appellants appeared at the hearing without legal representation. Mr Charan was given leave to rely on a document titled “Appellants’ final oral submissions on appeal” which he tendered at the hearing, on the basis that he did not intend to make oral submissions. Nonetheless, Mr Charan did make some oral submissions, which we also took into account.

# Appellants’ Submissions

1. The appellants’ submissions are somewhat prolix and repetitive. In substance, they argue that, as they have each reached the “pensionable age” of 65, they are entitled to claim an age pension under article 12(5). They say it is “outside working age limitation”, and that is logical; people between ages 20 and 64 should not be able to claim an age pension, they should be working and earning a wage. They claim that the definition of “working age residence” in article 5(5) does not affect pensionable age because of the express terms of article 12(5) which, they contend, imposes no restriction on the period of residence after the entitlement to make the claim has been established by reaching the age of 65. They say that another reason why no period of working age residence is required is because it would make no sense in light of article 12(3)(b).
2. The appellants rely on the highlighted parts of *Mahrous* (FC) at [48] and [51] (appellants’ emphasis):

48 **We are fortified in this conclusion by two further matters. First, like Art 12(4), Art 12(5) is similarly directed to one class of benefit (the age pension). Secondly, by virtue of Art 5(5), the working age residence provisions of Arts 12(1) to (3) do not in terms apply to a person under 20 years of age.** Under the social security law of Australia, a person need only be 16 to qualify for a disability support pension: see *Social Security Act*, s 94(1)(d). Article 12(1) to (3) would not therefore apply to benefit any claimant for a disability support pension aged 16 and less than 20. There is nothing in the Agreement that would justify an inference that persons in this younger class were intended to be disadvantaged, as the Secretary’s argument would have it. Such an outcome is also inconsistent with the preamble to the Agreement stating that the State parties made the Agreement to “enhance the equitable access by people covered by this agreement to specified social security benefits provided for under the laws of both countries”. A disability support pension is a specified social security benefit: see Art 2(1)(a)(ii).

…

51 For the following reasons, we consider that, as Senior Counsel for the respondent argued, Art 12(4) of the Agreement *both describes* the category of persons who are “entitled to claim a disability support pension” *and identifies* those who would satisfy the residence qualification for such a benefit once a claim can be made. **Put another way, we would construe Art 12(4) to provide that, if a person “has accumulated an aggregate of more than 10 years of residence in Australia and/or New Zealand”, then that person can not only claim a disability support pension but has also satisfied the residence criterion for that pension.** This interpretation is also, we note, further consistent with the language and assumptions in other parts of the Agreement. Article 11, for example, expressly contemplates that a person could *qualify* for a benefit under the social security law *or* the Agreement. **The result is that, by virtue of s 6 of the International Agreements Act, Art 12(4), read with certain other Articles (see [57]–[64] below), overrides** s 94(1)(e)(ii) of the *Social Security Act*. As noted already, ss 11 and 29 of the Administration Act are, in consequence, also affected by Art 12(4) of the Agreement.

1. They also rely on the highlighted parts of Secretary, *Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous (No 2)* (2012) 131 ALR 450; [2012] FCA 1275 (**Mahrous (No 2)**)per Logan J at [24] and [35]-[37]:

24 Whilst I respectfully differ from the tribunal, for the reasons just given, as to the approach to be taken to construction, it does not necessarily follow from this that the tribunal’s decision, and the construction it came to adopt, is in error. The tribunal stated, (at [34]), and by reference to a submission which the Secretary had made:

I accept that clauses 1 to 3 of article 12 can operate as restriction in clause 4. However, to argue it is not applicable to Mr Mahrous because he is 16 years old seem to me to unsustainable for a number of reasons. Firstly, the heading of article 12 is “**Totalisation in Australia”. That is the subject matter which is the purpose of article 12 (working age residence) is merely one issue which provides a specific formula for calculating working age residence if relevant. Here it is not relevant to the applicant, Mr Mahrous. Secondly, clause 4, dealing with DSP — Disability Support Pension, and clause 5, Age Pension, are given special treatment and special restrictions also, but those restrictions do not include any reference to “working age residence”**.

…

35 **Recalling the recital and the “legislative scope” of the agreement is of assistance in the construction of Art 12. That is because Art 12(1), is directed to an “Australian benefit,” not to one type of benefit alone. That is in contrast to Art 12(4) and (5) Art 12, para 4 and para 5, which are specifically directed to Disability Support Pension and Age Pension respectively.** Further, the language of Art 12, para 2 and para 3, is such that, either by necessary implication from the language employed (Art 12(2)) or expressly (Art 12(3)) they qualify Art 12(1). That is not so in respect of either Art 12(4), or Art 12(5). Each, as I have said, **is directed to particular types of benefit rather than just to the generic, “Australian benefit”.**

36 Yet further and as the tribunal appreciated, **Art 12 is directed to the general subject of, “totalisation for Australia,” and forms part of provisions in Pt E of the international agreement expressly relating to Australian benefits**. The use of the word “totalisation” is unusual according to Australian idiom. It is not a word in general use, in my experience, but it is not one without meaning. That meaning, as found in the *Oxford Dictionary* (online edition), is:

… the action or process of totalising or the condition of being totalised, calculation of the total.

As **found in the Macquarie Dictionary, 5th ed, p 1739**, **it is** a noun which bears a meaning **derived from the verb “totalise,” defined there to mean:**

… to make total, combine into a total

37 **Article 12 to me therefore, when read in the context of the international agreement is an article directed to how, in respect of particular benefits, periods of Australian or New Zealand residence are to be combined “or totalised” or exceptionally, in the case of the Age Pension, how an overriding age qualification is imposed**. In other words, when, as the International Agreements Act requires, one reads the terms of that Act, including its incorporated international agreement, with the Social Security Act where there is, in the case of, materially, a disability support pension, a need to look to a period of Australian residence Art 12(4), provides an answer in respect of persons who have both Australian and New Zealand residence.

1. The appellants also submit that they satisfy article 12(1)(a) because of the definition of “Australian resident” in article 5(1) which, they claim, is wider than the definition of “Australian resident” in s 7(2) of the *Social Security Act,* and article 5(1) overrides s 7(2) because of s 6 of the *International Agreements Act*. The appellants say that, because they are lawfully in Australia, they are “Australian residents” and their period of residence in both Australia and New Zealand must be taken into account under “totalisation” as residence in Australia. In their written submissions before Flick J at [7.5], they explained (as written):

The Applicants contend that Article 12(1)(a) clearly requires:

(a) Working age residence under Article 12(1)(c) of the Agreement can only be considered if the period of Australian residence is less than period required to qualify under Article 12(1)(a);

(b) Article 12(1)(a) does not define or specify period of Australian residents required to qualify; and;

(c) Qualification required for age pension under 12(1)(a) is defined under s. 7(5) of the Social Security Act 1991 which required 10 years of Australian residence “***any time***”;

(d) To qualify for age pension under Article 12(1)(a) s.6 of International Agreement Act override s.7(5) to include New Zealand residents as part of the law of Australia. Working age residence can only be applied if there was any discrepancy under article 12(1)(a) of the Agreement.

The Applicants had met the required period to qualify.

But the Tribunal had failed to consider whether anyone of those applies.

1. For this submission they rely on *Mahrous* (No 2) at [24] (excerpted above) and the highlighted parts of *Mahrous* (FC) at [45(3)], [57], [59] and [63]:

45(3) Other provisions of the Agreement expressly identify the circumstances in which a period of residence in one State party may be included in the calculation of residence in another State party, or specifically vary the requirements for the acquisition of resident status. For example, Art 12(1) to (3) specifically provide for circumstances in which a “period of working age residence in New Zealand shall be deemed to be a period in which that person was an Australian resident … for the purposes of meeting any minimum qualifying periods for [a] benefit set out in the social security law of Australia”. **Another example is Art 5(1), which provides for an extended meaning of “Australian resident” beyond that in s 7(2) of the *Social Security Act*, with the effect that the expression not only has the meaning given by the social security law of Australia “but for the purposes of the Agreement also includes a New Zealand citizen who is not the holder of an Australian permanent visa but is lawfully residing in Australia”, having regard to six enumerated factors. That is, for the purposes of the Agreement, there is no need to fall within s 7(2)(b) of the Social Security Act.**

…

57 We turn first to the text of Art 12(4) and to related articles. Article 12(4) provides “[n]o person shall be entitled to claim a disability support pension under this Agreement unless” he or she satisfies the residence criterion stipulated in it. Accordingly, if he or she satisfies that criterion because he or she has “accumulated an aggregate of more than 10 years of residence in Australia and/or New Zealand”, then he or she is, by virtue of Art 12(4), “entitled to claim a disability support pension under this Agreement”. **This residence criterion refers to a person who has accumulated a period of 10 years residence in either Australia or in New Zealand or an aggregate of more than 10 years derived from a combination of residence in Australia and residence in New Zealand. This is signified by the word “aggregate” and the words “and/or”. Our preferred construction also permits the provision to fall comfortably within the description “Totalisation for Australia”, which is the heading borne by the whole of Art 12.**

…

59 Whilst the use of the word “unless” would in some other contexts indicate a limitation, in the case of Art 12(4), we consider that it does no more than set out the boundaries of, or limit, the extent to which s 94(1)(e)(ii) is “overridden”. **The effect of Art 12(4) is that, where a person has “accumulated an aggregate of more than 10 years residence in Australia and/or New Zealand” in the sense discussed above, he or she is “entitled to claim a disability support pension”. To say a person is entitled to claim a benefit would ordinarily and naturally mean that that person has acquired some entitlement to the benefit, as opposed to having acquired merely a right to claim, in the sense of “request”, the benefit. Indeed, reference to the *Macquarie Dictionary* on-line and in print (Macquarie, 2008) p 317 indicates that this is in fact the ordinary and natural meaning of the expression “entitled to claim”. Thus, this Dictionary gives the verb “to claim” the primarily meaning of “to demand by or as by virtue of a right; *demand as a right or as due*” (emphasis added).** [Emphasis in judgment]

…

63 In conformity with Art 31 of the Vienna Convention, Art 12(4) should be construed so far as appropriate (having regard to the text and other contextual factors) in conformity with the preamble, “to enhance the equitable access by people” covered by the Agreement to disability support pensions. We have already referred to other provisions that are clearly designed to enhance this “equitable access”. Thus, for example, **Art 5(1) broadens the definition of “Australian resident” for the purposes of the Agreement. Other provisions enable periods of residence in both countries to be combined, with the effect that the total period of residence is deemed to be residence in the country in which the benefit is sought**: see Art 12(1)–(3). If Art 12(4) is construed in the manner we have indicated (see [51] above), then Art 12(4) will enhance the equitable access to disability support pensions, as the preamble contemplates, because Art 12(4) will ensure that, providing Art 2(2)(c) is satisfied, **whether a person’s residence was in Australia or in New Zealand is immaterial: all that will matter is that that person has accumulated an aggregate of more than 10 years residence, whether in Australia, in New Zealand or in both countries**.

1. The appellants contend that, by concluding that the appellants could not satisfy s 43 of the *Social Security* *Act*, Flick J failed to consider that their claims arose under the *International Agreements Act*. They also complain that Flick J did not afford them a fair hearing because he did not permit Mr Charan to continue with his oral submissions and he did not consider their written submissions dated 22 March 2016 because he did not consider Mr Mahrous’s position in *Mahrous* (FC).

# Consideration

1. The following matters are uncontentious.
2. Neither of the appellants is eligible to apply for an age pension “directly” under Australian domestic law because they fail to meet the qualification criteria in s 43(1)(a) or (b) of the *Social Security Act* as they do not have “10 years qualifying Australian residence” or “a qualifying residence exemption for an age pension”. This is because, although they have resided in Australia lawfully since 2014 and have reached pensionable age, they are not Australian citizens, permanent visa holders or protected SCV holders, so they do not meet the definition of “*Australian resident*” in s 7(2)(b) of the *Social Security Act* and therefore fail to meet the definition of 10 years of “*qualifying Australian residence*” in s 7(5)*.* Neither is a refugee or a former refugee, so as to meet the definition of “*qualifying residence exemption*” in s 7(6).
3. The appellants’ eligibility to apply for an age pension is to be determined having regard to the s 6 of the *International Agreements Act* and the *Agreement*.
4. The *Agreement* has effect pursuant to s 6(1) of the *International Agreements Act* as discussed in *Mahrous* (FC) at [39]:

Section 6 of the International Agreements Act provides that the provisions of scheduled agreements, such as the Agreement with which this appeal is concerned, “have effect despite anything in the social security law”, although “only in so far as the provision is in force and affects the operation of the social security law”. As already noted, the term “social security law” includes the *Social Security Act* and the Administration Act. Hence, by virtue of s 6 of the International Agreements Act, where the provisions of the agreement are in force and affect the provisions of the *Social Security Act* or the Administration Act (or, indeed, any other part of the social security law), the provisions of the agreement override the provisions of those enactments. The effect of s 6 of the International Agreements Act is, in this way, to enact the overriding provisions of the Agreement as part of the law of Australia.

1. Relevantly the purpose of the *Agreement* is set out in Part A of the *Agreement*:

WISHING to strengthen the existing friendly relations between the two countries; and

DESIRING to coordinate the operation of their respective social security systems and to enhance the equitable access by people covered by this Agreement to specified social security benefits provided for under the laws of both countries, …

1. The *Agreement* is to be interpreted in accordance with the principles which guide the interpretation of international agreements as set out in *Marous* (FC).
2. However, the appellants’ argument as to the relevance of *Mahrous* (FC) and *Mahrous* (No 2) to, and the impact of the *Agreement* on, their eligibility for the age pension in Australia cannot be accepted. In seeking to draw propositions of general application from the decisions in the two judgments, the appellants have ignored the context of Mr Mahrous’ claims and cherry-picked language to support their claims. So much can be seen from the full text of the paragraphs of the judgments set out above, rather than just the highlighted material on which the appellants relied.
3. The issue in both *Mahrous* cases was whether a severely disabled New Zealand citizen lawfully resident in Australia would be entitled to a disability pension when he turned 16. Mr Mahrous was born in Egypt. He had lived in New Zealand (from age 3) and in Australia (from age 8) for an aggregate period of more than 10 years when he made the claim, but he had no “working age residence” in New Zealand. He could not have “working age residence” because he was less than 20 years old. The AAT had concluded that he did meet the residence requirement in s 94(1)(e)(ii) of the *Social Security Act* (which is to the same effect as s 43(1)(a) and (b)) because article 12(4) of the *Agreement* modified the definition of “Australian resident” in s 7(2) of the *Social Security Act* by operation of s 6 of the *International Agreements Act* in relation to a claim for a disability support pension. The issue on appeal was whether Mr Mahrous satisfied the residence requirement by virtue of article 12(4) or whether, as contended by the Secretary, article 12(4) was a provision of limitation and Mr Mahrous had to satisfy articles 12(1)–(3).
4. The Full Court (Kenny, Flick and Kerr JJ) found that by virtue of s 6 of the *International Agreements Act*, article 12(4) (read with other articles of the *Agreement*) effectively overrides s 94(1)(e)(ii) of the *Social Security Act*: *Mahrous* (FC) at [51]. The Court found that articles 12(1)–(3) are general provisions which apply to an “Australian benefit” claimed under the *Agreement*. However, article 12(4) is a specific provision which applies *only* to a disability support pension claim. Accordingly, it is always open to a claimant for a disability support pension to rely on article 12(4), and articles 12(1)–(3) will be immaterial to that claim. In support of that view, the Court noted that article 12(5) is “similarly directed to one class of benefit” (i.e. the age pension). Further, by virtue of article 5(5), the “working age residence” provisions of articles 12(1)–(3) do not apply to people under 20. Under the social security law of Australia, a person need only be 16 to qualify for a disability support pension (see s 94(1)(d) of the *Social Security Act*); articles 12(1)–(3) would therefore not benefit any claimant for a disability support pension aged 16 or over and less than 20. There is nothing in the *Agreement* which would justify an inference that persons younger than 20 were intended to be disadvantaged and such an inference is inconsistent with the preamble to the *Agreement*: *Mahrous* (FC) at [47]–[48].
5. The Court found that article 12(4) of the *Agreement* “*both describes* the category of person who are entitled to claim a disability support pension *and identifies* those who would satisfy the residence qualification for such a benefit once a claim can be made” (emphasis in the original). The Court therefore construed article 12(4) to provide that if a person “had accumulated an aggregate of more than 10 years of residence in Australia and New Zealand”, then that person can not only claim a disability support pension but the person has also satisfied the residence criterion. As part of Australian law, by virtue of s 6 of the *International Agreements Act*, article 12(4) affected and overrode the residence criterion in both s 94(1)(e)(ii) of the *Social Security Act* and the following two sections of the of the *Administration Act*: s 11 (the requirement to make a claim) and s 29 (the requirement that a claim can only be made, among others, by an “Australian resident”): *Mahrous* (FC) at [43], [51] and [66].
6. Turning to the appellants’ contentions, in contrast to article 12(4), article 12(5) only specifies the class of person who is entitled to claim an age pension. It does not identify those who would satisfy the residence requirement. As found by Flick J, that work is to be done by article 12(1), having regard to the definition of “Australian resident” in article 5(1): see J[22].
7. In their submissions, the appellants provided “worked examples” of how article 12(1) applied to them on the assumption that article 5(1) was to be construed so as to deem all residence in New Zealand to be residence in Australia. One such example is in the “Appellants’ final oral submissions on appeal” document (as written):

**1. Where a person to whom this Agreement applies** [Mrs Charan] **has claimed an Australian benefit** [age pension under Article 12(5)] **under this Agreement and has accumulated** [10 years of residence]:

**(a) a period as an Australian resident** [a combined or totalised residence of New Zealand and Australian from 1 January 2005 to 1 January 2015];

**that is less than the period required to qualify that person, on that ground under social security law of Australia for a benefit;**

**(b) a period of working age residence in Australia equal to or greater than the period identified in accordance with paragraph 3; and**

**(c) a period of working age residence in New Zealand.**

1. The example makes no sense either grammatically or legally. Article 5(1) cannot be construed to include as residence in Australia the periods in which the appellants were resident in New Zealand. The fact that article 12(4) provides for that expressly in relation to disability support benefits does not assist the appellants.
2. It is clear from the language used in article 5(1) that, generally, the term “Australian resident” has the meaning given to it in the social security law, for instance, s 7(2) of the *Social Security Act*. But “for the purposes of the *Agreement*” it extends the definition to include “a New Zealand citizen who is not the holder of an Australian visa but is lawfully residing in Australia”. Its focus is on the nature of the New Zealand citizen’s residence in Australia. See, for instance, article 5(1)(a) “nature of the accommodation used by the person in Australia”; article 5(1)(e) “frequency and duration of the person’s travel outside Australia” and article 5(1)(f) “any other matter relevant to determining whether the person intends to remain permanently in Australia”. Such language is simply not apt to cover a person who is a New Zealand citizen and resident in New Zealand at a time before they set foot in Australia. Like the AAT, Flick J was correct in concluding at J[23]:

Article 5(1) does not deem all New Zealand residents to be Australian residents. Nor does it render all periods of residency in New Zealand as periods of residency in Australia. The Article clearly states that it extends the definition of an Australian resident to include New Zealand citizens who are “*lawfully residing in Australia*”.

1. Further, the fact that the words “at any time” are used in s 7(5)(a) does not advance the appellants claims. The requirement in s 7(5)(a) is that the person “has, at any time, been an Australian resident for a continuous period of not less than 10 years”, not that the person has resided in Australia for some time “at any time”.
2. Articles 12(1) and 12(5) as now in force set out the preconditions that a New Zealand citizen lawfully residing in Australia without a permanent visa and not being a protected SCV holder must satisfy to be able to claim an age pension. Each of those preconditions must be met, having regard also to articles 12(2) and 12(3).
3. A person to whom the *Agreement* applies must have reached the age of 65: article 12(5). The appellants satisfy that criterion. However, there is nothing in article 12(5) which addresses the residence criterion. It would be an absurd interpretation of article 12(5) to take the fact that there is no reference to a period of residence to mean that none is required. The fact that a period of residence is specified in relation to disability support benefits under article 12(4) could not justify such an interpretation.
4. Article 12(1) applies to a person who has claimed an Australian benefit under the *Agreement*. The age pension is a “benefit”: see article 2(1) of the *Agreement*.
5. Article 12(1)(a) applies to the appellants because they cannot satisfy s 43(1)(a) even though the definitions of “Australian resident” in s 7(2) and “10 years *qualifying Australian residence”* in s 7(5) are affected by the definition of “Australian resident” by virtue of s 6 of the *International Agreements Act* and article 5(1) of the *Agreement*. They cannot satisfy s 43(1)(a) because, at the time they applied for the age pension in October 2014, they had been lawfully resident in Australia for less than 10 years. At that date Mrs Charan had resided in Australia for eight months and Mr Charan for six months.
6. Article 12(1)(b) has no application because there is now no minimum period of “working age residence” in Australia required as a precondition to the operation of article 12(1). Article 12(3) was amended in March 2001; article 12(3)(b) now provides that “for the purposes of an Australian benefit payable to an Australian resident, there will be no minimum period”.
7. The appellants have periods of “working age residence” in New Zealand as mentioned in article 12(1)(c). As found by the AAT, at the time of their claims in October 2014, Mrs Charan had approximately 73 months of working age residence in New Zealand and Mr Charan 32 months.
8. The words after “then” in article 12(1) deem “working age residence” in New Zealand to be a period in which each of the appellants was an “Australian resident” for the purpose of meeting the minimum qualifying period for the age pension under s 43(1)(a).
9. There is no period in which the appellants had “working age residence” in both Australia and New Zealand, so article 12(2) has no work to do to avoid double counting under article 12(1).
10. The “totalisation” performed by article 12(1) is to combine the period in which the appellants were actually and lawfully resident in Australia (deemed to be “Australian residence” under ss 7(2) and 7 (5) having regard to article 5(1)) together with the period of their “working age residence” in New Zealand to see if that amounts to the “10 years *qualifying Australian residence*” required by s 43(1)(a). The AAT and the primary judge were not in error in their interpretation of articles 5 and 12 or their approach to the impact of those articles of the *Agreement* on ss 7(2), 7(5) and 43(1)(a) of the *Social Security Act* by reason of s 6 of the *International Agreements Act*. A period of residence in New Zealand after attaining the age of 65 is not included in that calculation.
11. That interpretation of articles 5 and 12 is consistent with the purpose of the *Agreement*. The Secretary correctly conceded that, if the appellants remain legally resident in Australia, when the appellants’ period of “residence in Australia” taken with their periods of “working age residence” in New Zealand reaches 120 months, they will be entitled to claim an age pension, even if at that time they do not satisfy s 7(2)(b) or s 43(1)(a) (having regard to s 7(5)) “directly”, assuming the law remains the same.
12. For completeness, to address issues mentioned by the appellants, article 13(4) has no relevance to the appellants’ claim to an Australian age pension since they made their claims in Australia, not New Zealand. No submissions made to the SSAT are relevant in this appeal. In the circumstances, it was unnecessary for Flick J to deal with the question of whether Mr Charan’s application was premature under clause 4 of Schedule 2 of the *Administration Act* when he made it in October 2014. Justice Flick did not “fail to justify” his findings which had the result that the appellants’ residence in New Zealand after reaching the age of 65 was not included in the calculation of 10 years of “*qualifying Australian residence*” because it was not “*working age residence*”; that the appellants do not accept the explanation does not mean that none was given.
13. We reject the appellants’ contention that Flick J failed to afford them a fair hearing by asking Mr Charan to cease making oral submissions on s 7(5) of the *Social Security Act* and giving him an opportunity to provide further written submissions. The appellants were given a full and fair opportunity to make their argument. His Honour afforded them procedural fairness by allowing them to provide further written submissions of 27 pages (together with attachments). This was in addition to the written submissions filed by the appellants prior to the hearing on 4 February 2016 (7 pages) and 19 February 2016 (19 pages). Having regard to the issues addressed in the written submissions and in Flick J’s reasons, we do not accept that he failed to take those submissions into account, he simply did not agree with them.

# Disposition

1. None of the grounds of appeal has been made out. The appeal must be dismissed with costs.

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| I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier, Katzmann and Farrell. |

Associate:

Dated: 13 December 2016