

# Administrative Appeals Tribunal decisions

## Overpayment: place of birth

**STARK and SECRETARY to DSS**  
(No. N88/409)

**Decided:** 6 September 1988

by C.J. Bannon.

William Stark was born in the USA and is a citizen of that country. At an early age his parents took him to live in New Zealand where he remained until he came to Australia in July 1980. He entered Australia on a 3-month temporary visa, but overstayed that visa whereupon he became a prohibited non-citizen under the *Migration Act*.

In October 1986 he was arrested by immigration officials and shortly thereafter the DSS cancelled his sickness benefit but instead paid him special benefit. The Department then sought recovery of the amounts paid by way of sickness benefit and unemployment benefit since his arrival in Australia on the basis that he was not entitled to them as he was not a resident within the meaning of the Act. Stark asked the AAT to review that decision.

### Was Stark an Australian resident?

The AAT rejected the DSS submission that Stark was not a resident within the meaning of the Act.

Relying on the High Court decision in *Federal Commissioner of Taxation v Miller* (1946) 73 CLR 93, the AAT held that 'resident' as used in the *Social Security Act* bore the ordinary and popular meaning. It referred to the place where a person normally had his or her home and ate and drank. At all material times, Stark was a resident of Australia.

However, as a prohibited non-citizen Stark was prevented by s.31B(2) of the *Migration Act* 1973 from legally undertaking paid work, though he had in fact at various times been employed driving taxis.

### Was Stark eligible for unemployment benefit or sickness benefit?

The AAT ultimately accepted the DSS submission that Stark had received benefits to which he was not entitled on the basis that the statement on each of his claim forms, that he was born in

New Zealand, was a false answer since he was in fact born in the USA.

The AAT held that the statement as to his place of birth was a 'material statement', involving a 'material deception'. It suggested that, had he not made those statements, his overstayed status may have been revealed earlier. Accordingly,

'the making of false representations means the Department of Social Security is entitled, pursuant to s.181(1) [now s.246(1)] of the *Social Security Act*, to recover the moneys paid to Mr Stark as a debt due to the Commonwealth.'

(Reasons, p.9)

Earlier, the AAT had rejected an argument that, even if Stark was not entitled to sickness benefit or unemployment benefit at the relevant times, he was nonetheless entitled to special benefit on the basis that his claims for the benefits to which he was not entitled could, under s.159(5) be treated as claims for special benefit.

The AAT held that there was no evidence upon which the Secretary could determine that Stark was unable to earn a sufficient livelihood, within the meaning of s.124.

### The discretion to recover the overpayment

The AAT held that there was a recoverable overpayment of \$17 457. At the time of the hearing, the DSS was deducting \$30.40 per fortnight from Stark's continuing benefit. In lieu of the decision to recover the full amount, the AAT directed that the DSS continue to recover at that rate until further order.

The AAT noted that a District Court action arising out of a motor vehicle accident was pending and ordered that, if it was finalised, the matter should come back before the Tribunal to determine what amount if any of the capital should be returned to the Department.

### Formal decision

The AAT affirmed the decision that there had been a recoverable overpayment.

[R.G.]



## Unemployment benefit: full-time student

**AMOAH and SECRETARY TO DSS**

(No. 4710)

**Decided:** 31 October 1988

by E.T. Perrignon.

Sam Amoah asked the AAT to review a decision that he had been overpaid \$1505 in unemployment benefits.

Amoah had been granted unemployment benefit in April 1987. On 1 June 1987 he commenced a course at Control Data Institute. He did not notify on his unemployment benefit continuation forms that he was undertaking the course. When the DSS discovered this, his unemployment benefit was cancelled and an overpayment raised for the period 1 June 1987 to 9 September 1987.

### The legislation

Section 136(1) of the *Social Security Act* provides that 'a benefit is not payable to a person . . . in respect of any period during which . . . the person is engaged . . . in a course of education on a full time basis'.

### Was Amoah eligible for unemployment benefit?

The course involved attendance for afternoon sessions between the hours of 1 and 6 pm five days a week and 20 field training sessions of normal working hours. Amoah stated that he did not in fact attend more than about 65% of the sessions over the 3-month period during which he completed the course.

There was no dispute that the course in question was a course of education within the meaning of s.136 but it was submitted that it was not a full time course.

The AAT rejected that submission and held that the requirements for daily attendance coupled with the expectation that up to 3 hours per day would be spent on private study indicated that the course was full time, notwithstanding that Amoah was able to complete the course without attending all the sessions.