paid to him were immediately recoverable from his son; and decided that, although DSS officers had expressed the opinion that special benefit paid to Sebaratnam would be immediately recoverable from his son, no decision on that issue appeared to have been made.

Accordingly, the SSAT decided that it had no jurisdiction to entertain the applicant's application for review.

The AAT decided that, at the time of Sebaratnam's appeal to the SSAT, there had been a reviewable decision within s.177(1) of the *Social Security Act*, namely the decision made in February 1990, this being a decision which raised the very issues which Sebaratnam wanted clarified. The AAT pointed out that there was no limitation in the Act on applicants amending the grounds of their appeal.

Formal decision

The AAT directed that the application to the SSAT lodged by Sebaratnam should be amended to include a reference to the decision of February 1990 and remitted the matter 'to SSAT to deal with the appeal according to law'.

[P.H.]

AAT review and criminal proceedings

SKINNER and SECRETARY TO DSS

(No. 2425)

Decided: 4 June 1991 by B.M. Forrest.

The applicant had applied to the AAT to review a SSAT decision that she was married for the purposes of the *Social Security Act* and so was not entitled to sole parent's pension. An overpayment of this pension had been raised against her.

At a preliminary conference before the AAT the DSS indicated that criminal charges were to be brought against the applicant. The DSS then sought to have the AAT proceedings adjourned pending the outcome of the criminal proceedings.

Should the proceedings be stayed?

The DSS, in seeking the stay, relied on the AAT's decisions in *Lane and Conservator of Wildlife* (1984) 5 ALN 429, *Gruzman and Secretary, Department of Aviation* (1986) 9 ALN 111 and *Re Commissioner of Taxation* (unreported decision No. 3500). The applicant opposed the stay and relied on *Philippine Airlines v. Goldair (Aust.) Pty Ltd* [1990] VR 385. The principles in that case stated that the DSS was not entitled as of right to have the matter adjourned until the outcome of the criminal proceedings. The AAT had to decide each case on its merits 'balancing justice between the parties'.

The applicant argued that no question of privilege against self-incrimination should enter into the consideration of the matter as it was the applicant who was seeking to have the case heard. The AAT commented that the privilege was still available in the Tribunal.

The AAT also referred to the length of time taken to initiate criminal proceedings and expressed concern. But, in the absence of any explanation from the Director of Public Prosecutions, the Tribunal did not take the matter further.

The AAT decided that the matter should be adjourned. It was not persuaded that to do so would render an injustice to the applicant. If the allegations against the applicant were not proved in the Magistrates' Court there would be no injustice done to her by staying the AAT proceedings.

The Tribunal also referred to the comments in *Lane* that the AAT should not act in a way which might prejudice the conduct of proceedings before a Court. Reference was also made to the possibility that the AAT continuing with a review could constitute contempt.

Formal decision

The AAT adjourned the matter until the outcome of the Magistrates' Court proceedings involving the applicant.

[B.S.]

SECRETARY TO DSS and PLUTA

(No. 7061)

Decided: 20 June 1991 by D.F. O'Connor, J.D. Horrigan and H. Pavlin.

Renata Pluta had her sole parent's pension cancelled in May 1990. She applied to the SSAT for review of the decision and that Tribunal set aside the decision in September 1990. In October 1990 the DSS asked the AAT to review the decision of the SSAT. In addition the DSS sought a stay of the decision of the SSAT. This was granted for the period between the original decision to cancel and the date of the SSAT decision.

In April 1991, the AAT became aware that there was the possibility of criminal charges being brought against Pluta in respect of an overpayment which would flow from a decision that she was not qualified for the payment she had received. The AAT proceedings were set down for hearing in May 1991. Pluta then applied for an adjournment of the AAT proceedings because of these likely criminal proceedings. Pluta referred to the DSS using the AAT hearing to gather evidence for any subsequent criminal proceeding and argued that this would unduly prejudice her.

Were criminal proceedings under way?

The DSS said that no prosecution against Pluta was in fact on foot. The policy of the DSS was not to apply to the AAT for review where a prosecution had been commenced. In Pluta's case, said the DSS, a prosecution was purely hypothetical. Given the decision of the SSAT, the DSS argued that it would be improper for it to pursue the overpayment. It was also submitted by the DSS that the availability of the privilege against self-incrimination in the AAT would adequately protect Pluta.

Pluta replied that if reliance was placed on this privilege then she might not be able fully to present her case.

The fact that no prosecution had been initiated weighed heavily on the Tribunal:

> 'The Tribunal would have no difficulty in granting the adjournment sought by the respondent if criminal proceedings were under way. Indeed, in a case where the issues in the criminal proceedings are the same as those before the Tribunal, it may well be a contempt of court for the Tribunal to proceed. Again, if matters had got to the stage of consideration by the Prosecutions Section of the Department before referral to the Director of Public Prosecutions, that is, if a criminal prosecution was actively contemplated, the Tribunal would have little difficulty in adjourning proceedings until the matter had been dealt with. In this case, however, criminal proceedings have not been instituted, the matter has not been referred to the Prosecutions Section and the issue is not under active consideration by the Department. It is difficult to see on what basis the adjournment sought by [the respondent] could be granted.'

(Reasons, p.4)

Need for administrative reform

The AAT was sympathetic with the position of the respondent. As the proceedings could produce a decision that

might be used to ground a later prosecution, the AAT acknowledged that she might either incriminate herself or through relying on the privilege against self-incrimination, not be able adequately to put her case.

The AAT thought that this state of affairs could be remedied by the DSS altering its procedures. It said:

> 'Ms Pluta is not the only party to proceedings before the Tribunal in this situation. While the numbers do not seem to be large, the Tribunal is concerned about the problems they face and the fact that Tribunal proceedings themselves have the potential to be compromised. The solution to the problem would seem to be an administrative one . . . [T]he facts upon which the Department relies to support a cancellation of pension and to raise an overpayment are essentially the same. Once the appropriate investigations have been carried out decisions on both these issues can be made. If these decisions are made at the same time, the person affected can proceed to have both decisions reviewed by the Social Security Appeals Tribunal and, if necessary, matters can then come to this Tribunal. There may be particular cases where that course is not able to be followed. As a general rule, however, the Tribunal would recommend that the two issues be dealt with simultaneously by the Department.'

(Reasons, p.5)

Formal decision

The AAT refused the request for an adjournment.

[B.S.]

Backdating invalid pension: claim for another payment

CALDERARO and SECRETARY TO DSS

(No. 7038)

Decided: 12 June 1991 by J.R. Dwyer, G. Woodard and A. Argent.

Rosanna Calderaro, who was born in 1959, left school at the end of 1975 and abandoned a business college course a few months later because of ill health. She had never been in paid employment.

In November 1976, Calderaro claimed and was granted sickness benefit, which continued until July 1977. From then until June 1983, Calderaro was fully maintained by her parents.

In July 1983, Calderaro claimed and was granted unemployment benefit, payment of which continued until October 1986.

On 31 March 1989, Calderaro lodged a claim for invalid pension, which was in due course granted with effect from the next pension pay-day, 13 April 1989.

Calderaro then claimed that payment of her invalid pension should be backdated to 1976, when she had claimed and been granted sickness benefit.

The DSS conceded that Calderaro had been qualified for invalid pension since 1976. This concession was based on a psychiatric diagnosis of phobic anxiety and panic attacks made in 1989 and 1990.

A medical report, dated May 1976, indicated that Calderaro was then suffering from chronic eustachian obstruction; and there was no medical evidence of any significant neurosis before February 1982.

The legislation

Section 159(5) of the *Social Security Act* allows the Secretary to treat a claim lodged by a person for one payment under the Act (or under any Commonwealth program) as a claim for another pension, allowance or benefit under the Act 'that is similar in character'.

The exercise of this discretion would permit the person to be paid the substituted pension, allowance or benefit from the date of the earlier claim.

'Similar in character'?

The AAT said that, in determining whether a pension, benefit or allowance was 'similar in character' to another pension, benefit or allowance, attention should be focused on the legislative qualifications for each payment rather than the social and economic reality associated with those payments. It did not matter, therefore, that unemployment benefit had become for many people a scheme of long-term income support similar to invalid pension.

The intention behind the legislation for unemployment benefit had been to provide short-term support. There was not sufficient similarity between the qualifications for unemployment benefit and those for invalid pension to regard those payments as 'similar in character' for the purpose of s.159(5): the former was a payment to a person who was capable of working and who was seeking work; the latter was paid to a person permanently incapacitated for work.

On the other hand, the differences between sickness benefit and invalid pension (which hinged on the elusive distinction between temporary and permanent incapacity) were less significant than the fact that they were similarly grounded in the circumstance of the physical or mental disability which incapacitates a person from supporting herself or himself by engaging in paid employment.

Accordingly, the claim lodged by Calderaro in 1976 was available to ground an exercise of the Secretary's discretion under s.159(5).

The discretion

However, the AAT said, the facts of the present case did not support a favourable exercise of the s.159(5) discretion. These facts included:

- the length of time involved;
- the grant to Calderaro of the benefits for which she had applied;
- her assertion when claiming unemployment benefits in 1983 that she was capable of working; and
- her relative youth in 1976 (she was 17 years of age).

Moreover, it appeared to the AAT that, despite the DSS concession at the hearing of this review, Calderaro had not been qualified for invalid pension at the time of her claim for sickness benefit in 1976, in that her medical condition at that time was not such as was likely to last indefinitely.

The AAT pointed out that it was not bound by the DSS concession but was bound to give its own decision accompanied by its own reasons for its findings. The AAT said that, if it had intended to reject the DSS concession, it would be preferable to give notice to both parties and seek written submissions on the point. However, the AAT made no concluded finding on the question whether Calderaro had been qualified for invalid pension as far back as 1976.

Formal decision

The AAT affirmed the decision under review.

[P.H.]