> We note that the respondent called no evidence at all. The principle in Jones v Dunkel is certainly applicable to a well-advised party with the resources of the Commonwealth.'

(Reasons paras 28-9)

Formal decision

The AAT set aside the SSAT decision.

[P.O'C.]

Wife's pension payable overseas

SECRETARY TO DSS and STEFANOU

(No. 7568)

Decided: 10 December 1991 by R.C. Jennings QC.

The Department sought review of, and a stay order to prevent the implementation of, an SSAT decision to set aside a DSS decision of 12 July 1991 to reduce the rate of wife's pension paid to Stefanou who resided in Greece. Both matters were dealt with in this appeal.

Facts

Stefanou first arrived in Australia in 1965. She was granted a wife's pension on 14 February 1980 as her husband was an invalid pensioner. She left Australia in November 1986.

Following the introduction of the *Social Security Act* 1991, the Department applied s.1221 of that Act, which, according to the DSS, allowed it to reduce her rate of pension according to a formula which took account of the length of Stefanou's working life in Australia. The DSS decided that she was entitled to 254/300ths of a full pension.

The SSAT set aside this decision and substituted a decision that s.1221 did not apply to Stefanou, that she was entitled to have her rate assessed under the 'normal' income test, and that arrears were payable.

Legislation

Section 1216 provides that, generally, a person is disqualified from receiving a wife's pension overseas after 12 months absence. However, s.1216B provides various exceptions for 'entitled persons' including a woman who was an Australian resident for at least 10 years: s.1216B(2)(a).

Section 1221 sets the rate for a portable pension. Section 1221(2) provides that, subject to subsections (3), (4), (5) or (6), the section applies to a person who commenced to receive a wife's pension after 1 July 1986.

Section 1221(2A) states that, in spite of subsections (3) or (4), the section applies to a person who is receiving a wife's pension and is an 'entitled person' under s.1216B(2)(a).

Section 1221(3) provides that the section does not apply if the person was an Australian resident on 8 May 1985, they commence to receive a pension before 1 January 1996 and their absence from Australia commences before 1 January 1996.

Section 1221(4) provides that the section does not apply to a person if the person was an Australian resident on 8 May 1985 and the person is in a country with which Australia does not have a reciprocal agreement.

The rate calculator, included in Module A, then provides instruction for calculation of the appropriate rate of a portable pension.

The argument

The DSS argued that s.1221(2A) meant that s.1221 applied to all wife pensioners outside Australia with more than 10 years residence. Section 1221(2A) should not be restricted in its operation to wife pensioners who commenced to receive their pension after 1 July 1986. According to the Department, s.1221(2A) should not be read as if it were subject to s.1221(2): had Parliament intended it to be so, it would have said so, having expressly provided that s.1221(2) was subject to s.1221(3), (4), (5) and (6). It argued that subsection (2A) was intended to stand alone, and, given that it was subsequent to subsection (2) and more specific than it, it should 'be given its full effect'.

Which subsection prevails?

The Tribunal rejected the Department's arguments. It found that s.1221(2A) should be limited to wife pensioners who had commenced to receive their pension after 1 July 1986 and should not be read as if it stood alone. The Tribunal preferred the arguments of Stefanou's representative which 'mirrored' those of the SSAT:

> 'Sub-section 1221(2A) is not intended to add to the categories of persons to whom section 1221 applies, rather it merely reduces the effect of the exceptions under sub-section (3) and (4) . . . [P]roportional portability was introduced in 1986 and was only ever to apply to pensioners who commenced to receive their payment after 1 July 1986. To introduce a law now, 5 years after than time, and take away the respondent's exemption from proportional portability is considered outside the scope of the amendment'

(Reasons, pp.11-12).

The Tribunal also said it was not necessary to have regard to explanatory memoranda and second reading speeches, which the Department said the Tribunal should rely on. In the Tribunal's view, there was no ambiguity or obscurity in the legislation nor did its interpretation lead to an absurd or unreasonable result. Further, the Tribunal said, none of this material altered its view of the legislation.

Formal decision

The Tribunal affirmed the decision under review and rejected the application for a stay order. In making the latter order, it commented that a foreshadowed amendment to the portability provisions could not be relevant to the substance of the decision in dispute.

[J.M.]

Note: In decisions handed down on the same day, 10 December 1991, the AAT (constituted by R.C. Jennings QC) affirmed SSAT decisions to the same effect on the following cases:

SECRETARY TO DSS and BARSONY (No. 7632)

SECRETARY TO DSS and BELDING (No. 7625)

SECRETARY TO DSS and BRAND (No. 7624)

SECRETARY TO DSS and CACHIA (No 7628)

SECRETARY TO DSS and CETINIC (No. 7626)

SECRETARY TO DSS and HAGE (No. 7623)

SECRETARY TO DSS and KERNIOTIS (No. 7621)

SECRETARY TO DSS and LATIFOGLOU (No. 7627)

SECRETARY TO DSS and MATHER (No 7629)

SECRETARY TO DSS and SECANSKI (No. 7622)

SECRETARY TO DSS and STOLPER (No. 7567)

SECRETARY TO DSS and TAKACH (No. 7630)

SECRETARY TO DSS and VESPERO (No. 7631)