within the meaning of the *Migration Act* 1958.

In September 1991, the Migration Regulations were amended so that they no longer provided for the issue of refugee (temporary) entry permits. Those permits were replaced by domestic protection (temporary) entry permits, issued according to different criteria. However, the *Social Security Act* includes no reference to domestic protection (temporary) entry permits.

The AAT's decision

Evidence was given to the AAT by a DILGEA officer that DILGEA did not make preliminary findings on the processing of domestic protection (temporary) entry permits, nor does that Department make any determination that a claimant for refugee status has a 'substantial claim' for the relevant permit.

The AAT decided that special benefit could not be paid to a claimant for refugee status who was an illegal entrant to Australia.

Beigman could not be paid special benefit because he was an illegal entrant to Australia, whether or not he had a 'substantial claim' to refugee status. The question whether he had such a 'substantial claim' could only be determined by advice from DILGEA, neither the DSS nor the AAT having any power to investigate that question.

The AAT expressed concern at the failure of the *Social Security Act* to keep pace with changes to migration legislation and practice.

DILGEA's attitude to the AAT hearing

The AAT was also critical of the attitude apparently adopted by DILGEA when the officer from that Department was asked to give evidence to the Tribunal. First, DILGEA had insisted that a summons be issued to the witness; and, secondly, a legal officer from DILGEA had attended the AAT hearing with a 'watching brief' on behalf of the witness while she gave evidence. The AAT described both practices as 'extraordinary':

> 'Proceedings before this Tribunal are not adversarial but are designed to enable the Tribunal to reach the correct or preferable decision in the circumstances of the case. To this end the role of the parties is to assist the Tribunal in reaching its decision. The Tribunal expects departments and agencies involved in the review process to have an understanding of that role. In particular we would expect that where one department is called upon to provide evidence and assistance in a matter where another agency is a party, that department would be more than ready to unequivocally provide that assistance.'

(Reasons, para. 24)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Federal Court decisions

Family allowance: payment of arrears following setting aside of cancellation

SECRETARY TO DSS v O'CONNELL

SECRETARY TO DSS v SEVEL

(Federal Court of Australia)

Decided: 20 November 1992 by Wilcox, Lee and French JJ.

O'Connell's family allowance was cancelled by the Secretary in January 1990, after she had not responded to a notice posted to her former address. O'Connell reclaimed the allowance in August 1990, as soon as she discovered that payments had stopped. The DSS granted her the allowance but refused, in September 1990, to pay her the 8 months arrears between January and August 1990.

On review, the AAT decided that the January cancellation had not been the preferable decision, set it and the September decision aside and directed that the arrears be paid to the respondent: *O'Connell* (1991) 61 *SSR* 851. (At the same time, the AAT made the same decision in relation to Sevel, whose case presented identical facts.)

On appeal to the Federal Court, Jenkinson J decided that the AAT's decisions had not involved any error of law: *Secretary to DSS v O'Connell* (1992) 67 *SSR* 964.

The Secretary appealed to the Full Court of the Federal Court, which gave a single set of reasons in relation to O'Connell and Sevel.

The cancellation decisions

Section 168(1) of the *Social Security Act* 1947 authorised the Secretary to cancel a pension, benefit or allowance if the person did not respond to a notice. Both the AAT and Jenkinson J had observed that the Secretary had a discretion under this provision. The AAT had decided that the discretion should be exercised against cancellation; and Jenkinson J had held that the AAT's approach involved no error of law.

Before the Full Court, the Secretary did not challenge the AAT's decision to set aside the January decisions to cancel O'Connell's and Sevel's allowances and, the Full Court said, 'could hardly have done so'. Those decisions had originally been supported on the basis that the failure of each of the thousands of family allowance recipients to return the review forms posted to them indicated that the recipient's income exceeded the relevant limit. That basis, the Full Court said, 'was untenable'.

The effect of setting aside cancellation

The Secretary argued that the AAT's decisions to set aside cancellation could only take effect from the date of the AAT decisions: they could not be retrospective, because neither O'Connell nor Sevel had sought review of the cancellation decision within 3 months of the decision. This was because, the Secretary argued, a decision to resume payment of family allowance was a decision under s.168(3) of the 1947 Act; and s.168(4) of that Act provided that a decision under s.168(3) could only take effect, where that decision followed a request for the review of an earlier decision, from the date of the request if the request was made more than 3 months after notice of the earlier decision. The Secretary argued that the delay, by O'Connell and Sevel, in seeking review of the January 1990 cancellation decision meant that the AAT's decision to set aside the cancellation could only take effect from the date when they applied for review — August 1990.

The Full Court rejected the Secretary's argument: once the cancellation decisions were set aside, the Full Court said, O'Connell and Sevel were entitled to be paid the moneys attributable to the decisions (made well before the January 1990 cancellation decisions) granting each of their claims for family allowance without the necessity of any new decision within s.168(3) of the *Social Security Act* 1947.

This was because s.168(3) 'referred to decisions creating an entitlement to a pension, benefit or allowance; not accounting or clerical decisions to implement an entitlement', such as the issuing of an authority for payment to each of O'Connell and Sevel.

Even if the decisions to pay arrears to O'Connell and Sevel had been decisions of the type referred to in s.168(3), the Full Court said, those decisions would not have been subject to the time limits fixed by s.168(4) of the 1947 Act (that is, time limits dependent on review being sought within 3 months), because they were not decisions of the Secretary but decisions of the AAT.

The date of effect of the AAT's decisions was controlled by s.183 of the 1947 Act: the respondents having applied to the SSAT within 3 months of the decisions not to pay arrears of family allowance, there was no impediment to the AAT fixing, as the date of effect of its decision, the date of the cancellation decision.

If ss.168(3) and 168(4) had applied to the AAT's decisions to set aside the cancellation decisions, the Full Court said, those provisions would not have prevented the AAT from directing the payment of all arrears of family allowance. Section 168(4)(a) did not operate to prevent payment of arrears because the notices of cancellation had not been 'given' to O'Connell or Sevel. Section 29 of the *Acts Interpretation Act* 1901 did not operate to deem notice to have been given by posting pre-paid letters to the respondents. As Gummow J had said in *Secretary to DSS v Garratt* (1992) 68 *SSR* 981, 'the rights of persons should not readily be constructed so as to fix upon something less than the giving of notice and to accept an imputed notification as sufficient for the operation of the legislation'.

After observing that, in *Garratt*, there had been no decision to set aside the cancellation of family allowance so that recourse to ss.168(3) and 168(4) had been necessary, the Full Court concluded by offering some guidance to the Secretary for the 'thousands of other cases [which] depended on the outcome of these cases':

> 'It may assist the consideration of those cases if we summarize the situation by saying that, in our view, in any of those cases in which the cancellation decision has been — or, hereafter, is — set aside, s.168(3) will have no application. Consequently, the limitations imposed by s.168(4) will be irrelevant. If the person receiving the allowance remained otherwise qualified, including in relation to the income test, that person will be entitled to payment of arrears of the allowance to the same extent as if the cancellation decision had never been made. There will be no statutory impediment to the Secretary making that payment.
>
> In cases where the cancellation decision has not been — and is not hereafter — set aside, Garratt will apply. If the beneficiary in fact received notice of the cancellation decision, s.168(4)(a) or (b) will apply to the new claim; with the possible result that arrears cannot be paid. If the beneficiary did not receive notice of the cancellation decision, a notice sent to the last-known place of residence not being sufficient to fulfil this condition, s.168(4)(ca) will apply. The Secretary will have a discretion as to the date from which the allowance should resume, the matters mentioned above being all relevant to the exercise of the discretion.'

(Reasons for judgment, p. 29-30)

Formal decision

The Full Court dismissed the appeal.

[P.H.]

Unemployment benefit: moving residence

SECRETARY TO DSS v CLEMSON

(Federal Court of Australia)

Decided: 29 January 1993 by Neaves J.

Sandra Clemson was retrenched from her employment in February 1991. The next day, she moved her residence from Sydney to Young. On 8 March 1991, Clemson claimed unemployment benefit.

The DSS decided that Clemson had reduced her employment prospects by moving her place of residence and that she did not have a sufficient reason for the move. The DSS imposed a non-payment period of 12 weeks on Clemson, under s.126(1)(aa) of the *Social Security Act* 1947.

On appeal, the SSAT set aside that decision. The AAT affirmed the SSAT's decision, on the basis that s.126(1)(aa) did not apply to a person who moved her residence before claiming unemployment benefit: see *Clemson* (1991) 63 *SSR* 888.

The Secretary to the DSS appealed to the Federal Court under s.44 of the *AAT Act* 1975.

The legislation

Neaves J said that the AAT's decision was handed down after the repeal of the 1947 Act and the commencement of the 1991 Act; and noted that the appeal had been conducted on the basis that the 1947 Act controlled the issues before the Court.

Section 116(1) of the 1947 Act set out the qualifications for unemployment benefit. It required that, during the relevant period, the person be unemployed, willing to undertake and capable of undertaking suitable employment, have taken reasonable steps to obtain employment and be registered with the CES.

Section 116(6A) provided that a person was not qualified for unemployment benefit 'on a day on which the person reduces his or her employment prospects by moving to a new place of residence without sufficient reasons for the move'.

Section 125(1) provided that unemployment benefit was payable from the 7th day after the day on which a person became unemployed or after the day on which he or she claimed unemployment benefit, whichever was the later.

Section 126(1) provided that unemployment benefit was not payable to a person for a period determined by the Secretary in a number of situations. These included the situation where a person's unemployment was due to the person's voluntary act without sufficient reason: para. (a) or due to the person's misconduct as a worker: para: (b).

They also included the situation covered by s.126(1)(aa), where —

> 'a person has reduced his or her employment prospects by moving to a new place of residence without sufficient reasons for the move'.

According to s.126(4), the non-payment period for a person covered by s.126(1)(aa) was 12 weeks.