ly approved by the Full Federal Court [in O'Connell], it seems that the decision to cancel a payment because the Secretary does not know whether a person remains qualified for that payment, will usually not be the preferable decision. This is particularly so if there is going to be difficulty in obtaining arrears once the payment has been cancelled. It is our view that entitlement to allowances should only be cancelled after consideration of questions relevant to qualification, not for reasons of administrative convenience.'

(Reasons, para. 22)

This view was reinforced by the fact that Darlington's evidence had revealed that her name and number were listed in the phone book in full and it would have been very easy for a departmental officer to find her.

While it expressed some sympathy with the Department's argument that the Act imposed no obligation on it to search for recipients of payments, the Tribunal stated:

'in view of the burden and expense caused by cases such as O'Connell, Garratt, this matter, and other similar ones, that administratively it would be money well spent if some steps were taken to try to trace recipients before cancelling their entitlements'

(Reasons, para. 23).

Review of the cancellation

The Tribunal did not consider it necessary to decide to set aside the cancellation decision. Instead, the decision should have been reconsidered pursuant to s.883 of the 1991 Act when Darlington requested her arrears. Section 883 provides for reconsideration of a cancellation decision and specifies that if, on such reconsideration, the Secretary becomes satisfied that a person did not receive family allowance that was payable to her, the Secretary can determine that family allowance is or was payable to the person. Section 883 'clearly contemplates such a reconsideration taking place on an application under s.1240 or on the Secretary's own initiative': Reasons, para. 24.

The Department's advocate had agreed that Darlington's request for arrears was in fact an application for reconsideration of the decision to cancel family allowance. Although neither the Department nor the SSAT had reconsidered the cancellation under s.883, the AAT held that it was able to do so and decided that once Darlington had re-established contact with the Department, the decision to cancel her family allowance should have been reconsidered.

Arrears: date of effect

Section 884 deals with the date of effect of a decision after review, including a decision under s.883. Subsection 884(3) provides that where a person has applied for review of a decision more than 3 months after receiving notice of it, any new determination made as a result of that review takes effect on the day on which the review was sought. The SSAT had decided that as Darlington had not received notice of the previous decision, the appropriate section was not s.884(3) but s.884(4) which provides that a new determination takes effect on the day on which the previous (not notified) decision took effect.

Was notice given?

This raised the question of whether notice of the decision was given to Darlington. The Full Court in *O'Connell* had been concerned with s.183(5) of the 1947 Act which was in terms similar to s.884(3) of the 1991 Act. The AAT rejected a Departmental submission that a difference in tense 'notice *is* given' as against 'notice *was* given' is a relevant distinguishing element between the 1947 and 1991 Acts. 'In our view Gummow J's comments in *Garratt*, which have been adopted by the Full Federal Court in *O'Connell*, apply equally to s.884 of the 1991 Act': Reasons, para. 34.

Applying those cases, and endorsing the view expressed by the Federal Court in *O'Connell* that:

'family allowance payments are made for the benefit of the child and an interpretation of the Act leading to a loss of allowance by qualified people should be adopted only in the clearest of cases'

(Reasons, para. 38)

the Tribunal decided that no notice was given to Darlington of the making of the decision to cancel her family allowance in October 1991. This was because, following *Garratt*, a notification sent to her last known address is not sufficient to constitute notice. Therefore, s.884(4) applies and the determination that she is entitled to be paid arrears takes effect on the day on which the previous decision, namely the cancellation decision, took effect.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Family allowance: arrears

SECRETARY TO DSS and KONDOULIS

(No. 8445)

Decided: 21 December 1992 by M.T. Lewis, G. Johnston, G. Stanford.

The Department appealed against a decision of the SSAT which had set aside a decision of a delegate not to pay Kondoulis arrears of family allowance for the period 29 December 1989 to 3 March 1991. The SSAT had decided that she should be paid from the date of cancellation.

Kondoulis had been receiving family allowance for her 2 sons P and S. When P turned 16 on 12 December 1989, she ceased to be qualified to receive the allowance for him, but remained eligible in relation to her son, S for whom she expected payment to continue. After discovering that she had not received any payments from December 1989-March 1991, she lodged a new claim for him on 4 March 1991 and on 11 April 1991, she asked for her payment to be backdated to the date payment ceased. The Tribunal treated this as an appeal against the cancellation of family allowance.

The SSAT decision was made under the *Social Security Act* 1947 , after the coming into effect of the 1991 Act on 1 July 1991. The Tribunal followed the decision of O'Connor J in *Cirkovski* 67 *SSR* 955 and *Simek* (1991) 65 *SSR* 920 in determining that the legislation to be applied in this case is the legislation in force at the time of making the claim — the 1947 Act.

The decision under review

The Tribunal first noted that it was necessary to decide whether the decision under review was a decision setting aside a decision to cancel family allowance. The decision not to pay arrears did not purport to review the cancellation decision, but the Tribunal found that Kondoulis' request to the Department, which led to the review by the Authorised Review Officer and the SSAT could be construed as an appeal against the cancellation and this was how it was treated by the SSAT. The issue of whether or not the cancellation decision had been reviewed was relevant in light of the distinction drawn by the Full Federal Court in its decision in *Secretary to DSS v O'Connell and Sevel* ((1993) 71 *SSR* 1029).

Did Kondoulis receive the review forms?

After a lengthy discussion of the evidence, and of the inconsistencies in it, the Tribunal found on the balance of probabilities that a review of family allowance form was completed by Kondoulis (with the assistance of a friend) and mailed to the Department, but the Department had no record of its ever having been received. However, the Tribunal noted that it was not necessary to make a finding in respect of the receipt of this form because it was non-receipt of another form, an income and financial circumstances review form (FIR4), which had caused the cancellation of family allowance. On this form, the evidence was even less clear, but the Tribunal inclined to the view that it was probably never received by Kondoulis.

After considering comments of the Federal Court in *O'Connell and Sevel*, the Tribunal stated that it could only conclude here that the relevant notice went astray either in the post or on receipt. It was unfortunate that the Department did not attempt to communicate with Kondoulis rather than assuming that she had not returned the form because her income was over the limit, or, worse, cancelling the payment because of non-response.

> 'As was noted by the Full Federal Court, simple and inexpensive administrative exploration before cancellation of family allowance after non-receipt of the review form in general is justifiable and in this case it would also have been much less costly than the litigation which followed.'

(Reasons, para. 29)

The Tribunal then considered whether Kondoulis had been notified of the decision to cancel. Having found that the Department had sent her a computer generated notice of cancellation on 1 January 1990, the Tribunal decided that on the balance of probabilities, this was not received by Kondoulis. The evidence showed that as soon as she became aware of the discontinuation of family allowance, Kondoulis took action to have the payment restored. Accordingly, the Tribunal decided that family allowance for S should not have been cancelled, and affirmed the decision of the SSAT to set aside the cancellation and to restore payment from 28 December 1989.

Arrears where cancellation not set aside

The Tribunal also considered the issue of the date from which payments could be made under s.168 of the 1947 Act in the event that they had erred in finding that the decision under review was a decision to cancel family allowance. This flowed from the Federal Court's decision in *Garratt* (1992) 68 *SSR* 981. Taking into account the fact that Kondoulis, who is illiterate in English and in her own Greek language, had difficulties in communicating with the Department, her previous co-operative history of dealings with the Department, and the Tribunal's finding that any failure to comply with a requirement (ie to return her form) was not deliberate or the result of negligence and was beyond her control, it was held that this was an appropriate case in which to exercise the discretion under s.168(4)(ca). That section provided that where a determination was made to grant a claim under s.168(3) and none of paragraphs (a), (b) or (c) of s.168(4) applied, that determination had effect from a date specified. The determination at issue here was effective on and from 28 December 1989.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.G.]

Family allowance: cancellation

SECRETARY TO DSS AND WAY

Decided: 4 December 1992 by A.M.Blow.

(No. 8406)

The DSS asked the AAT to review a decision of the SSAT setting aside a delegate's decision to cancel Way's family allowance, and paying her arrears from the time her payments ceased at the end of 1988.

In December 1988, Way was sent a letter advising of a change in the method of payment of family allowance. The letter was sent to the address at which she had been living when she applied for family allowance for her children. As she had moved, the letter was returned to the Department with the endorsement 'MOVED' and payment of family allowance into her bank account was suspended.

On 18 June 1991, a delegate cancelled her family allowance (along with that of 22 other parents who had also had their allowances suspended), relying on s.168 of the *Social Security Act* 1947. Way was advised of this decision by a notice sent to the address from which she had moved. It, too, was returned to the Department, indicating 'MOVED'.

The power to cancel

The Department argued that it was empowered to cancel her family allowance in consequence of Way's failure to notify a change of address. Section 168(1) of the 1947 Act provided, inter alia, that if, having regard to any matter that affects the payment of a pension, benefit or allowance under the Act, or by reason of the failure of a person to comply with a provision of the Act, the Secretary determines that a pension, benefit or allowance should be cancelled or suspended, the Secretary may make such a determination with effect from a date specified in the determination.

The Tribunal stated that it was apparent from the determination of 18 June 1991 that the delegate's reason for cancelling Way's family allowance and the 22 others was that 'each client's whereabouts is unknown and has been unknown for 12 months': Reasons, para.4.

Accordingly, the Tribunal considered whether Way had failed to comply with a provision of the 1947 Act. Way had received a letter from the Department on 25 February 1983 when she was first granted family allowance, but the Tribunal found that nothing in that letter imposed any legal duty upon her to notify the Department if she changed her address. In the letter sent to her on 15 December 1985 (after the birth of her second child), she was advised to notify the Department if she changed her address as, if correspondence is returned unclaimed, family allowance payments may be stopped. The letter also referred her to the back of the notice which stated, inter alia, 'you should also tell us when you . . . decide to change your address . . .'

The Tribunal held that neither the letter of 15 December 1985 nor any part of it constituted a notice *requiring* Way to notify of a change of address for the purposes of sub-section 163(1). That section permitted the Secretary to serve a notice on recipients requiring certain information be provided and created penalties for failure to supply it. The Tribunal noted that as s.163 was a