

Administrative Appeals Tribunal decisions

Jurisdiction: SSAT 'functus officio'

SECRETARY TO DSS and
FRANKOS

(No. 9178)

Decided: 14 December 1993 by B.H. Burns.

Background

The SSAT decided in December 1992 to set aside a decision to cancel age pension and remit the matter to the DSS to calculate and pay arrears from the date of suspension in August 1981 until pension was granted again in October 1991. The DSS sought review of that decision.

Frankos had lived in Australia for many years when he left for Greece in 1977. He returned to Australia in late 1980 or early 1981. In November 1980 he applied for an age pension which was granted. The pension ceased being paid in August 1981.

In early 1984 Frankos asked the SSAT (which then had recommendatory powers only) to review the cancellation of his pension. He was advised by the SSAT that his appeal had been considered and that the SSAT recommended to the DSS that it should be allowed. However, no further advice on the DSS decision was received. In 1992, following further requests for information about his pension, he was invited to lodge another appeal. He did this in August 1992 and that application, heard by the SSAT in December 1992, was also successful.

The AAT noted that documentation relating to the cancellation of his pension and SSAT files was no longer in existence.

Jurisdiction

The AAT noted that the substantive issue to be determined was whether or not Frankos was entitled to arrears of age pension, effectively from 1981 to 1991. However, before this could be addressed, the AAT had to consider whether it had jurisdiction.

The Department argued that the SSAT had been *functus officio* when in December 1992 it purported to set aside the decision made by the delegate in 1981. This was because the issue which the SSAT purported to decide in 1992 was the same issue, with the same facts, as that which had been considered by the SSAT in 1984.

It had been argued that, because in 1984 the SSAT had had only recommendatory powers, no issue could arise about it being *functus officio*.

However, the AAT decided that it could be inferred from Schedule 1A of the 1991 Act (the transitional provisions) that a decision cannot be reviewed by both the SSAT as constituted under the 1947 Act and the SSAT as presently constituted (under the 1991 Act). And, as payments had never been restored to Frankos, it could also be inferred that the then Secretary had made a decision to affirm the cancellation of age pension, thereby rejecting the SSAT's 1984 recommendation. However, if such a decision was made, it was never notified to Mr and Mrs Frankos.

While the AAT noted that a failure to notify could have rendered the decision of the DSS void, it held that the decision in *Brian Lawlor v Collector of Customs* (1978) 1 ALD 167 supported the view that the AAT nonetheless had jurisdiction, as *Brian Lawlor* is authority for the proposition that the Tribunal had power to remedy procedural defects.

However, the AAT distinguished the 1992 decision of the SSAT. This was, in the AAT's view, a nullity, rather than 'merely plagued by procedural defects' since the SSAT was *functus officio* when it purported to make the decision. Therefore, the AAT considered that it had no jurisdiction to review that decision.

The AAT also rejected an argument that because the *functus officio* submission had not been put to the SSAT, it could not be raised before the AAT. As the AAT sits *de novo* and not as an appellate body, it was irrelevant whether a matter had been raised before the SSAT.

Having decided that it lacked jurisdiction, the AAT then went on to consider the substantive application in the event that it had wrongly decided the jurisdiction point.

Should the pension have been cancelled?

The AAT heard evidence that Frankos had, shortly after being granted pension in 1980, heard from his wife in Greece that she was ill and he had to return. He notified the department of his departure indicating that he hoped to return in a few months, with his wife. As it hap-

pened, he did not do so for some time. In 1981, Frankos had written to the Department asking why his pension had been cut and again indicated that his wife was ill.

The AAT referred to what was then s.83AD which applied to former residents who returned to Australia. In such cases, a person who had been granted pension had to stay in Australia for 12 months before the pension became portable. However, provision was made in s.83AD(2) for the 12 months' requirement to be waived where the departure 'arose from circumstances that could not reasonably have been foreseen...'

The AAT decided, after considering the evidence available (including that given at the hearing) that 'although Mrs Frankos' condition can be described as serious, it was not such as would warrant a determination pursuant to s.83AD(2) of the 1947 Act that s.83AD(1) does not apply'. While the Tribunal accepted that Mrs Frankos' illness could not reasonably have been foreseen by Mr Frankos at the time of his return to Australia in 1980 and that the reason for his early departure to Greece was his wife's illness, the AAT found that the circumstances of the illness did not warrant an exercise of the discretion as:

'the medical problems from which Mrs Frankos suffered throughout the period in which Mr Frankos chose to return home did not constitute the sort of unforeseen [sic] medical emergency which the section envisages.'

(Reasons, para. 52)

On this basis, if it did have jurisdiction, the AAT would have set aside the SSAT decision.

Formal decision

The AAT did not have jurisdiction to entertain the application.

[R.G.]