tion made by the SSAT it substituted specified directions in accordance with the findings above as to the producer status, assets and liabilities of Mr and Mrs Thomas.

[P.O'C.]

Sickness allowance: jurisdiction, rate and debt recovery

REID and SECRETARY TO DSS (No. 9227)

Decided: 7 January 1994 by Professor S.D. Hotop.

Ms Reid appealed to the AAT against the SSAT's decision to affirm the DSS decisions that the rate of sickness allowance payable to her from 6 May 1992 was half the rate applicable to a married person and that a debt of $1480.47 be recovered from her.

Factual background

Reid and her partner, Verstraeten, had lived together in a *de facto* relationship since 1987. Reid had been paid sickness allowance from October 1991 to 28 April 1992 at the rate applicable to a single person. She lodged a new claim form on 28 April 1992 and was paid from 6 May 1992. at half the rate applicable to a married person. No additional amount was paid for her partner because he was not an Australian resident. Verstraeten was employed on a casual basis as a fruit picker from 1 March 1992 until 26 May 1992 and for 2 days in August 1992. However in a review form dated 21 April 1992, completed by a DSS officer but signed by Reid, she answered 'no' to the question whether she or her partner were employed. In another review form, dated 24 July 1992, Reid advised DSS that Verstaeten had been employed from 1 March 1992 to 14 April 1992 and his gross weekly wage was $220 a week. On 21 October 1992, DSS advised Reid that she had been overpaid $1480.47 because she failed to declare her partner's earnings.

Reid wrote to the DSS in October 1992 requesting a review of its decision to pay her sicknesss allowance at half the married rate. In the same month she reiterated her claim that she had been underpaid and requested that the matter go before the SSAT as soon as possible. At the same time she requested a meeting with a senior DSS officer to resolve her overpayment. A DSS officer (not an authorised review officer (ARO)) advised her in January 1993 that he had reconsidered the decision to recover the overpayment and found the decision to be correct. Reid responded to that letter in February 1993 stating that she wanted SSAT hearings for her claim of underpayment and the DSS claim of overpayment. On 3 March 1993 both decisions were referred to an ARO. The ARO declined to review the matters stating that Ms Reid had rejected the course of ARO review in preference to a SSAT hearing and as the decisions to pay at the half married rate and to raise an overpayment were made in 1991 and 1992 respectively, 'it would be improper . . . not to proceed directly to the SSAT'. Reid's appeal and the DSS submission were lodged with the SSAT on 9 March 1993.

Jurisdiction

The DSS submitted that the AAT lacked jurisdiction to review the decision of the SSAT on the basis that the SSAT itself had no jurisdiction to hear Reid's appeal because it had not been reviewed by the Secretary or an ARO as was required by s.1247(1) of the *Social Security Act* from 1 January 1993. The AAT held that whether or not the SSAT had jurisdiction in law to review, the relevant decision was, under the *Brian Lawlor* principle (1978) 1 ALD 167, irrelevant to the existence of the AAT's jurisdiction to review the decision in fact made by the SSAT. The AAT then went on to find that there had been sufficient reconsideration by the delegate in January 1993 and the ARO in March 1993 to constitute the prerequisite internal review prior to the SSAT's review and therefore the SSAT had jurisdiction.

The substantive issues

Rate of payment

From 12 March 1992, the rate of pension or benefit payable to a member of a couple whose partner was not receiving a pension, benefit or allowance, was restricted to half the rate applicable to a married person rather than the higher 'single' rate. A savings clause preserved payment of the higher rate to a person who had been receiving it immediately prior to 12 March 1992 until the person ceased to receive the pension or benefit. The AAT stated that while Ms Reid continuously received sickness allowance until 28 April 1992, she was entitled to the higher rate. Once that period of incapacity for work expired and she had to lodge a fresh claim, on 6 May 1992, there was a period of 7 days when she ceased to receive the allowance and thereby lost the benefit of the savings clause. The AAT concluded therefore that the decision to pay her at half the married rate from 6 May 1992 was correct.

The debt

It was not in dispute that the income earned by Reid's partner between 1 March 1992 and 26 May 1992 was not taken into account in calculating her rate of sickness allowance because the DSS was not notified of Verstraeten's earnings until the review form of 24 July 1992, and that Reid had been overpaid $1480.47 in that period. However the crucial question was whether this overpayment was a debt due to the Commonwealth. Section 1224(1)(a) was satisfied because Reid had made a false statement or false representation when she signed the review form dated 21 April 1992 and answered 'no' to the question whether she or her partner was employed. It was not necessary that the statement be deliberately or intentionally untrue: just that it was in fact untrue. However, under s.1224 (1)(b) there had to be a cause/effect relationship between the false statement and the amount paid and as that was the only false statement, only the amount of the overpayment that was made after 21 April 1992 was a debt due by her to the Commonwealth. The AAT remitted the matter for the amount of the debt to be recalculated.

The final issue was whether it was appropriate to waive or write-off recovery of the debt. Having regard to the straitened financial circumstances of Ms Reid and her family which left them barely able to cover essential living expenses, the AAT decided to exercise the discretion in s.1236(1) to write-off recovery of the debt for a period of at least one year.

The formal decision

The AAT set aside the decision under review and remitted it for reconsideration in accordance with the directions that:

1. as from 6 May 1992 sickness allowance was payable at half the married rate;
2. the overpayment was the amount of sickness allowance paid from 21 April 1992 to 26 May 1992 – such amount to be calculated by the DSS – was a debt due to the Commonwealth; and

3. the full amount of the debt be written off for a period of one year from the date of the hearing.

[B.W.]

[**Note:** Despite the preoccupation of the AAT with the jurisdictional issue it considered was imposed by the amendments made to s.1247 by the *Social Security Legislation Amendment Act (No.3) of 1992*, the amendments requiring that a decision be reviewed by an ARO before it is reviewed by the SSAT, only apply if the decision was made on or after 1 January 1993 (see s.3(4) of the amending act).]

Sickness allowance - 'in gaol'

BULSEY and SECRETARY TO DSS

(No. 9078)

Decided: 27 October 1993 by S.A. Forgie, G.S. Urquhart and A.M. Brennan.

Bulsey requested review of a SSAT decision of 25 March 1993 which affirmed a DSS decision refusing Bulsey's claim for sickness allowance (SA). When Bulsey lodged his claim he was a patient in the John Oxley Memorial hospital receiving treatment for a psychiatric illness.

The facts

Bulsey was imprisoned in 1973 for five years. In 1977, while in prison, Bulsey was convicted of murder and sentenced to life imprisonment. At the time of his conviction Bulsey's mental illness was not apparent and it played no part in his conviction.

Bulsey was admitted to hospital as a 'regulated patient' for treatment of his mental illness. The grounds for certifying him as a regulated patient were that his mental ilness was severe enough to warrant detention in hospital, and his detention was either in his own interest or to protect other people.

The law

Section 1160 of the *Social Security Act 1991* provides that SA is not payable to a person in goal, or to a person undergoing psychiatric confinement because the person has been charged with committing an offence. 'In gaol' is explained in s.23(5) as:

> 'For the purposes of this Act, a person is in gaol if the person:
>
> (a) is imprisoned in connection with the person's conviction for an offence; or
>
> (b) is being lawfully detained in a place other than a prison in connection with the person's conviction for an offence; or
>
> (c) is undergoing a period of custody pending trial or sentencing for an offence.'

It was agreed between the parties that Bulsey was not imprisoned while he was an inpatient. The AAT noted that lawful detention under the *Mental Health Act* (Qld) could amount to imprisonment, but that s.23(5)(a) had to be read with s.23(5)(b) which refers to lawful detention 'in a place other than a prison'. The term 'imprisoned' in s.23(5)(a) must mean lawful detention in a prison only. While Bulsey is in hospital he is legally detained, but not in a prison because the hospital is not designated as such under the relevant legislation.

In connection with the person's conviction

The DSS submitted that there did not have to be a causal connection between a person's lawful detention and the conviction. The meaning of 'connected with' was dealt with in several Federal Court decisions including *Perrett v Commissioner for Superannuation* (1991) 23 ALD 257. The term should be interpreted in the context of the particular legislation, and is: 'something more comprehensive than a causal relationship': Reasons, para.18.

The AAT identified the issue to be decided as whether there was a causal link between Bulsey's detention in hospital and his conviction. Bulsey had only been hospitalised because he was mentally ill and his illness was severe enough to warrant his detention in hospital. There was no link between his hospitalisation and his imprisonment or his conviction. Therefore s.23(5)(b) did not apply to Bulsey because there was no connection between his detention in hospital and his conviction.

Formal decision

The AAT set aside the decision under review and substituted a decision that Bulsey was not prevented from receiving sickness allowance because of the operation of s.1160.

[C.H.]

Wife pension: portability

SECRETARY TO DSS and SRPCANSKI

(No. 9095)

Decided: 29 October 1993 by G. Ettinger, J. Kalowski and A. Cripps

Srpcanski was granted a wife pension in 1979 and, when she returned to Macedonia to live permanently in 1982, her wife pension was paid to her overseas. A legislative change to the *Social Security Act 1947* restricted portability of wife pension to 12 months from the date of leaving Australia or from 1 July 1990 when the pensioner had left before that date. Srpcanski's pension was cancelled, last paid on 20 June 1991, when she did not return to Australia before 1 July 1991. Srpcanski returned to Australia on 8 August 1992 and lodged a new claim for wife pension which was granted from 13 August 1992. She applied for portability but was told that her pension would cease if she left Australia before 8 August 1993. Srpcanski returned to Macedonia, on her return ticket, on 5 September 1992 and her pension was cancelled from that date. The SSAT had set aside that decision and decided that Srpcanski had resumed qualification once she temporarily returned to Australia and her pension remained payable until she had been overseas for 12 months when she would again be disqualified.

The issues

The issues considered by the AAT were:

(i) whether the wife pension was correctly cancelled under s.1216;
(ii) the effect of s.1217 on the qualification and payabilityof wife pension;
(iii) whether s.1217 automatically reinstated pension rights and payments; and
(iv) whether s.1220 operated to prevent payment of Srpcanski's wife pension when she left Australia in September 1992.

The cancellation

The AAT said that both parties agreed that Srpcanski's wife pension had been correctly cancelled under s.1216 (the section restricting portability to 12 months) and that Srpcanski was not exempt by being an 'entitled person' under s.1216B.

The effect of the return to Australia

The main dispute was the effect of s.1217 which stated (1) that a person disqualified under s.1216 remained disqualified until returning to Australia and