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

(2) that a temporary return to Australia was sufficient for (1). The DSS argued that s.1217 only acted to remove the disqualification, that it did not requalify the person, and to achieve requalification the former wife pensioner would have to reapply and comply with the claim requirements in ss.152 to 155 of the Act.

Section 155 stated that a claim for wife pension was not a proper claim unless the woman was an Australian resident and in Australia on the date of the claim. 'Australian resident' is defined in s.7(2) as a person who 'resides in Australia' and meets other criteria. Both parties agreed Srpcanski did not qualify as a resident as she did not reside in Australia when she returned and had no intention of remaining permanently.

The argument put for Srpcanski was that a temporary return to Australia was sufficient to reinstate the wife pension otherwise s.1217(2) would be redundant; that she was not required either to apply for a review of the cancellation nor to lodge a new claim to requalify.

The AAT decided that s.1217 operated to remove the disqualification and restore Srpcanski's eligibility to reapply for a pension rather than restore automatic entitlement to payment. Srpcanski reapplied but was unable to meet the residency requirements as her intention was a temporary visit. She did not qualify for consideration of the discretion in s.1220(3) to continue payment when she left Australia in September 1993 because her application for portability did not result from unforseen circumstances.

The formal decision

The AAT set aside the decision of the SSAT and decided that Srpcanski did not qualify for payment of wife pension from the date of cancellation.

[B.W.]

[**Editor's note:** This case has been appealed to the Federal Court.]

Disability support pension - departure certificate

SECRETARY TO DSS and OLGYAY

(No. 9156)

Decided: 3 December 1993 by J.R. Dwyer.

The DSS requested review of a SSAT decision which had set aside a delegate's decision to cancel payment of disability support pension (DSP) to Olgyay. Mrs Olgyay's wife pension had also been cancelled, and she requested review of that decision.

The facts

Olgyay was granted invalid pension from 23 June 1988 and his wife was granted wife pension. On 14 March 1992 they travelled to Czechoslovakia. The DSP and wife pension were cancelled on 3 December 1992 after Olgyay and his wife had been out of Australia 6 months.

Mrs Ogyay told the AAT that she had notified the DSS before she and her husband went overseas but no departure certificate was issued. Her evidence was that she had gone to the DSS and picked up the relevant papers. She completed the forms, including a copy form, and returned them to the DSS. Olgyay's daughter had told the SSAT that she found a partially completed form among her parents' papers when they were overseas, and she had subsequently lodged these papers with the DSS. The AAT pointed to a number of inconsistencies in Mrs Olgyay's evidence and found that it could not be satisfied that Mrs Olgyay had lodged the form with the DSS.

The departure certificate

Section 1218 of the *Social Security Act 1991* provides that if a person who is receiving a DSP or wife pension leaves Australia for more than 6 months without receiving a departure certificate, that person ceases to be qualified for a pension. Section 1219 sets out the requirements for the issue of a departure certificate. The Secretary must give a certificate if satisfied that the person is in Australia and qualified for the relevant pension. The person must notify the DSS of a proposed departure as required by a recipient notification notice.

This issue was considered by the AAT in *Gellin and Secretary to DSS* (1993) 76 *SSR* 1101. The AAT had decided that s.1218 operated independently of s.1219. Once the conditions specified in s.1218(1) were satisfied, the person ceased to be qualified for the pension.

On behalf of Olgyay it was submitted that s.1218 must be read together with s.1219. Section 1218 should only apply where the DSS has issued a valid recipient notification notice. If the recipient notification notice which had been issued was invalid, Olgyay did not have to notify the DSS that he was going overseas. The AAT rejected this argument saying that: 'Section 1218 is not expressed to apply only where the Department has not been at fault. Nor is it expressed to be read together with s.1219': Reasons, para.18.

It would not be appropriate to read into s.1218 that the section only applied where a person had received a valid recipient notification notice.

Even though it was not necessary for the AAT to consider whether the recipient notification notice was valid, it noted that it may be unnecessarily complicating social security legislation to insist that all the technical requirements specified in the *SSA* be complied with – especially where there was no injustice.

Formal decision

The AAT set aside the SSAT decisions and affirmed the DSS decisions cancelling the Olgyays' pensions.

[C.H.]

Disability support pension: continuing inability to work

HAOUCHAR and SECRETARY TO DSS

(No. 9224)

Decided: 24 December 1993 by J.R. Dwyer, C.G. Woodard and R.W. Webster.

Mr Haouchar was granted an invalid pension on 26 June 1990. From November 1991, when the disability support pension (DSP) was introduced, he received the DSP. On 3 August 1992, the DSS decided to cancel his DSP.

On review, the SSAT affirmed that decision and Haouchar appealed to the AAT.

The legislation

Section 94(1) of the *Social Security Act 1991* specifies the qualifications for a DSP. A person must have:

- a physical, intellectual or psychiatric impairment of 20% or more under the Impairment Tables (in sch.1B to the Act): s.94(1)(a) and (b); and
- a continuing inability to work: s.94(1)(c).

The continuing inability to work is defined by s.94(2). The 2 elements