receive pension, the Secretary shall give the person a certificate acknowledging the notification of the proposed departure.

The AAT stated that Smaragdis was in receipt of age pension, was qualified for it, and had notified the DSS of her impending departure. On the basis of these findings, the Tribunal decided that the Secretary ought to have given her a certificate acknowledging that departure. However, there was no dispute that such a departure certificate had not been issued.

Because Smaragdis had not received a pre-departure certificate, her pension was cancelled on 15 December 1992, with effect from 28 August 1991, that is, six months after she left Australia. This decision was subsequently affirmed by an authorised review officer. It was this decision that was set aside by the SSAT which substituted a new decision that age pension remained payable to Smaragdis under s.60A of the 1947 Act.

1947 or 1991 Act?

It was argued for Smaragdis that the correct Act to apply was the 1947 Act. This was because she left Australia in February 1991 while that Act was still operative. As she had accrued rights under that Act, it was argued that a pension could only be taken away in accordance with that Act. And, as the Savings and Transitional Provisions contained in Schedule 1A of the 1991 Act did not specifically apply to this particular fact situation, it was argued that s.8 of the *Acts Interpretation Act* preserved her rights to have her entitlements determined under the 1947 Act. Section 8 of that Act provides that a repeal of an Act shall not, unless the contrary intention appears '. . . (c) affect any right privilege obligation or liability acquired, accrued or incurred under any Act so repealed . . .'

The DSS, on the other hand, submitted that the operative date was the date that the pension was cancelled and that decision was made in December 1992. The date of effect of that decision was 31 August 1991 and both these events occurred after the date upon which the 1991 Act came into force.

The AAT considered the various decisions on the issue of which Act applied, and found that, as the DSS should have issued Smaragdis with a departure certificate under s.60A(1) of the 1947 Act, to that extent she had a right to have a certificate issued and a right that affected her entitlement to age pension. Since the provisions of s.60A(1) directly affect her right to receive a pension and are not merely procedural, it was held that this case falls to be decided under the 1947 Act.

Sub-section 60(A)(3) of the 1947 Act provided that where a person leaves Australia and has not received a certificate under s.60A acknowledging the notification of their departure, and their absence continues for more than six months, 'the person is not qualified to receive a pension at any time after the first 6 months of the absence while the person remains absent . . .'

The AAT considered this provision in the context of the history of this case. Having found that the DSS had acted unlawfully in not issuing Smaragdis with a departure certificate, the AAT considered that it had the power to direct that the departure certificate be issued to her so that she could satisfy the requirements of s.60A(3). The AAT decided that the power to order the issue of a certificate was within its powers under ss.1283 and 1285 of the 1991 Act:

> 'The Tribunal has often remarked that social security legislation is welfare legislation that should be administered beneficially. How unjust it would be if, in circumstances where the pension recipient has done all that is required, and because the Secretary or the Secretary's delegate acts unlawfully in not issuing a departure certificate, the recipient's pension is cancelled.'

(Reasons, para. 30)

The AAT decided that it was in its power to set aside the decision under review and remit the matter to the Secretary with directions that the Secretary give Smaragdis a certificate acknowledging the notification of her proposed departure, and stating that the Secretary was satisfied that the respondent was a person qualified to receive age pension prior to the giving of the certificate. The AAT also pointed out that the practical effect of this decision was the same as affirming the decision of the SSAT under review though the legal basis of the decision was different. The Tribunal commented that it was

> 'sufficiently concerned by the evidence or the lack thereof in this matter to express its dismay at the record keeping procedures of the department. For the period under review, and particularly 1991, there are no documents before the Tribunal . . . In such circumstances, if the department is unable to support its submissions because of a lack of documentary evidence, the Tribunal will, where conflict exists between the parties, have no option but to accept the uncontroverted evidence of pension recipients.'

(Reasons, para.34)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions that

(i) the Secretary give Smaragdis a certificate acknowledging the notification of the proposed departure and stating that the Secretary was satisfied that she was qualified to receive age pension prior to giving the certificate; and

(ii) Smaragdis remained qualified to receive age pension on and after 28 August 1991.

[R.G.]

Extension of time

McIVER and SECRETARY TO DSS (No. 9334)

Decided: 1 March 1994 by D.J. Grimes.

McIver lodged an application under s.29(7) of the *AAT Act* asking for an extension of time for appealing against a decision of the SSAT made on 11 July 1989. That Tribunal had reviewed a DSS decision to recover an overpayment of unemployment benefits. The SSAT had varied the decision by reducing the period of the overpayment to a shorter period than the DSS had originally sought.

The AAT referred to decisions of the Federal Court relating to the power to extend the time for making an application for review. In the most recent decision referred to, *Pulitano and Telstra Corporation Limited* (27 July 1993), it was stated that the Tribunal is to '. . . do what is just and equitable between the parties'.

The AAT said that it was appropriate to focus on the explanation given by the applicant for the delay, the possible prejudice that may be caused to the respondent, the merits of the substantive application and whether the applicant had 'rested on his rights': Reasons, para. 6.

McIver said that he could not recall receiving a notice of the SSAT decision in 1989. However, he did acknowledge that he knew of the decision after being contacted by the DSS. Between the time of the decision in 1989 and December

1992, McIver was contacted at six-monthly intervals by the DSS concerning the repayment. He stated that he had refused to pay, believing that the decision was unjust. He explained that at the time of the alleged overpayment he had been in a family business and that it was the business rather than him personally who received the funds at issue.

The DSS argued that McIver had had repeated contact with it and had done nothing to challenge the decision. Even after allegedly discovering his right to appeal in December 1992, he did not seek an appeal until December 1993.

The AAT decided that McIver had not provided an acceptable explanation for the delay in lodging his application for review. The AAT said that he had 'rested on his rights' by not acting sooner. The AAT also noted that he had regular contact with the DSS and that there was evidence that he had received the SSAT decision in 1990. And, even though his own evidence was that he was not aware of his appeal rights until 1992, he still waited another 12 months before he acted on that knowledge.

The AAT also found that there was some prejudice to the DSS in the re-opening of the matter considered closed, and which related to matters that occurred in the period 1986 to 1988. Moreover, while the AAT said that it was not its role to come to a conclusion as to the substantive application, it was noted that there was no fresh evidence that would materially contribute to McIver's case.

The AAT decided that in all the circumstances, fairness and justice between the parties would not be served by extending the time within which to allow McIver to lodge an application for review.

Formal decision

The AAT refused the application for an extension of time and, as a consequence, the substantive application was dismissed for lack of jurisdiction.

[R.G.]

Child disability allowance: arrears: qualification

SECRETARY TO DSS and FALK (No. 9407)

Decided: 7 April 1994 by G. Ettinger.

The facts

Falk gave birth to a daughter named Gretel on 24 November 1988. Gretel was kept in hospital for 11 weeks after her birth. Falk initially applied for a family allowance on 13 January 1989, while Gretel was still in hospital. Later, on 8 May 1992, she applied for a child disability allowance (CDA). (Falk claimed she had not previously been aware that she could apply for a CDA.) The DSS decided to pay CDA as from 12 months before her application, that is, from 8 May 1991.

On internal review the Authorised Review Officer decided that she was not entitled to receive arrears of payments for 12 months prior to her claim. On an appeal by Falk to the SSAT, it was decided that she should receive CDA payments as from 25 November 1988 when Gretel was born. The DSS appealed to the AAT.

The legislation

The AAT found that, since Falk had applied for CDA in 1992, the *Social Security Act 1991* applied. However, since Falk sought backpayments to 1989, her eligibility for CDA had to be determined under the *Social Security Act 1947*.

Section 102 of the 1947 Act provides that for a person to be qualified for CDA care and attention must be provided on a daily basis in the residence of the person and the child. This requirement was carried across to the 1991 Act (s.954(1)(b)).

Section 958(1) of the 1991 Act provides that the provisional commencement day (the day from which CDA is paid) is the date on which a person claims CDA. However, s.958(2)(a)(i) provides an alternative provisional commencement date where a person has made an 'initial claim' for family payment. On the facts, an initial claim for a family allowance was made on 13 January 1989.

Section 958 is subject to s.960 which provides that if the provisional commencement date is more than 12 months after the person becomes qualified for a CDA, then payments can be backdated for up to 12 months before the provisional commencement day.

Section 955(3) provides that where there is a temporary loss of qualification because the child is not receiving care and attention on a daily basis in the private home of the person, the DSS may nevertheless decide that the person continues to be qualified for CDA.

The main issue

It was not in dispute that Falk was entitled to receive CDA. The main issue before the AAT was whether CDA payments were payable either:

(i) from the date Gretel was born,

(ii) from the date of the initial claim for a family allowance (January 1989), or

(iii) from 8 May 1991, being 12 months prior to the application for CDA.

Daily care and attention

Falk submitted that she had provided care and attention while Gretel was in hospital, as required by s.102 of the 1947 Act and s.954 of the 1991 Act. She relied on evidence of telephone calls several times a day, her visits, her time with the baby walking her around the hospital grounds, changing nappies and attending to all her needs, including her feeding requirements.

On this basis, the AAT was satisfied that Falk had provided daily care and attention to Gretel, as from her birth, as required by both Acts.

Care and attention in the residence of the person and the young person

The DSS submitted that as Gretel was in hospital and not residing with Falk when she made the 'initial claim' for family allowance in January 1989, there was no eligibility for CDA at that date. Accordingly, the DSS argued that CDA payments could not be backdated to January 1989. Falk submitted that since Gretel's birth, the family home had been her residence.

The AAT found that Gretel had not taken up residence in the family home when she was in hospital. Accordingly, Falk did not qualify for CDA when she made the initial claim in January 1989.

Provisional commencement date

Falk submitted that pursuant to s.958(2)(a)(i), the provisional commencement date should not be 8 May 1992 when she made a claim for CDA, but 13 January 1989, when she made an initial claim for a family allowance.

The AAT rejected this argument and found that, as Gretel was in hospital in