

Interpretation Act. The AAT then considered whether s.1236A expressed a contrary intention. The AAT adopted the reasoning in *Allinson* (1994) 79 SSR 1145 and found that the wording was not sufficiently clear to express a contrary intention. The AAT also referred to the Second Reading Speech and the Explanatory Memorandum introducing the amending Act, and found that there was no intention that the s.1236A was meant to operate retrospectively.

The AAT referred to the principles set out in *Director-General of Social Services v Hales* (1983) 13 SSR 136, and *Ward and Secretary, DSS* (1985) 24 SSR 289 as applicable when applying the general discretion to waive a debt. These are:

- (a) whether the applicant has received public moneys to which he was not entitled;
- (b) the way in which the overpayment arose;
- (c) the financial circumstances of the applicant;
- (d) the prospect of recovery of the debt;
- (e) whether a compromise is offered;
- (f) whether recovery should be delayed because there is a prospect of the applicant's financial circumstances improving; and
- (g) compassionate considerations given that this is social welfare legislation.

Circumstances of the overpayment

Nassif and his wife gave evidence that they had not known that they were completing the claim forms incorrectly. These forms were quite often completed by Mrs Nassif or friends. Nassif did not understand the difference between gross and net income. The first claim form was completed by a friend and Nassif used this as a guide to complete the later forms. On a number of occasions Nassif had provided the DSS with pay-slips which resulted in the DSS officer amending the form, but the reason for the change was not explained to Nassif. Nassif's command of English was limited, although his wife's English was adequate.

Financial circumstances

Nassif received part payments of job search allowance plus additional family payments. His wife earned \$319.13 per week. The DSS was withholding \$20 a week to repay the debt. None of the 5 children was paying board although 2 were working and 2 were receiving job search allowance. The children

contributed towards expenses on an irregular basis. One child was still at school and received Austudy. Nassif owned the family home valued at approximately \$270,000 (mortgage of \$63,000), and an old car.

Administrative practices of the DSS

Nassif had provided the DSS with copies of his wife's pay-slips and bank statements, and the DSS had not acted on this information. The DSS had failed to provide Nassif with an interpreter when he was interviewed. These poor administrative practices of the DSS might have contributed to the overpayment.

Health

Nassif had suffered from a back condition for 10 years. He also had diabetes which required medication, and depression. Nassif believed that he was able to work but on light duties only.

Write off

The AAT stated that the same principles that apply to the exercise of the discretion to waive the debt, apply to the discretion to write off the debt.

Conclusion

The AAT was satisfied that the overpayment occurred because of an innocent mistake made by Nassif. Because of his limited command of English he did not understand the necessity of distinguishing between net and gross income. Nonetheless, Nassif had received a large amount of public moneys which he was not entitled to receive. Although the family were having financial problems, the rate at which the DSS was recovering this large debt was not onerous. Nassif's prospects of gaining employment were limited, and in spite of this, he had chosen to support his adult children financially. In all these circumstances the AAT decided that the debt should not be waived or written off because recovery of the debt would not cause financial hardship.

Formal decision

The AAT affirmed the decision under review.

C.H.J

Waiver of debt: which law applies?

JIN and SECRETARY TO DSS
(No. 9463)

Decided: 11 May 1994 by S.A. Forgie, K.L. Beddoe and A.M. Brennan.

The SSAT affirmed a decision of the DSS on 19 January 1993, that Jin had been overpaid sole parent pension (SPP), because she did not meet the residency requirements of the *Social Security Act 1991*.

Jin claimed SSP on 10 April 1989, and advised the DSS in her claim form that she had permission to remain permanently in Australia. She had first arrived in Australia on 15 March 1987 on a student visa (temporary entry permit). This visa was extended several times to 15 March 1989. Jin applied for permanent residence 27 May 1988, and this was granted on 11 February 1991. This meant that between 16 March 1989 and 26 November 1990 Jin was an illegal entrant to Australia.

Residence requirements for SPP

According to s.249(1)(c) of the *Social Security Act* there are various ways by which a person can qualify residentially for the SPP. Common to all requirements is that the person be an Australian resident, a term which is defined in s.7(2). To be an 'Australian resident' a person must either be an Australian citizen or hold one of the permanent residency permits. As Jin was not an Australian citizen and did not hold a permanent residence permit, she was not qualified for SPP and owed a debt to the Commonwealth in respect of the SPP paid to her until she was granted permanent residence on 11 March 1989.

Waiver – which law applies?

The AAT considered whether the debt owed by Jin should be waived. The issue for the AAT was which waiver provisions applied – the general discretion in force before 24 December 1993, or the more restricted discretion in force after that date. The general principles determining the law to be applied at a particular time are set out in *Costello and Secretary, Department of Transport* (1979) 2 ALD 934. The AAT would normally apply the law to the facts at the date of its decision. Where the law has been changed, the law to be applied will depend on the nature of the decision under review and

the provisions of the legislation changing the law. If the decision does not involve accrued rights or liabilities, then the law as amended at the date of the AAT's decision would apply.

Accrued rights?

Section 8 of the *Acts Interpretation Act 1901* was also relevant when considering which law applies. It provides that an Act which repeals a section does not affect an accrued right or liability, unless a contrary intention is expressed in the repealing Act. In *Cirkovski and Secretary, DSS* (1992) 67 SSR 955, the AAT discussed the repeal of the *Social Security Act 1947* and its replacement by the *Social Security Act 1991*, and concluded that a claimant for a pension had an accrued right to that pension until the claim was determined. In *Esber v Commonwealth of Australia and Anor* (1992) 106 ALR 577, the High Court said that Esber had the right to have an application to the AAT determined pursuant to a repealed Act. The AAT decided that it must look to the repealing legislation to see whether the amended provisions were meant to operate retrospectively.

The AAT first considered whether Jin had any accrued rights to have the debt waived. It decided to adopt the conclusions in *Secretary, DSS and Edwards* (1992) 70 SSR 1004, in which it was stated that the discretion to waive a debt is a power to be exercised by the Secretary and not a right, and therefore not preserved by s.8 of the *Acts Interpretation Act*. In this case, however, the delegate has considered whether to exercise the discretion to waive the debt, so that:

'the delegate is under an obligation to take into account and to reach a decision taking into account those appropriate matters. Miss Jin has a corresponding right that he do so. This is an accrued right.'

(Reasons, para. 26).

As Jin had an accrued right, the AAT considered whether ss.1236A, 1237 and 1237A (the new sections) were intended to apply to all debts whenever they were incurred. Section 1236A focuses on debts being incurred, and not on the exercise of the discretion. If the discretion has been exercised in the past, then the new sections do not apply.

'the new sections 1237 and 1237A apply to any exercise of the discretion when it is a fresh exercise of the power.'

(Reasons, para. 30).

The new sections did not apply to Jin because this was not a 'fresh' exercise of the discretion to waive the

debt, but a review of the past exercise of the discretion.

The evidence

Jin trained as a doctor in China, and practised as an acupuncturist in Australia. While negotiating with the Immigration Department about her residence permits, she was advised by an officer of that department that she could stay in Australia, and that she would not be sent back to China. In hospital after the birth of her son Jin was advised by the staff to claim SPP. She stated on the form that she could stay in Australia permanently, relying on the information given to her by the Immigration Department officer. Under cross-examination Jin admitted to having some knowledge of the social security system, as she had applied for a health card before the birth of her son. She also stated that she knew she was not a permanent resident by the end of 1989, although she did not think she had to tell the DSS this. There was some evidence before the AAT that Jin had been living in a 'defacto relationship' for part of the period she was receiving SPP, although Jin denied this. The man Jin was supposed to be living with had told the Immigration Department that he had lived with Jin in Canada from October 1991 until January 1992, and in Australia from July 1992 until June 1993.

The AAT found that Jin had made contradictory statements to the DSS and the Immigration Department. Her lack of fluency in English might explain this in part. Jin knew that permanent residence had not been granted to her by 1989, but thought that she could stay in Australia. After the birth of her son Jin had health problems and was desperate for assistance. The AAT noted that Jin had advised the DSS of her true residence status on 1 July 1989. A file note of that date recorded that Jin had permanent residence status, that is, she had applied for this. The DSS should have followed up this advice and clarified Jin's residence status. Jin's financial status at the time of the hearing was unclear as she was not in receipt of a social security benefit.

The AAT took into account the general principle that a person should not be entitled to retain public money to which the person was not entitled, when considering whether to exercise the discretion to waive in Jin's favour. The AAT took all the above matters into account, and decided that recovery of the debt after Jin advised the DSS of her true status on 1 July 1989, should be waived.

Formal decision

The AAT decided that the decision under review should be set aside and substituted for it the decision that repayment of the debt incurred after 1 July 1989 be waived.

[C.H.]

Cancellation of wife pension: never a resident

CIMINO and SECRETARY TO DSS

(No. 9329)

Decided: 25 February 1994 by M.T.E. Shotter.

Mrs Cimino had never been a resident of Australia. In August 1990 she was granted wife pension after the DSS invited her to make a claim because her spouse had claimed an Australian pension under the reciprocal agreement between Australia and Italy. In August 1992 the DSS cancelled the wife pension because changes to the legislation required some element of residency to satisfy eligibility for payment of Australian pensions. Cimino contended that having been granted the pension under earlier legislation, subsequent legislation could not remove her right to continue to receive the pension.

The AAT looked at the initial issue of retrospective application of current legislation. The AAT accepted the established precedent that the law to be applied is the law at the date of the decision (*Costello and Secretary, Department of Transport* (1979) 2 ALD 934). The AAT also referred to the decision of *Secretary to DSS and Hodzic* (1992) 69 SSR 994 which indicated that the present Act has retrospectivity to decisions made under previous legislation. The AAT concluded that 'Mrs. Cimino has no accrued rights under earlier legislation because it is not so stipulated under the current Act': Reasons, para. 8.

The legislation

Section 147 sets out the qualification provisions for wife pension and in addition s.155 states that a claim is not a proper claim unless the woman is an Australian resident and in Australia on the day on which the claim is lodged. Section 7(2) defines Australian