# Background

## Departure certificates: shouldn't they be going now?

In the past 12 months there has been a spate of Administrative Appeals Tribunal decisions highlighting the increasingly inequitable results of the requirement to obtain a departure certificate under the *Social Security Act 1991*.

**History of legislation**

The requirement that pensioners obtain a departure certificate from the DSS prior to leaving Australia came into effect from 1 February 1989 under s.60A of the *Social Security Act 1947*. The section provided a mechanism by which a departure certificate could be obtained.

> '60A(1) Where:
>
> (a) a person who is in receipt of a pension proposes to leave Australia;
>
> (b) the person notifies the Department of that proposal as required by a notice given to the person under section 163; and
>
> (c) the Secretary is satisfied that the person is qualified to receive that pension;
>
> the Secretary shall give the person a certificate . . . '

Section 60A(3) provided that, where the pensioner failed to obtain a departure certificate prior to leaving Australia, under sub-sections (1) or (2), their qualification for the pension would cease after 6 months absence. The pensioner could not recover qualification without returning to Australia (s.60A(4)).

The 1991 Act repeated the effect of this provision by splitting the mechanism by which a departure certificate can be obtained and the penalty for failure to do so into separate sections, the one referring to the other as follows:

> '1218. (1) If a person:
>
> (a) leaves Australia; and
>
> (b) has not received a departure certificate under section 1219; and
>
> (c) remains absent from Australia for more than 6 months;
>
> the person ceases, at the end of the period of 6 months, to be qualified . . . '

Subsections (2) and (3) provide that disqualification continues until the person returns to Australia, but may cease with a temporary return.

> '1219. (1) If:
>
> (a) a person is receiving . . . (listed pensions) . . . and
>
> (b) the person proposes to leave Australia; and
>
> (c) the person notifies the Department of the proposed departure as required by a recipient notification notice; and
>
> (d) the Secretary is satisfied that the person is in Australia and is qualified for the pension or allowance;
>
> the Secretary must give the person a certificate . . . '

Section 1219 (2) provides similarly for new claimants.

**Must a valid recipient notification notice or s.163 notice have been issued before a pensioner is disqualified?**

It has been argued that s.60A(3) and s.1218(1)(b) import a threshold requirement that a valid notice be issued to the pensioner before the disqualification can arise.

In *Zaleski and Secretary DSS* (decided 11 July 1991) the applicant was an age pension recipient who was unable to return to Australia owing to ill health. The Department conceded that for s.60A(1)(b) to operate it was necessary that a notice under s.163 be issued. However, in subsequent cases the Department advised that the concession was incorrect.

In *Gellin and Secretary, DSS* (1993) 76 *SSR* 1101 the applicant was an age pension recipient who was unable to read the recipient notification notices and travelled overseas for more than 6 months without obtaining a departure certificate. The AAT found that there was no discretion in s.1218. The section operated mechanically once paragraphs (a), (b) and (c) of s.1218(1) were satisfied. Section 1218 did not necessarily depend upon the receipt of a recipient notification notice 'although the drafting of s.1218(1)(b) leaves room for some doubt'. The tribunal then determined it was satisfied that, in any event, a proper notice was given to Mr Gellin. The AAT decided that a recipient notification notice must comply with the authorising provision in order to be valid. However, it found that sufficient compliance was achieved if the effect of the authorising provision were conveyed. It was not necessary to use the exact words contained in the authorising provision.[1]

In *Secretary, DSS and Glover* (1993) 77 *SSR* 1122 the AAT found that the recipient notification notice given to Glover did not 'require' him to inform the Department of his intention to travel overseas owing to the use of the phrases 'you should tell . . .' and 'you should advise . . . '. The mandatory requirements contained in the notice were headed with the words 'what you must tell us'. Thus Glover could not have notified the Department 'as required by' a recipient notification notice in order to obtain a departure certificate under s.1219. Nevertheless the AAT found that the disqualifying provision in s.1218 operated by virtue of the pensioner being absent from Australia without having previously obtained a departure certificate. The AAT commented on the harshness of the legislation and the duty of the Department to administer it in such a way that there is no additional harshness.

Subsequent decisions followed *Gellin* and *Glover* with the exception of *Secretary DSS and Peretti* (1993) 77 *SSR* 1123. In *Peretti* the AAT decided that ss.1218 and 1219 ought to be read together, and then proceeded to consider the validity of the recipient notification notice. The AAT decided that the notice complied with the legislation in all matters of substance and was therefore not invalid. Although not clearly stated, it is difficult to see for what purpose the examination of the notice was undertaken, unless it were predicated on the view that an ineffective notice would lead to a conclusion that Peretti did not have to obtain a departure certificate

This issue was clarified by Deputy President McMahon in *Moe and Secretary DSS* (p.1165 this issue). In *Moe* the applicant had received no recipient notification notice at all prior to departure, an the notice was forwarded after her departure was found to be invalid.

The AAT decided that s.1218 operated 'mechanically' to disqualify persons remaining overseas for more than 6 months without having obtained a departure certificate before leaving Australia: 'Whether a s.68 notice has been served, whether such a notice is a valid notice, whether a person notifies the Department, whether or not required by the notice, of a proposed departure, s.1218 will continue to operate if for whatever reason, a person has not

received a relevant departure certificate'. The AAT added that *Peretti* ought to be restricted to its facts.

**Must the DSS issue a departure certificate to a qualified pensioner upon notification of intention to travel?**

There does appear to be one exception, to the strict disqualifying effect of s.1218. That is where the Department has been duly advised by a pensioner prior to departure and has failed to issue the departure certificate to which the pensioner was entitled.

In *Secretary DSS and Smaragdis* (1994) 79 *SSR* 1148 the respondent was an age pensioner. The AAT found that no s.163 notice had been sent to Smaragdis but that she had, in any event, advised the AAT that she intended travelling overseas because she wanted her mail redirected. The AAT found that although no departure certificate had in fact been issued, the DSS had acted unlawfully in failing to issue a departure certificate. The AAT found it had the power to review the DSS decision not to issue a certificate and could direct the Secretary to issue the certificate. Although the matter was decided under the 1947 Act, the AAT indicated that it would have decided similarly had the matter been subject to the 1991 Act.

*Smaragdis* was referred to in *Moe* and, although the summing up statement quoted from *Moe* (above) may indicate otherwise, *Smaragdis* was not disapproved. The result in *Smaragdis* is consistent with s.1283(4) of the 1991 Act, which provides that, where the Tribunal sets aside a decision, the Secretary has the power to deem to have occurred an event which would have occurred but for the decision set aside.

**Cessation of qualification and date of cancellation**

The above cases considered by the AAT assumed that the loss of qualification for a person after 6 months equalled cancellation of the pension. The issue of qualification, payability and the date of effect of a decision to cancel the pension, has not been considered by the AAT.

An examination of the automatic termination provisions of the *Social Security Act* leads to the conclusion that these sections could not be meant to apply when cancelling the pension as a result of the operation of s.1218. Recently, the SSAT decided that the date of effect of the decision to cancel pursuant to s.1218, is ascertained by reference to those sections dealing with cancellation because the pension is not payable. The date of effect of such decisions, if there has been no contravention of the Act, is the date of the decision or a later date. For there to have been a contravention of the Act, there must have been a valid notice issued to the person affected by the decision. The SSAT decided that, as there had not been a contravention of the Act, there was a discretion as to the date of effect of the decision. This was determined to be the day before the person lodged a new claim, because of the circumstances of the case.

**Is hardship arising from departure certificate requirements warranted?**

A review of the case law in this area and cases handled by the Welfare Rights Centre, Sydney, reveals that the persons most likely to be adversely affected by these provisions are recipients of the age pension, who have either limited English skills or serious health problems.

For example, in *Glover*, Glover was an age pensioner and a widower who suffered from a loss of short-term memory. He was unable to care for himself and lived at alternate 6 monthly intervals with his daughter in Australia and his son overseas. As he spent no more than 6 months overseas at any one time, he had remained unaffected by the departure certificate provisions until becoming seriously ill while overseas. At the date of the decision it was unlikely Glover would ever recover sufficiently to return to Australia. Thus he could remain without a pension for the remainder of his life.

The AAT has frequently commented on the hardship and unfairness arising from this legislation and it is difficult to see what possible public benefit arises from the provisions to justify the resulting hardship.

Since the introduction of the requirements, the restrictions on portability of pensions have increased and the DSS's data matching facilities with the Department of Immigration and Ethnic Affairs have also improved. With the exception of age pensioners and certain widows, all other pensioners are subject to some constraints on the portability of their pension, in addition to the departure certificate requirements. Further, the usual notification of address requirement continues to apply to all payments.

While it may be desirable, in order to prevent possible overpayment, to ascertain a pensioner's intention to travel before departure from Australia, it appears that notification after a person leaves Australia is not a barrier to proper administration of the person's entitlement. In the case of age pensioners their qualification would not cease by virtue of their travel overseas, but for s.1218. Their rate of payment may be affected by a calculation of their working life residence in Australia. However, the rate of payment can only be reduced after 12 months absence, by which time any absence which has not been notified could be detected by data matching. Further, any overpayment could easily be recovered from the pensioner's continuing entitlement.

There appears to be no useful purpose in requiring elderly persons to return to Australia to establish their entitlement. A better scheme would encourage pensioners to advise the DSS before travelling, but merely suspend payment in the event that they fail to do so. Once the pensioner again contacts the DSS, even if from overseas, and satisfies the DSS as to continuing entitlement, payment should be restored.

In the meantime, the DSS could make administrative changes to limit the harsh effect of the current legislation. It could clearly and more frequently notify clients of their obligation, and the consequences of failing to notify the DSS prior to leaving Australia. It could provide notifying material in various languages. Most importantly the Department could warn those persons who the Department is aware have left Australia without notification, prior to the expiration of 6 months, that their pension will cease.

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**Reference**

1. In *Smyth and Secretary DSS* (1994) 78 *SSR* 114 Deputy President Breen chose to follow *Secretary DSS and Carruthers* (1993) 76 *SSR* 1100 in preference to *Gellin* insofar as the former case required recipient notification notices to conform strictly to the legislation authorising their issue in order to be valid.