

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.