Administrative Appeals Tribunal decisions

Jurisdiction of AAT: reviewable decision

KUMURKAN and SECRETARY TO DSS
(No. 9651)
Decided: 5 August 1994 by M.T.E. Shotter.

Kumurkan asked the AAT to review a decision of the SSAT that it had no jurisdiction because the DSS had not made a decision.

The facts

Kumurkan came to Australia in 1972 and left in 1978 following her husband's death. She had lived in Turkey with her 2 children ever since. She was initially granted widow's pension, and was later transferred to sole parent pension.

In a letter dated 9 July 1990, Kumurkan was advised that her pension would be cancelled when her youngest child turned 16 in 1993. Kumurkan questioned this advice in a telephone call to the DSS in 1992, and then in a letter to the SSAT. She explained that the DSS had told her that she would receive the pension for the rest of her life, and she had no other source of income.

In reply, the DSS wrote to Kumurkan and advised that her pension would be cancelled when her youngest child turned 16, because having a dependant child (a child under the age of 16) was a basic qualification for the sole parent pension. In a further letter the DSS advised that the decision to cancel her pension had not yet been made.

Jurisdiction

In its submission to the SSAT, the DSS stated that Kumurkan had appealed against the 'intent to cancel': Reasons, para. 4. The AAT observed that right to appeal a DSS decision was found in ss.1240 and 1243 (authorised review officer), s.1247 (SSAT) and s.1283 (AAT) of the *Social Security Act 1991*. The AAT's power arises if a decision has been reviewed by the SSAT and either affirmed, varied or set aside. In this case:

> 'the SSAT has not either affirmed, varied or set aside a decision because it decided that it had no jurisdiction in this matter as it considered that no decision had been made by an officer of the Department.'

(Reasons, para. 8).

The AAT considered it had no alternative but to decide it also had no jurisdiction.

Was there a decision?

The AAT went on to discuss whether the DSS had made a decision, even though the AAT did not consider it had the jurisdiction to decide this issue. The AAT stated that the advice in the letter of July 1990 that the pension would be cancelled, could be considered a decision. This was an unequivocal statement by the DSS, as was the the statement in the later letter of July 1992. The last letter from the DSS which said that Kumurkan's pension would be cancelled, but the decision to cancel the pension had not yet been made, was confusing according to the AAT. This confusion was passed on to the SSAT. However the DSS advice that the pension would be cancelled was correct on the law.

Formal decision

The AAT affirmed the decision under review.

[C.H]

[Editor's note: The AAT did not refer to an earlier decision of the AAT, *Anderson* (1992) 70 *SSR* 998, which had decided that a decision of the SSAT that it had no jurisdiction, was a nullity which could not prevent the AAT from reviewing the original decision. The AAT in *Anderson* had referred to a number of earlier decisions in support of its conclusion.]

Stay of decisions

SECRETARY TO DSS and GLANVILLE
(No. 9645)
Decided: 20 July 1994 by H.E. Hallowes.

Background

The DSS asked the AAT to review a decision made by the Social Security Appeals Tribunal (SSAT) and to stay the operation or implementation of the SSAT decision under s.41 of the *Administrative Appeals Tribunal Act (AAT Act)*. The SSAT's decision would, unless stayed, involve paying Glanville $994.00 and the DSS contended that this amount was not payable under the Act. The substantive issue in dispute in the appeal concerned which tax year the respondent's rate of family payment ought to be calculated by reference to. If the decision under review was set aside, then the DSS argued that money would have been paid to the Glanville, which would then be a debt under s.1223AB of the 1991 Act following an amendment which came into effect on 19 May 1994.

Glanville was receiving family payment at the maximum rate, and her counsel submitted that she was suffering from significant financial hardship. She had a number of outstanding accounts and was awaiting a hospital bed to undergo an operation.

The issue became whether or not, if the DSS succeeded in its review, a debt would be created in respect of any amount paid to Glanville by reference to the SSAT decision.

Section 1223AB

Section 1223AB provides:

> 'if a person applies to the AAT for review and a stay order is made and as a result of the order, the amount that has in fact been paid to the person by way of social security payment is greater than the amount that was payable to the person the difference between the amount that was in fact paid to the person and the amount that was payable to the person is a debt due to the Commonwealth and recoverable by the Commonwealth . . .'

In determining the meaning of this section, the AAT turned to the Explanatory Memorandum. The AAT noted that the new category of debt arises where the DSS has paid money to a person appealing to the AAT, the money being paid because the AAT has stayed the SSAT decision against which the person has appealed. It was noted under the heading 'Background' in the Explanatory Memorandum that the previous list of recoverable debts (prior to the amendment) did not include a debt arising because of social security payments made pursuant to an AAT stay order granted at the DSS client's request where the client ultimately loses at the AAT and, with hindsight, it was clear that the money was not payable.

The AAT noted that most requests for stay orders are made by the Secretary rather than by a claimant. If an order were made staying the effect of the SSAT decision, then no amount would be paid to the claimant until the