was automatically imposed pursuant to s.1229 because the debt was not repaid within 3 months and was more than $50. The AAT noted that there was no suggestion that the Thanasoudases had acted improperly, and that a departure certificate would have been issued if the Thanasoudases had applied for one.

> 'The impossibility of applicants – whether they are non-English speaking or not – being able to comply with the retrospectively operating legislative provisions is a disquieting feature of this case.'

(Reasons, para. 15)

As with previous AAT decisions on this issue, the AAT referred this case to the Ombudsman.

Formal decision

The AAT set aside the decision of the SSAT and reinstated the original decision.

[C.H.]

[**Editor's note:** The AAT did not refer to the argument in the SSAT decision, that the date of effect of the DSS decision could only be either the date of the decision to cancel the pensions (5 November 1993) or a later date (see s.81). The automatic termination provisions did not apply because of the wording of the notice.]

Assets test: method of valuing forgiven loan

WRIGHT and SECRETARY, DSS

(No. 9736)

Decided: 16 September 1994 by M.D. Allen, G.D. Stanford and I.R. Way.

The Wrights had claimed age pensions on 8 July 1992. Their claims were rejected because their assets exceeded the permissible amount. The one issue which remained for determination by the AAT was how the net value of an asset deprivation, arising from the Wrights' forgiveness of a debt, was to be calculated.

Their situation at 8 July 1992, the date of their claims for age pension, was:

- they each held one of 6 shares in the family company, Collektra Holdings Pty Ltd ('Collektra');
- they had advanced to Collektra, by way of loans, the total sum of $447,968;
- of that sum, $154,940 had been advanced before 27 October 1986 and the balance, $293,027, had been advanced after that date;
- as, at 30 June 1992, it was plain that Collektra would never be in a position to repay the full sums advanced by way of loan, the Wrights, as directors of Collektra, forgave the debt by the company to them, thus disposing of the sum of $447,968;
- the 'consideration' for the disposal of the asset was the increase in the value of the Wrights' shares in Collektra to $50,950 each (the value of the shares reflecting Collektra's asset backing, as at 8 July 1992, of $305,701).

In order to calculate the value of the assets disposed of by the Wrights, the AAT had to ascertain the value of their shares in Collektra prior to 30 June 1992 when the debt was forgiven. Referring to the AAT decision *King and Repatriation Commission* 12 AAR 375, it stated that the value of the Wrights' advances to Collektra before 27 October 1986 were to be calculated having regard to the asset backing of the company and its capacity to repay. It found that prior to the forgiveness of the loan, the debts of Collektra amounted to $533,041 and the assets to satisfy the debts amounted to $390,774. On those figures, in the event of a winding up, and not allowing for preferences, each creditor would receive 73.3 cents in the dollar. Applying that figure, the true value of the Wrights' loan to the company was found to be $328,406.

Pursuant to s.1122 of the *Social Security Act 1991*, the amount advanced after 27 October 1986, $293,027, had to be valued at face value. The Tribunal therefore calculated the true value of the Wrights' loan to the company prior to 27 October 1986 to be $328,406 less $293,027, namely $35,379.

The total value of the Wrights' assets were then calculated by totalling their assets from all sources, including the value of their Collektra shares and the debt dispositions to Collektra (pre and post 27 October 1986), and subtracting the 'consideration' received for the dispositions (the value of the Collektra shares) and the gifting allowance of $10,000. As the resultant total still exceeded the permissible asset limit at the date of the Wrights' claims for age pensions, the AAT affirmed the decision to reject the Wrights' claims.

Decision

The AAT decided to affirm the decision that the Wrights were not entitled to age pensions as their assets exceeded the permissible amount.

[B.W.]

AAT procedure: application for reinstatement

OATES and SECRETARY, DSS

(No. 9698)

Decided: 25 August 1994 by S.A. Forgie

The SSAT had set aside a decision made by DSS to cancel Oates' family allowance payments, and had substituted a decision that they continued to be payable but, as Oates had applied to the SSAT more than 3 months after being notified of the DSS decision, that no arrears were payable.

Oates applied to the AAT however his application was dismissed under s.42A(2) of the AAT Act when he failed to appear at the hearing. Within 28 days of the dismissal, he applied under s.42A(8) for reinstatement of his application for review.

The principles applicable to reinstatement applications

The AAT canvassed case authorities which set out the principles applicable in similar procedures:

- applications for extensions of time; and
- applications to set aside judgements entered or dismissals of proceedings because of delay in prosecuting or failure to comply with procedural directions.

Having regard to the cases, it found that courts approached the two types of applications differently:

Applications for extension of time started with the premiss that applications which are out of time should not be entertained, so that consideration not only of the substantive merits of the application

and of fairness and equity between the parties were relevant, but also questions of public interest concerning fairness between the party in default and other people in similar positions. On the other hand, applications for reinstatement or to set aside default judgements did not start with the premiss that the applications should not be reinstated but adopted the view that, provided the party seeking reinstatement could establish a prima facie case and it was fair to the other party to reinstate the application, it would be reinstated.

The AAT concluded that applications under s.42A(8) were more like applications in other courts for reinstatement and the setting aside of default judgements than to applications for extension of the time allowed to commence a proceeding.

The AAT then considered whether the application being in the context of an administrative review meant that the wider public interest should be considered. It mooted that, because the group affected did not comprise those for whom a particular type of administrative decision had been made, but a much smaller group who had actually sought review but failed to appear at the appropriate time, the public interest shifted from ensuring certainty in administrative decision making and consistency of treatment of those affected by decisions, to ensuring the efficient operation of a case management scheme and consistency of treatment of those affected by the scheme. It considered that the regard the party had paid to the case management system was relevant to the question of fairness to the other party and whether it had been prejudiced.

Oates' application

The hearing proceeded on the basis that if Oates succeeded in his application for reinstatement, the AAT would then determine the substantive merits of the case. That being so, the merits of the case were considered more exhaustively than they would have been if the AAT were only considering the application for reinstatement.

The facts of the case were that Oates' family allowance was cancelled on 24 September 1992 on the basis that he had not supplied a tax file number as requested by the DSS. In fact he had supplied the number as requested. Oates did not receive the letter which advised him of the cancellation. In February 1993 he discovered that his family allowance was not being paid and, on being told that it had been cancelled, provided his tax file number again and his payments were reinstated from 5 February 1993. At the same time Oates asked to be paid the payments he missed between September 1992 and 5 February 1993. DSS refused this request because he had not contacted them within 3 months. The Authorised Review Officer (ARO) affirmed the decision 'to cancel Oates' family payments' referring to the letter of 24 September 1992 advising of the cancellation and the 3 months time limit under s.887(3) of the *Social Security Act* 1991. Oates then applied to the SSAT on either 20 or 23 June 1993.

The AAT looked at the three stages of the decision and review.

In relation to the original decision to cancel, it was unable to find evidence that Oates was required to give his tax file number within the specified period of 28 days and therefore found that Oates had not failed to comply with the requirement, so there was no ground on which to cancel his payments.

As to the ARO decision, the AAT followed the Federal Court decisions in *O'Connell* and *Sevell* (1992) 71 *SSR* 1029 rather than applying s.1302A of the *Social Security Act* which did not come into effect until 24 December 1992 (after the date of the letter) and found that Oates had not received the letter of 24 September 1992 advising of the cancellation. As a result s.887(4) of the *Social Security Act* should have been applied to restore Oates' family payments from 17 September 1992.

However, as Oates applied to the SSAT more than 3 months after receiving the ARO's letter of 18 February 1993, s.1255(4) of the *Social Security Act* came in to play. The AAT found that the 'written notice of a decision' referred to in s.1255(4) was the notification of the ARO's decision, rather than the original decision:

> 'To reach a different conclusion would mean that very few would ever be able to apply to the SSAT within 3 months of having been notified of the primary operative decision where that decision had simply been affirmed on review. Such an impractical result could not have been intended.'

(Reasons, para. 46)

As Oates was outside the 3 month period, the earliest day on which the SSAT's decision could take effect was the date of his application, either 20 or 23 June 1993, which would not benefit Oates to recover the payments between 17 September 1992 and 5 February 1993.

The AAT therefore decided that Oates did not have a prima facie case on the merits of his substantive application, and that this was determinative of his application for reinstatement.

Decision

The AAT decided to refuse Oates' application for reinstatement of his application pursuant to s.42A(2) of the AAT Act.

[B.W.]

Age pension: Australian resident

CLIFOPOULOS and SECRETARY TO DSS

(No. 9745)

Decided: 21 September 1994 by G.L. McDonald.

Clifopoulos claimed age pension when she returned to Australia from Greece. The DSS rejected the claim on the basis that Clifopoulos was not an Australian resident when she lodged the claim. The SSAT affirmed this decision and Clifopoulos requested review by the AAT.

The facts

Clifopoulos migrated to Australia in 1956 with her husband and child. Two more children were born in Australia, and she became an Australian citizen in 1974. Clifopoulos and her husband both worked, and by 1983 when they retired, they owned their own home.

In 1984 Clifopoulos and her husband returned to Greece. Her two younger sons had already returned to Greece to continue their education, and Clifopoulos' husband had inherited a few acres of marginal land in the north of Greece from his father. Clifopoulos and her husband arranged to buy a two bedroom flat in Greece from a relative, before they left Australia. In 1987 they sold their house in Australia to pay for the flat. Most of their furniture was sent to Greece and the rest given to friends.

Clifopoulos returned to Australia once for several months to visit her eldest son and his family. She returned again in December 1992 and lodged a claim for age pension in January 1993. Clifopoulos had a return ticket to