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

Greece which she used in March 1993. Clifopoulos returned to Australia in June 1994.

Clifopoulos' eldest son owns a house in Australia. He had built a self-contained unit in the back yard for his parents to use when they came to Australia. Clifopoulos had serious medical problems and was undergoing chemotherapy in Australia. The AAT heard evidence that one son would probable return to Australia to live and the other son might also return.

The law

When Clifopoulos applied for the age pension she had to be in Australia and an Australian resident. It was conceded by the DSS that Clifopoulos satisfied all requirements to be granted the age pension, except she was not an Australian resident when she lodged the claim. To be an Australian resident a person must be residing in Australia (s.7(2) *Social Security Act 1991).* Section 7(3) codifies the criteria that the courts have decided are relevant when deciding this issue. The AAT described these criteria as being there 'to guide the decision-maker in determining the person's intention as to the place of residence': Reasons, para. 17. The AAT referred to the Federal Court decision of *Hafza* v *Director-General, DSS* (1985) ALR 674, 26 *SSR* 321, and noted that the intention was to treat the place as home at least for the time being. The decision-maker was also entitled to decide the converse of each criterion set out in s.7(3).

Residing in Australia

(a) nature of accommodation

The AAT found that Clifopoulos' decision to sell her house in Australia was understandable, as it was necessary to provide a stable home environment for her two younger sons in Greece. Because Clifopoulos' eldest son had built self contained accommodation for his parent in his back yard, Clifopoulos continued to retain continuous accommodation in Australia.

(b) family relationships in Australia

Clifopoulos' eldest son and his family continue to live in Australia, as well as Clifopoulos' two brothers and a sister. Her two youngest sons and other relatives live in Greece. The AAT found that Clifopoulos enjoys a close relationship with her family no matter where they live.

(c) employment and business ties

Clifopoulos has no employment ties in Australia as she is retired. The income her husband earns from his property in Greece is small and irregular.

(d) nature and extent of person's property in Australia

The AAT found that Clifopoulos' sale of her house in Australia to buy a flat in Greece was understandable, and of less significance because of her need to provide for her two younger sons. Because of the accommodation provided by her eldest son, Clifopoulos retained a continuous link with Australia.

(e) frequency and duration of person's travel

The AAT found that the time spent by Clifopoulos in Greece could be explained by her need to assist her sons and her deteriorating health.

(f) other relevant matters

Clifopoulos lived for a long period in Australia where she brought up her children, worked, and became an Australian citizen.

The AAT referred to an earlier statement made by Clifopoulos to the DSS, which illustrated that Clifopoulos was equivocal about where her 'home' was. The AAT decided that it preferred Clifopoulos' oral evidence at the hearing. The AAT stated that it must take a global view based on the totality of the evidence.

> 'This may involve, in a multi-cultural society, an appreciation of factors which may attract people to spend some extended time in their country of origin, while still regarding Australia as home.'

(Reasons, para.24)

Formal decision

The AAT set aside the decision under review and sent the matter back to the Secretary with directions that the applicant was an Australian resident on the date of her claim.

[C.H.]

Sole parent pension: living separately and apart

SECRETARY TO DSS and CLASENER

(No. 9762)

Decided: 30 September 1994 by A.M. Blow.

The SSAT had affirmed a decision of the DSS to cancel Clasener's sole parent pension (SPP) on the basis that, as at 7 September 1993, she was not living separately and apart from her husband.

Clasener had been receiving SPP since 2 August 1988. She claimed that she satisfied s.241(1)(a)(iii) of the *Social Security Act 1991* in that she was 'a member of a couple who is living separately and apart from . . . her partner'.

Clasener and her husband gave evidence at the hearing, both maintaining that they had at all times since August 1988 lived separately and apart. The AAT accepted their contention, although it found that 'generally neither of them could be relied upon to tell the truth'.

Clasener's husband had been a frequent visitor to her home, staying overnight every second weekend. They maintained that the purpose of the visits was to enable the husband to see their son, Tony. They denied that any sexual relations took place.

The husband had given Clasener's address as his own address for various purposes, but the AAT accepted that this was because he lacked a fixed place of abode. He led a 'fairly slippery existence', using different addresses to evade his many creditors. Clasener continued to receive mail and telephone messages for her husband in connection with his business, an arrangement that the AAT said was not necessarily inconsistent with them living separately and apart.

They continued to operate a joint cheque account until March 1994. Clasener said that it was convenient for her to use the joint account as she had never established a cheque account of her own. She said that she reimbursed her husband for any amounts drawn by her. The AAT said: 'She and her husband are so unbusinesslike that her explanations could all be true'.

The AAT found that there was a