not. The July continuation form asked the same question for the period May to July. In that form Hill had stated that he and his wife had gone overseas from May to June. The AAT emphasised that there was no suggestion that Hill had made a false statement or had failed to comply with a provision of the *Social Security Act 1991*. In fact, the DSS had now changed the question on the continuation forms to, if 'you or your partner went overseas or decided to go overseas.'

The SSAT decision

The SSAT decided that there was no debt in spite of the fact that s.593 of the Act states that to be qualified for newstart allowance the person must be in Australia. The SSAT relied on s.660(1) which provides:

> '660.(1) A determination that:
>
> (a) a person's claim for a newstart allowance is to be granted; or
>
> (b) a newstart allowance is payable to a person;
>
> continues in effect until
>
> (c) the allowance ceases to be payable under section 660A, 660B, 660C or 660D; or
>
> (d) a further determination in relation to the allowance under section 660I or 660IA has taken effect.'

The SSAT found that the only section specified in s.660(1) under which newstart allowance could be cancelled was s.660I. This section provides that the DSS is to cancel or suspend payment if it forms the opinion that newstart allowance is not payable. The date of effect of such a decision is determined by applying s.660L. This section does not provide for a retrospective determination. Therefore the date of effect of the decision to cancel Hill's allowance would be after his return to Australia, and there could be no debt for the period when Hill was overseas because the allowance remained payable to him throughout the period.

The AAT's decision

The AAT decided that this analysis of the law ignored the other relevant provisions of the Act. According to s.593, Hill was not qualified for newstart allowance when he was overseas. Section 1211 provides that newstart allowance is not payable to a person outside Australia because presence in Australia is essential for qualification. The debt occurs because of the provisions of s.1223(1) which provide:

> '1223.(1) Subject to subsections (1A) and (2), if:
>
> (a) an amount has been paid to a person by way of social security payment; and
>
> (b) the recipient was not qualified for the social security payment and the amount was not payable to the recipient;
>
> the amount so paid is a debt due to the Commonwealth.'

According to the AAT:

> 'The clear effect of those provisions is to render the newstart allowance paid to Mr Hill in respect of the period when he was not "in Australia" "a debt due to the Commonwealth". That conclusion does not necessarily require a determination cancelling Mr Hill's grant of newstart allowance and as the SSAT explained there is no point in applying any of the cancellation provisions of the Act as none of them apply in the circumstances of this matter.'

(Reasons, para. 14)

If Hill had advised the DSS that he was going overseas his allowance would have been suspended. Hill was not obliged to notify the DSS of his trip because of the questions on the review form. The AAT was of the opinion that there was no reason to cancel Hill's allowance, but this did not mean that s.1223(1) did not apply.

Calculation of the debt

The AAT then considered the calculation of the debt. It noted that in the original DSS decision the DSS officer had imposed a '2 week penalty', because Hill did not advise the DSS that he was going overseas. The AAT found that this was clearly incorrect. Nothing in the Act allowed the DSS to impose a 2 week penalty period and add payments made during these 2 weeks to the debt. On review the authorised review officer reduced the 2 weeks, but applied the normal one week waiting period which would apply to any new claim for newstart allowance.

The AAT decided that, because it had found that there was no need to cancel Hill's allowance, there was no need to impose a waiting period for a new claim.

Waiver

Finally the AAT considered whether it was appropriate to write off or waive the debt. After Hill received notification of the debt in 1994, he promptly paid it off. This meant that because the debt was not outstanding at 1 January 1996 Hill was not entitled to the benefit of s.1237AAD of the Act. This section allows the DSS to waive a debt if write off is not appropriate and there are special circumstances. However, s.1236A(1) provides that this section only applies if the debt was outstanding on 1 January 1996.

The AAT agreed with the DSS submission that it could only apply the waiver provisions which existed prior to 1 January 1996. Section 1237(2) provided that the debt could be waived if it was caused solely by Commonwealth administrative error, and the person received the payment in good faith. According to the AAT the debt was caused by administrative error because the continuation forms did not ask the appropriate question. The AAT accepted Hill's evidence that he did not think that he had to volunteer evidence to the DSS. Because Hill was only required to lodge a continuation form every 12 weeks he was encouraged to believe that he was entitled to travel overseas for short periods. The AAT was also satisfied after hearing the evidence that Hill had received the payments in good faith. The AAT considered whether the waiver provisions could apply after a debt had been recovered. After some hesitation, the AAT decided that they could because the former waiver provisions did not explicitly provide that the debt had to be outstanding, as the current provisions do.

Formal decision

The AAT decided that Hill was overpaid newstart allowance for the period 9 May 1994 to 9 June 1994, but that this debt should be waived because of administrative error. Hill was entitled to be refunded the whole amount he had repaid.

[C. H.]

Age pension: meaning of resident

GNISIOS and SECRETARY TO DSS
(No. 10759)

Decided: 22 February 1996 by G. Ettinger, G.A.R. Johnston and S.M. Bullock.

Gnisios was refused an age pension on the grounds that he was not an Australian resident at the time he lodged his claim. Both the authorised review officer and the SSAT affirmed this decision.

The facts

Gnisios migrated to Australia from Greece in 1956. He married and had a daughter born in Australia before the family returned to Greece in 1972. In 1974 Gnisios alone returned to Australia. He obtained Australian Citizenship in April 1975 and returned to Greece in October of the same year, with the intention of remaining there permanently. He purchased property in Greece in his daughter's name and built and lived in a family home there until his daughter's marriage. Following this he and his wife lived either with his daughter and her family or his mother-in-law. Although

Gnisios worked in various casual positions in Greece between 1975 and 1995, he did not accrue any right to be granted a Greek pension on retirement. He renewed his Australian passport a number of times and voted in two Australian federal elections in 1975 and 1977. His close relatives lived in Greece, including his wife, daughter, grandchildren, mother-in-law and a brother, although there were some relatives residing in Australia. Neither Mr or Mrs Gnisios owned property in Australia, but they had an interest in an olive grove in Greece.

On 25 March 1995, Gnisios returned to Australia on a one-way ticket. He applied for age pension on 24 April 1995, the day after his 65th birthday. He told the AAT that he intended to live in Australia permanently and that his sole purpose for returning to Australia was to obtain an age pension. At the time of his claim he lived with a relative and as at the date of the AAT hearing he had a 6-month lease on a rented flat. It was intended that his wife would join him when her health permitted, but, if she was unable to come, Gnisios intended to remain living in Australia alone.

The meaning of resident

The issue before the AAT was whether Gnisios was an Australian resident for the purposes of s.7 of the *Social Security Act 1991*. The AAT noted that the criteria set out in s.7(3) which were to be taken into account when considering whether or not a person is a resident are not exhaustive, and that the relevance and importance of each of the factors set out in that sub-section vary in each case.

It was argued on behalf of Gnisios that because of his stated intention to remain in Australia permanently and despite his association with Greece, that he had broken his residence in Greece. The AAT considered Gnisios' stated intention in the light of corroborating material, such as family ties, residency, duration of stay in and out of Australia, assets and financial situation. In addition, the AAT took into account the fact that Gnisios had allowed his Australian passport to expire in 1990, and did not renew it until 1995. Although he had voted in two Australian federal elections, he had ceased to do so after 1977. As he had told the AAT that he had returned to Australia for the sole purpose of obtaining income support, the AAT did not accept that he had broken residence in Greece.

The AAT noted the decision of *Re Schlageter and Secretary, DSS* (1985) 26 *SSR* 317 in which the Tribunal found that 'for a person to be residing in a country, he must have a settled home in that country. It need not be his only home, but it must have some degree of permanence.' The AAT did not accept the accommodation arrangements made by Gnisios to be either settled or permanent. The Tribunal also found that Gnisios' close family ties were in Greece, that on the evidence before it there seemed little likelihood of Mrs Gnisios joining her husband in the foreseeable future, and that Gnisios had no employment, business or financial ties in Australia. He had a long-term and continuing commitment to Greece, and had not formed a commitment to live in Australia. Therefore he was not a resident within the meaning of s.7 of the Act.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Age pension: qualification, provisional commencement day and the making of a 'proper claim'

KALOGRIS and SECRETARY TO DSS
(No. 19853)

Decided: 4 April 1996 by J.R. Dwyer.

Kalogris's claim for age pension was rejected because he was not an Australian resident at the time he lodged his claim. This decision was affirmed by an authorised review officer and the SSAT.

The facts

Kalogris lived and worked in Australia from 1960 to 1978 when he returned to live in Greece. He was not an Australian citizen. As he was only entitled to a small Greek pension, enquiries were made by Kalogris's brother in Australia as to his entitlement to age pension. Kalogris's brother gave evidence at the AAT hearing that he had been told by the DSS that his brother would need to return to Australia to lodge a claim. This Kalogris did in April of 1995, travelling on a 6-month's visitor's visa. On his arrival he lodged a claim for age pension which was subsequently rejected. He made some enquiries about applying for permanent residency in Australia, but did not do so and returned to Greece in July of 1995.

The legislation

The AAT considered the following legislative provisions governing entitlement to age pension:

> 43.(1) A person is qualified for an age pension if the person:
>
> (a) has reached pension age; and
>
> (b) has 10 years qualifying Australian residence, or has a qualifying residence exemption for an age pension.
>
> ...
>
> 45. An age pension is not payable to a person before the person's provisional commencement day (identified under section 46).
>
> 46.(1) Subject to subsections (2), (3) and (4), a person's provisional commencement day is the day on which the person claims the age pension.
>
> . . .
>
> 48.(1) Subject to subsection (3), a person who wants to be granted an age pension must make a proper claim for that pension.
>
> . . .
>
> 51.A claim by a person is not a proper claim unless the person is:
>
> (a) an Australian resident; and
>
> (b) in Australia;
>
> on the day on which the claim is lodged.

The AAT found that Mr Kalogris, at the time of claim, satisfied the qualification provisions in s.43(1). It also found that the claim lodged was not a 'proper claim' because Mr Kalogris was not an Australian resident as defined in s.7 of the Act. The Department argued that as the claim was not a proper claim, there could be no 'provisional commencement day' under s.46, and that therefore Mr Kalogris, despite satisfying the qualification provisions for age pension, was not entitled to payment.

The AAT noted that s.46 provides that a person's provisional commencement day is the day on which the person lodges 'a claim' rather than 'a proper claim' for age pension. Despite this, the AAT considered that it was clear from ss.48 and 52 of the Act that the intention of the legislature was to maintain some residential qualification for age pension, similar to that existing under the 1947 Act. The AAT concluded that it would be inappropriate to attempt to apply ss.43, 45 and 46 of the Act without reference to ss.48 and 51. As a result it was determined that Mr Kalogris was not entitled to an age pension.

Formal decision

The AAT affirmed the decision under review.

[A.T.]