Di Pietro asked the AAT to review that decision.

The legislation

The AAT said that the DSS preclusion decision was supported by s.153(1) of the *Social Security Act*. According to the AAT, this precluded payment of pension to a person who received a lump sum payment by way of compensation while qualified to receive a pension.

The AAT referred to DSS guidelines, which said that the Department should treat 70% of any lump sum award as the 'incapacity component' of the award, where the award did not distinguish any of the components of the award.

Section 156, on which the AAT focused in this review, gave the Secretary a discretion to treat all or part of a compensation payment as not having been received if the Secretary thought this appropriate 'in the special circumstances of the case'.

No 'special circumstances'

Di Pietro said that his doctor had advised him that he would be entitled to receive invalid pension as well as his compensation payment; and that he had spent all the award in paying debts and renovating his house.

His current assets were conservatively valued at $115 000, and he owed debts of $7,600. He told the AAT that his regular outgoings exceeded $1,800 a month.

The AAT said that di Pietro had spent the compensation award after he had been informed that s.153 would be applied against him; this prevented him from showing 'special circumstances'. The Tribunal discounted, as a special circumstance, di Pietro's claim that he had entered into the settlement on the understanding that he would continue to receive invalid pension. The AAT said that it should also be borne in mind that 'only 70% of the amount received has been taken into account in calculating the period of preclusion': Reasons p.8.

[Comment: The AAT did not mention that the version of s.153(1), used by it, came into effect *after* the decision under review, namely 15 December 1987. The relevant version of s.153(1) was worded quite differently.

The guideline used by the DSS was apparently intended to 'codify' the Secretary's discretion under s.152(2)(c) of the Act. However, the AAT did not refer to that discretion; nor did the AAT examine the question whether arbitrary rule in the guideline was appropriate to the present case. This at least raises the possibility of a failure, on the part of the AAT, fully to exercise its review powers; see *Drake v. Minister for Immigration* (1979) 2 ALD 60.] [P.H.]

Tribunal's review powers

SARINA and SECRETARY TO DSS (No.A88/14)

Decided: 18 March 1988 by R.K. Todd

Ronald Sarina had applied to the AAT for review of a DSS decision to cancel his age pension because of his failure to provide the DSS with a statement of assets, as required by a notice issued under s.135TE(2) of the *Social Security Act* [now s.163].

When hearing of the application commenced in December 1986, Sarina agreed to supply the DSS with a list of his assets and the AAT adjourned the hearing.

When Sarina supplied the list of his assets to the DSS, a local office of the DSS 'cancelled' Sarina's pension because the value of his assets exceeded the assets test limits. In December 1987 the AAT learnt of this course of events.

After examining the evidence, the AAT decided to *affirm* the original cancellation of Sarina's pension. It emphasized that the later action taken by the DSS had not affected the Tribunal's obligation to deal with that original decision:

> '[T]he prima facie position is that in the absence of some particular provision in the relevant legislation it is not open to a decision maker to alter or otherwise tamper with a decision once it has become the subject of an application for review to this Tribunal. I have noted in more than one jurisdiction in recent times that an imperfect understanding of this proposition may be entertained by some decision makers. The decisions of the High Court of Australia in *R v Moody;* ex parte *Mithen* (1977) 17 ALR 219, and of this Tribunal in *Re Bloomfield and Sub-Collector of Customs, Australian Capital Territory* (1981) 4 ALD 219.'

(Reasons, para.6)

[P.H.]

Rehabilitation allowance: jurisdiction to review

CHRISTIANS and SECRETARY TO DEPARTMENT OF COMMUNITY SERVICES (No. V87/420)

Decided: 22 April 1988 by R.A. Balmford.

The applicant, Christians, applied to the Department of Community Services (DCS) in June 1986 for a rehabilitation allowance under s.135B of the *Social Security Act*. The application was rejected and Christians applied to the AAT for review.

The legislation

At the time of the decision under review, s.135(1) gave the 'Secretary' power to provide 'treatment and training' to -

> 'persons who are suffering from a physical or mental disease . . . who would be likely to derive substantial benefit from that treatment and training'.

The treatment and training could include, according to s.135(2)(b) and (c), the payment of tuition fees and the provision of incidental amenities.

According to s.135A(2)(b), a person was not eligible for treatment and training unless, *inter alia*, the person's physical or mental disability was, or was likely to be, 'a substantial handicap . . . to the person's undertaking employment.'

Section 135B(1) provided that a person was eligible to receive a rehabilitation allowance, if (a) the person was undertaking a rehabilitation program and (b) was qualified to receive a pension, benefit or allowance under the Act.

Jurisdiction

The DCS raised the question whether the AAT had any jurisdiction to review the decision of the DCS.

Section 17 of the *Social Security Act* [formerly s.15A] allowed for an application to the AAT for review of a decision 'made by the Secretary' which affirmed, varied or set aside a decision (under the Act) of an officer that had been reviewed by an SSAT.

Christians' original application had been rejected in October 1986. An SSAT reviewed that decision in May 1987; and the Secretary to the DCS had affirmed the original decision on 3 June 1987.

Christians had applied to the AAT for review of that decision on 9 July 1987.

At the time of Christians' original application, the DCS original decision, the SSAT review and the affirming decision by the Secretary to the DCS, s.6(1) of the *Social Security Act* defined 'Secretary' as meaning the Secretary to the DCS where the DCS was administering the part of the Act in question; or the Secretary to the DSS where the DSS was administering the part of the Act in question.

Throughout this period, the term 'officer' was defined in s.6(1) to mean an officer or person exercising functions under the Act.

The administration of Part VIII of the Act (which included s.135) had been transferred from the DSS to the DCS at some time before Christians' application.

On 5 June 1987 (that is, after the Secretary to the DSS affirmed the original decision), the *Disability Services Act* came into operation. Sections 135 and 135A of the *Social Security Act* were repealed; but the rights of any person receiving, or eligible to receive, treatment and training under s.135 were converted into rights under the *Disability Services Act*.

At the same time, the definition of 'the Secretary' in s.6(1) of the *Social Services Act* was amended to mean 'the Secretary to the Department'.

Until 24 July 1987, s.17(ia) of the *Acts Interpretation Act* provided that the term 'the Department' in any Act meant the Department administered by the Minister responsible for the Act in question or responsible for the relevant aspect of the Act in question.

From 24 July 1987, that definition was repealed and a new s.19A inserted into the *Acts Interpretation Act*. This section stated that a reference to 'the Department' in an Act meant the Department which dealt with the relevant matter or the matters to which the provision in question related.

The AAT noted that the term 'Secretary' had been given a variety of meanings at various stages in the administrative process through which the matter had passed:

> '17. Looking at the series of definitions . . . , the story . . . is . . . of a process of decision and review carried out as to the first step (the decision of an officer) in the DCS, but within the meaning of s.17(1) of the *Social Security Act*; as to the second step, in the SSAT which operates pursuant to the *Social Security Act*, and within s.17(1); as to the third step, the decision under review, again in the DCS, but still pursuant to the *Social Security Act*. The decision of the Secretary to the DCS was the culmination of a procedure of decision and review initiated and carried through in his Department, but under the *Social Security Act*.
>
> 18. I consider that the breadth and flexibility of the several definitions of "Department" which effectively governed, throughout the relevant period, the meaning of the word "Secretary" in s.17(1) of the *Social Security Act* is such as to encompass a connected process of the kind defined in s.17(1), in respect of which actions took place in more than one Department, so that, in this case, the word "Secretary" can extend to include the Secretary to DCS in respect of the decision sought to be reviewed. And I consider that to be so whether the matter falls to be determined in the context of the date of the decision under review, the date of Mr Christians' application for review, or the dates of the hearing and determination of the application.'

The AAT said all the expressions used in the definitions were 'deliberately broad and general':

> 'They are drafted with an awareness of administrative reality, and should, in my view, be interpreted in that spirit.'

(Reasons, para.19)

Substantial handicap to undertaking employment

Christians, who was 51 years old, had suffered an injury to his wrist and a heart attack. These had left him unable to perform work requiring the use of his hands, and other physical and stressful work. He enrolled in a tertiary orientation program in 1986, and was admitted to a University course in law in 1987. His only income, while undertaking this course, had been allowances under the *Student Assistance Act*.

The AAT said Christians' disabilities were a handicap but not a 'substantial' handicap to his undertaking employment, in the sense of beginning employment. The Tribunal noted 'in particular that he has demonstrated the high level of intellectual ability necessary to obtain admission to the . . . University Law School as a mature student with no senior secondary education apart from the tertiary orientation program': Reasons, para.34.

'Substantially reduced capacity to obtain employment'

From 4 June 1987, the qualification for a rehabilitation program was expressed in s.18 of the *Disability Services Act*. Section 18 referred to a person with a disability which resulted 'in a substantially reduced capacity . . . to obtain or retain unsupported paid employment'.

The AAT said that the change, from 'undertaking' to 'obtaining' employment, was significant; and Christians' disabilities did result in a substantially reduced capacity to obtain unsupported paid employment. He was therefore eligible for a rehabilitation program for the University law course, which would substantially increase his capacity to obtain paid employment. The same could not be said for the tertiary orientation program.

No rehabilitation allowance

However, Christians could not qualify for a rehabilitation allowance.

To qualify for that allowance under s.135B(1) of the *Social Security Act* (which had not been repealed, and which was now numbered s.150), Christians had to be eligible for another pension, benefit or allowance under that Act. Because he was receiving an allowance under the *Student Assistance Act*, he could not qualify for another pension, benefit or allowance under the *Social Security Act;* and he was not eligible for a rehabilitation allowance.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Widow's pension: ten years residence in Australia

GALLIFUOCO and SECRETARY TO DSS
(No. N87/1228)
Decided: 15 April 1988 by A.P.Renouf.

Maria Gallifuoco applied to the DSS for a widow's pension in April 1987. The DSS refused her application because she did not have 10 years' continuous residence in Australia.

Gallifuoco asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.60(1)(f) of the *Social Security Act* [now s.44(1)(f)] provided that a person could not qualify for widow's pension unless she had been continuously resident in Australia for not less than 10 years.

According to s.60(4) [now repealed], a person who was an 'absent resident' was to be treated as if resident in Australia. Section 6(1) of the Act defined an 'absent resident' as a person outside Australia-

> 'whose domicile is in Australia, not being a person whom the Secretary is satisfied is a person whose permanent place of abode is outside Australia'.

The evidence

Gallifuoco came to Australia in September 1960 to join her husband, V, who was already here. In 1963, the family (which included 4 children) travelled to Italy, intending to remain there only 5 or 6 months; but stayed there until December 1970. Two further children were born in Italy, and the family purchased a house in Italy.

Following the family's return to Australia in December 1970, a seventh child was born and a house purchased in Australia. In June 1979, the family again travelled to Italy, intending to remain there for less than a year in order to arrange marriages for Gallifuoco's 2 daughters. This process proved to complicated and the first marriage did not take place until July 1981.

Before the second daughter could be married, Gallifuoco's husband was killed in an accident in France in October 1981. This further delayed Gallifuoco's return to Australia: it was necessary for her to observe mourning for an extended period, and she claimed compensation for her husband's death through French legal proceedings. It