are 'special circumstances' for the late lodgment of a claim: the terms of the provision are set out in *Wilson*, in this issue of the *Reporter*. The applicant appealed to an SSAT and then to the AAT.

The applicant told the AAT that she had lodged her claim for the second child shortly after the child's birth. At about that time, the quarterly payments of child endowment being credited to her savings bank account had increased and she had assumed that her claim had been processed. It was only in April 1980 that de Graaf discovered that the increase was due to an increase in the rates of child endowment for all children, effective from 15 June 1976, and that she was being paid endowment for her first child only.

The AAT concluded that it was not satisfied that de Graaf had lodged her claim for the second child, as she had claimed; although the AAT said:

> [W]e consider that she honestly believes and at all times believed, that she had lodged the claim. The Tribunal feels that it can accept that a woman who has just gone home with a new baby and to a three year old first child is subject to pressures that may well lead her to make mistakes with the lodging of forms.
>
> (Reasons for Decision, para. 5.)

Late lodgment and 'special circumstances'

The AAT observed that the internal DSS Instructions declared that late lodgment should only be allowed (for the purposes of backdating) in 'most exceptional' circumstances. 'These', said the Tribunal, 'are not the words of the Act'. The AAT was 'concerned only with the statutory expression': Reasons for Decision, para. 6.

The AAT took the view that the 'special circumstances' which would justify late lodgment should relate 'to the question of lodgment and not to her circumstances generally': Reasons for Decision, para. 9; but the AAT were clearly prepared to take a relatively non-restrictive view of 'special circumstances' for the purposes of s.102(1):

> 8. What are 'special' circumstances must be judged in the light of all of the relevant circumstances of each particular case as seen in the context of the relevant statutory provisions. In other areas of the law where lapse of time may make it difficult for the circumstances to be investigated or assessed (as for instance in the case of claims for damages in relation to highway or industrial accidents) lapse of time may be very important. Justice to other parties may there demand promptness of action, or at all events compliance with statutory time limits as to giving notice of intended claims or as to commencement of proceedings, as the rule rather than the exception. But how strong should be the demand for promptness in the case of an application for child endowment by a wife and mother in respect of a child of the marriage who has never been out of the custody, care and affection of its parents? The family are not well off. The father is a roof tiler. They cannot afford to send Meegan to pre-school more than two days a week because of the costs involved. We were told by the representative of the respondent that there were reasons why in some cases a longer time should not be allowed, as where a child had been with foster parents or in a home. Departmental instructions which were put before us indicate as factors that would militate against paying arrears over a lengthy period the retention of files and other records for an undue length of time in order to to be satisfied that payment had not been made to another person or institution, and the requirement contained in s.105 that family allowance be applied to the maintenance, training and advancement of the child. But however relevant these factors might be in an appropriate case, none of them are apposite here. The only one that needs to be mentioned relates to the requirements of s.105. We are satisfied from evidence of the applicant directed to this point that her intentions are to use the child endowment for the benefit of Meegan in ways that respect the requirements of the section.
>
> 9. It would not be possible to lay down a complete catalogue of the circumstances that should be seen as special in relation to late lodgment. Here, however, the circumstances were in our opinion special enough. The applicant made a mistake. She appears to have failed to lodge her claim, but she did not realise that she had so failed, for reasons which to us are quite explicable.

The AAT concluded that these special circumstances justified extending the time for the lodgment of the claim to 15 April 1980, the day after she actually lodged her claim. Consequently, payment of the endowment would be backdated to the birth of her second child.

Handicapped child's allowance: late application

WILSON and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. V81/40)

Decided: 21 August 1981 by Ewart Smith, W.B. Tickle, and M.J. Cusack.

On 25 January 1974 Valerie Wilson gave birth to a child who was diagnosed as suffering from a 'hole in the heart' defect. The child required a great deal of medical treatment and care from his parents.

On 23 September 1980, Wilson applied to the DSS for a handicapped child's allowance, payable under s.105J of the *Social Services Act:*

> 105J. Subject to this Part, where a person who has the custody, care and control of a severely handicapped child provides, in a private home that is the residence of that person and of that child, constant care and attention in respect of that child, that person is qualified to receive a handicapped child's allowance in respect of that child.

A Commonwealth Medical Officer certified that the child was a severely handicapped child and recommended some back payment – 'e.g. 6 months'.

The DSS accepted that the child had been severely handicapped from shortly after his birth but decided that it would only pay the allowance from the date of Wilson's application. The commencement date for a handicapped child's allowance is controlled by s.102 (dealing with child endowment), which applies to handicapped child's allowance through the operation of s.105R:

> 102. (1) Subject to the next succeeding sub-section, an endowment granted to a person (other than an institution) shall be payable –
>
> (a) if a claim is lodged within six months after the date on which the claimant became eligible to claim the endowment, or, in special circumstances, within such longer period as the Director-General allows – from the commencement of the next endowment period after that date; or
>
> (b) in any other case – from the commencement of the next endowment period after the date on which the claim for endowment is lodged.

The DSS conceded that Wilson had become eligible for the allowance on 30 December 1974 – the date when the amendment to the *Social Services Act*, introducing handicapped child's allowance, came into effect.

Wilson appealed to an SSAT against the refusal to backdate the allowance. The SSAT rejected this appeal and a delegate of the Director General affirmed the original decision. Wilson then appealed to the AAT.

Late lodgement and 'special circumstances'.

The question before the AAT was whether there were 'special circumstances' to explain the delayed lodgment of the claim so as to justify payment of the allowance from the date of eligibility (30 December 1974). (As the AAT pointed out, 'the terms of s.102(1) do not enable any halfway course to be adopted': the payment could be backdated almost six years if there were 'special circumstances'; if there were not, the payment could not be backdated at all.)

The applicant claimed that there was a variety of 'special circumstances' to explain the late lodgment of her claim. These were summarized by the AAT as follows:

(a) Neither the applicant nor her husband was aware of the existence of the relevant legislation or the availability of the allowance until last year.

(b) The doctors and social workers whom they could have expected to bring the matter to their attention did not at any time do so.

(c) A child suffering from a heart defect as in the case of her child would not be thought of commonly as a handicapped child.

To these might be added (though the point was not made as specifically as (a), (b) and (c)), the point that the Department of Social Security had not adequately brought the existence of the legislation, and in particular the meaning it attributed to "handicapped child", to the attention of the general public, so that persons eligible for assistance would know they could claim.

The AAT referred to a number of tribunal and court decisons in which similar provisions had been applied and said that administrative delay by the Department or misleading advice given by the Department would constitute special circumstances: Reasons for Decision, para. 23. The Tribunal said that some of the matters listed in *Wheeler* (*Social Security Reporter*, no. 1, p.3) were factors to be taken into account in deciding whether there were special circumstances:

> [W]e mention in particular the applicant's level of literacy, age and length of residence in Australia; the facilities available to the applicant to obtain information or to seek advice, and the attempts made by the applicant to obtain information or advice. We should say that in referring to the applicant we mean to include the applicant's husband, in the case of a normal family unit as is the case here.
>
> (Reasons for Decision, para. 25.)

The AAT said that the DSS had had no special obligation to the applicant to inform her of her eligibility for the allowance; nor had there been any administrative delay in the DSS. A publicity campaign by the DSS at the time when the allowance was introduced was described as 'reasonable steps . . . to bring these matters to public attention', even though 'more might have been done' and there was still 'room for improvement': Reasons for Decision, para. 27.

The 'mere unawareness of the existence of the legislation' could not be 'special circumstances': Reasons for Decision, para. 28; and, while the applicant's perception (and that of her husband) of 'handicapped' as excluding their child was 'understandable, we do not think that it constitutes "special circumstances" within the meaning of s.102(1)(a).' Although the DSS, as a matter of policy, did not issue any specific statement on 'what exactly constitutes a "handicapped" . . . child . . . information is, and has been, readily available on inquiry'. Indeed this child's disabilities were of such a degree that his parents should have been 'put . . . on inquiry in relation to special assistance. Such an inquiry would have provided the information they needed': Reasons for Decision, para. 29. The AAT concluded:

> What is unusual about the case is that the applicant and her husband continued in a state of unawareness of the allowance for such a long time and that no-one who did know thought to mention it to them. But while that may make the position unusual, in the absence of any special disability precluding the applicant becoming aware of the legislation and the assistance available and any failure on the part of the Department of Social Security to take reasonable steps to make the availability of the allowance known to the public, we do not think that the applicant's unawareness can, of itself, be regarded as "special circumstances". And we do not think that there are any other factors in the evidence before us that could, considered together with the unawareness of the applicant, properly be regarded as constituting special circumstances.
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> (Reasons for Decision, para. 30.)

The Tribunal then affirmed the decision under review, but strongly recommended an *ex gratia* payment of the allowance for six months before the lodgment of the application: Reasons for Decision, para. 31.

Invalid pension: maintenance of 'dependent' children

GRECH AND DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. V81/4)

Decided: 31 July 1981 by Ewart Smith, W.B. Tickle and I. Prowse.

On 13 March 1980, Domenic Grech claimed an invalid pension from the DSS. He indicated that he was separated from his wife, that he was required to pay a total of $32 a week maintenance for his six children and that he had an income of $7473.68 a year from superannuation.

On 27 March 1981 Grech was certified to be permanently incapacitated for work to the extent of 85% or more. However, on 31 March the DSS rejected his claim on the ground that his income precluded the payment of any pension to him.

Grech then appealed to an SSAT, the DSS reconsidered the matter and decided, on 6 May 1980, to reduce his income by the amount of maintenance he was paying for his children; and he was granted a part pension of $24.10 a fortnight from 13 March 1980. (This amount was later varied because of 'indexation' adjustment of pensions and an increase in Grech's superannuation pension.)

Grech appealed to an SSAT against this decision. The SSAT recommended the appeal be disallowed and, on 17 December 1980, a delegate of the Director-General affirmed the decision of 6 May 1980. Grech then applied to the AAT for review of this decision.

No deductions for maintenance payments

Before the AAT, the DSS (apparently seeking to return to its decision of 31 March 1980) argued that Grech's income should not have been reduced by the maintenance payments: nothing in the Act allowed such a deduction.

The definition of 'income' in s.18 of the *Social Services Act* did exclude (in para.(d)) 'a payment made *to a person*' by way of maintenance for a child in that person's custody; but (said the AAT) 'maintenance payments are not to be deducted from the income of the person making the payments in arriving at his income . . . On that basis, the applicant would have been paid more pension than the Act provides for': Reasons for Decision, para. 11.

Deductions for 'dependent' children

However, that AAT then considered whether Grech was entitled to deductions from his income under s.29(1)(b) of the *Social Services Act*:

> 29 (1) In the computation of income for the purposes of this Part –
> (a) . . .
> (b) where a child under the age of sixteen years is dependent on a person, the income of that person shall be reduced by the amount of Three hundred and twelve dollars per annum, less the annual amount of any payment, not being a payment under this Part, Part VI, Part VIA or Part VIB, received by that person for or in respect of that child.

Section 18A of the Act allowed a pensioner (or a claimant for a pension) to claim a similar deduction for a child who had attained 16 years and was under 25 years, was receiving full-time education and who was 'wholly or substantially dependent on [the] claimant or pensioner'.

At the time of the hearing of the AAT appeal, Grech had five children under 16 and one who was aged 17.

The children under 16

Grech was paying $5 a week maintenance to each of his children: could they be regarded as 'dependent on' him within s.29(1)(b)? Clearly, said the AAT, there was not 'total economic dependency on the applicant.' But the children were 'in part dependent on the applicant.' (Their mother was being paid a widow's pension and family allowance by the DSS.) As to the meaning of 'dependent', the AAT said:

> 22. We think that the term 'dependent' used in s.29(1)(b) does not connote either total dependency or substantial dependency in the sense that the child is largely or mainly dependent on the person concerned. It is enough, we think, that the degree of dependency is, in all the circumstances, meaningful: it must be such as to be a real contribution to the maintenance and welfare of the child.
> 23. On the facts of this case, we are of the opinion that the five children under 16 years of age at the time of the hearing can reasonably be regarded as being dependent on the applicant for the purposes of s.29(1)(b) during the periods that the applicant has in fact been paying the maintenance ordered by the Court, and that the applicant's income for the purposes of Part III of the Act should accordingly be reduced at the rate of $312.00 per annum for each of those children in respect of those periods.

This led to the anomalous result that Grech's income was to be reduced by $312 a year for each of the five children although he was paying maintenance of only $260 for each child.

The child over 16

The child who was over 16 (called Pancho) could only be treated as dependent on Grech if he was 'wholly or substantially dependent' on Grech. The evidence showed that Pancho stayed with his father on four nights in each week and that the father spent about $9 a week on Pancho's upkeep. Pancho had a part-time job outside school hours and earned about $60 a week.

The AAT adopted the Oxford English Dictionary definition of 'substantially':

> 4. In all essential characters or features; in regard to everything material; in essentials; to all intents and purposes; in the main.

The AAT concluded 'that in the circumstances [Pancho] cannot be regarded as being "wholly or substantially" dependent on the applicant within the meaning of s.18A': Reasons for Decision, para.27;