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.
>
> (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;

and pointed out that, as each of Grech's children reached 16 years, the child 'would have to meet the stricter requirements of s.18A if the applicant were to be accorded a deduction from his income in respect of [the child]': Reasons for Decision, para. 31.

The consequence was that, as at the date of the AAT hearing, Grech was entitled to deduct 5 x $312 ($1560) from his annual income. The fact that this equalled his maintenance payments (6 x $260) was no more than a coincidence.

Widow's pension: 'continuous residence' in Australia

DANILATOS and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. N81/17)
Decided: 28 August 1981 by R.K. Todd, L.G. Oxby and M.S. McLelland

Anastasia Danilatos applied to the DSS for class 'B' widow's pension. The claim was rejected on the ground that she did not satisfy the residence requirement in s.60(1) of the *Social Services Act*.

> 60. (1) Subject to this Act –
> (a) . . .
> (b) a widow who has not the custody, care and control of any child and –
> (i) is not less than fifty years of age;
> (ii) . . .
> (c) . . .
> is qualified to receive a pension if she is residing in, and is physically present in, Australia on the date on which she lodges her claim for the pension and –
> (d) . . .
> (e) she has been continuously resident in Australia for a period of not less than five years immediately preceding the date on which she lodges her claim for the pension; or
> (f) she has at any time been continuously resident in Australia for a period of not less than 10 years.

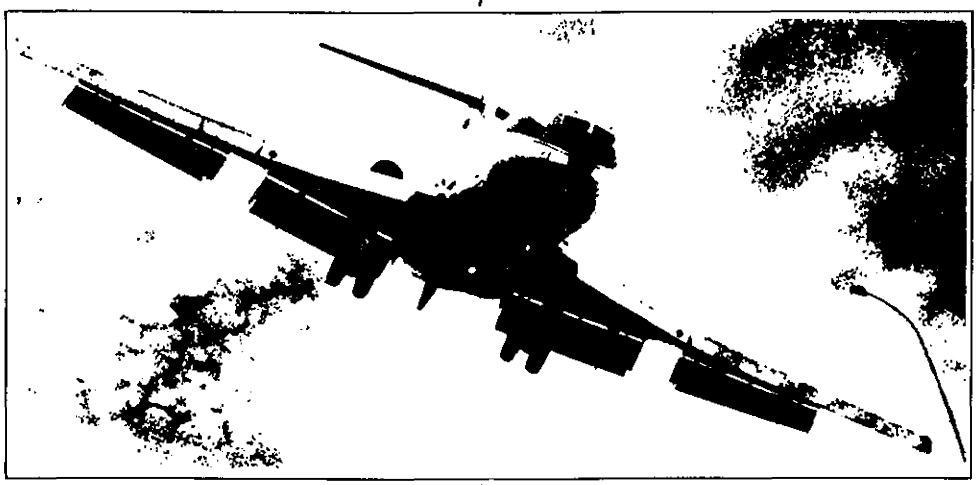
Section 61 of the *Social Services Act* amplified the meaning of 'resident' in s.60(1):

> 61. (1) For the purposes of sub-section (1) of the last preceding section, a claimant shall be deemed to have been resident in Australia during a period of absence from Australia if the Director-General is satisfied –
> (a) that, during that period, the claimant's home remained in Australia; and
> (b) . . .
> (2) For the purposes of sub-section (1) of the last preceding section, a claimant shall be deemed to have been resident in Australia –
> (a) . . .
> (b) during a period of absence from Australia during which the claimant was a resident of Australia within the meaning of any Act relating to the imposition, assessment and collection of a tax upon incomes; or
> (c) during occasional absences from Australia not exceeding, in the aggregate, one-tenth of the total period of residence and of those occasional absences.

'Continuously resident in Australia'

Before the AAT, it was agreed that Danilatos met the age requirement of s.60(1)(b) and the *current* resident requirement stated in the middle paragraphs of s.60(1); that she did not satisfy the 10 year residence requirement of s.60(1)(f); and, therefore, she could only qualify for widow's pension if she satisfied the alternative residence requirement in s.60(1)(e): that is, if she had been continuously resident in Australia for at least five years immediately before claiming the widow's pension.

Danilatos had been born in Greece in 1907. She had married and borne five children. In 1963, when her husband died, Danilatos and most of her family were living at Patnos on the mainland of Greece, Her husband owned a small property on Kefallinia, an island to the west of the mainland.



In 1956 and 1960, two of Danilatos' daughters emigrated to Australia, where they married. In 1972, GD, one of her sons, also emigrated to Australia to do research and postgraduate studies. In 1973 Danilatos came out to Australia 'to stay for good here'. She lived with and was supported by her son. In May 1975 Danilatos was granted permanent resident status.

In mid 1977 GD was awarded a Ph.D and went to the United States for a short period. As neither of her daughters could accommodate her, and as she could not afford to support herself, Danilatos decided to return to Greece. She flew to Greece in June 1977. She left in Australia (with one of her daughters) some furniture, kitchen equipment and her winter clothing.

The Australian immigration authorities gave Danilatos a re-entry visa for three years on her leaving this country. (Danilatos told the AAT that she intended to return to Australia as soon as GD came back from the U.S.A. and could pay her return air fare.)

GD returned to Australia in September 1977 but, for a variety of reasons he could not afford to pay for his mother's return to Australia. Accordingly, she remained in Greece until August 1979, when she flew back to Australia. (She had spent most of her time in Greece living on her late husband's small property on Kefallinia, where the living conditions were 'quite primitive'.) Danilatos was granted Australian citizenship on 10 December 1980.

The AAT summarized this sequence of events as follows:

> 13. In summary therefore the applicant lived in Australia for 44 months after her arrival in 1973, then lived in Greece for 27 months, and since returning has lived 21 months in Australia to the date of the hearing. In total she has spent 65 of the last 92 months in Australia.

The critical question was, therefore, whether the 27 month absence in Greece interrupted her residence in Australia.

The applicant's representative argued that Danilatos met the requirements of s.60(1)(e) in one of three ways: she had been 'resident' in Australia (in the normal sense of that word) for the five years before claiming a pension; or, if her absence in Greece broke the 'resident' status, her 'home' had remained in Australia: s.61(1)(a); or, if she was neither 'resident' or had her home in Australia during that absence in Greece, she remained a resident of Australia for income tax purposes: s.61(2)(b).

The AAT decided that Danilatos would satisfy s.60(1)(e) in either of the first two ways argued for: that is, she was resident in Australia even during her 27 months in Greece because Australia was her 'settled or usual place of abode' ('resident' involving an element of intention); and she should also 'be deemed to have been resident in Australia' in that period because her home remained in Australia. The AAT said:

> In our view the two tests are virtually identical. Certainly it would be difficult to imagine the circumstance of a claimant being such that her usual place of abode remained in Australia while her home did not, or vice versa. In our view the applicant's domestic circumstances satisfy either test.
> (Reasons for Decision, para. 18.)

The AAT accepted Danilatos's evidence that she had come to Australia to live with her son and that her return trip to Greece had been intended to be for less than six months. The evidence that she had left her belongings and winter clothing in Australia was 'highly probative and supportive of the applicant's evidence as to her intention', as was the fact of her obtaining a re-entry visa when she left Australia.