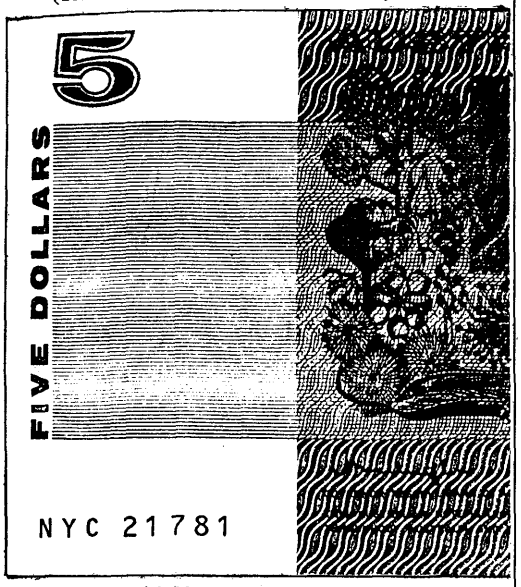
pensioner and against whom the only available remedy is an action at law. Having regard to the fact that, in our view, serious doubts exist as to the recoverability at law of the overpayment, that the prime cause of the overpayment was administrative error and that the applicant's circumstances are such as to make it inequitable that he should now be obliged to repay the overpayment consequent upon the failure of the Department to adjust the applicant's rate of pension in November 1978, we think that the discretion in s.140(2) should not be exercised.

(Reasons for Decision, para. 37)



22 May 1979 to 2 August 1979

The AAT concluded that the DSS had been misled by Buhagiar in the telephone conversation of 22 May 1979. If the DSS had been told (on that date) that Buhagiar was receiving workers compensation payments it could, after obtaining confirmation from his former employer, have adjusted the rate of pension from the pension pay day on or about 21 June 1979.

Accordingly, the overpayments made between 21 June 1979 and 2 August 1979 were 'moneys which should not have been paid and which would not have been paid but for the applicant's false statement': Reasons for Decision, para. 40.

Buhagiar's legal representative had submitted that the AAT should, in exercising the s.140(2) discretion, take into account the financial hardship which recovery of the overpayment would inflict. And he produced evidence that his weekly income of $27.65 was more than committed to basic living expenses. On this point, the AAT said:

> 42. In relation to a pensioner such as the applicant who is seriously disabled and obliged to live on a very low fixed income, it is virtually inevitable that there will be some hardship imposed if any part of that income is withdrawn. If hardship alone were a sufficient ground for relieving a pensioner from his liability to repay an amount which 'should not have been paid', the cases in which the discretion to make deductions could be exercised might well be severely limited. In the present case, having regard to the fact that there is an amount of pension which should not have been paid and which, in our view, it is proper to recover, we have concluded that considerations of hardship should only be taken into account in relation to the rate of deductions from Mr Buhagiar's ongoing pension. In this regard, as a result of our decision the recoverable overpayment will be considerably reduced and the level of deductions can be adjusted accordingly. Having regard to the applicant's financial commitments we consider that deductions at the rate of $6 per fortnight would be appropriate.

(Reasons for Decision, para. 42)

The AAT then set aside the decision under review and remitted the matter to the Director-General for reconsideration in line with the directions that the recoverable overpayment was to be restricted to the period after 21 June 1979 and that deductions from Buhagiar's current pension should be only $6 a fortnight.

[**Comment:** This is a very significant decision: it demonstrates the AAT's capacity to re-exercise the broad discretions given to the Director-General under the *Social Services Act;* it emphasizes the Tribunal's concern that these discretions be exercised consistently, fairly and in a way which will promote the general policy of the Act; and it indicates that any attempt by the DSS to recover an overpayment under s.140(2) should be carefully examined. That examination might reveal that the overpayment was due to the Department's oversight or error, in which case there is a strong argument for the s.140(2) discretion being exercised *against* recovery. Or it might show that recovery would impose financial hardship, in which case the discretion can (and should) be exercised to reduce the level of the deductions (and, consequently, increase the time over which the deductions will need to be made).]

McAULEY and DIRECTOR-GENERAL OF SOCIAL SERVICES
No. Q81/17

Decided: 20 July 1981 by J.B.K. Williams, I. Prowse, J.G. Billings.

Karen McAuley had been overpaid child endowment by the DSS. The overpayment, of $1288, was apparently due to Departmental oversight. The overpayment represented three years' payment of child endowment for two children who were not in McAuley's custody. The DSS decided to recover the overpayment by withholding the child endowment payable for McAuley's third child.

This decision was made under s.140(2) of the *Social Services Act* which allows the Director-General, 'in his discretion', to deduct an overpayment from any pension, allowance or benefit currently being paid. The Director-General had refused to exercise this discretion in favour of McAuley.

McAuley did not appear, nor was she represented, at the AAT hearing. Accordingly the Tribunal heard no evidence about the applicant's financial situation; nor did it hear any argument about the nature of the discretion in s.140(2). (See, for example *Buhagiar* in this issue of the *Reporter*.) The AAT simply said there was no evidence that withholding the child endowment would impose financial hardship on McAuley and there was no doubt that McAuley had received the payments over a long period in the knowledge that she was not entitled to them. The Tribunal exercised the discretion (in s.140(2)) 'in the same manner as was done by the Director-General' and affirmed the decision under review: Reasons for Decision, para.9.

Invalid pension: permanent incapacity

BRADLEY and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/29)

Decided: 19 August 1981 by Ewart Smith, M. Glick and W.B. Tickle.

Robert Bradley was injured while working in September 1978. He was then aged 33. He was awarded a lump sum settlement of his workers' compensation claim on 27 July 1980.

He claimed an invalid pension from the DSS on 26 June 1980 but, on 1 August 1980, the DSS rejected this claim on the ground that he was not permanently incapacitated for work. Following an unsuccessful appeal to an SSAT, the DSS decision came up for review by the AAT.

The qualifications for invalid pension are prescribed in ss. 23 and 24 of the *Social Services Act:*

> 23. For the purposes of this Division, a person shall be deemed to be permanently incapacitated for work if the degree of his permanent incapacity for work is not less than eighty-five per centum.
> 24. (1) Subject to this Act, a person above the age of sixteen years who is not receiving an age pension and—
> (a) is permanently incapacitated for work or is permanently blind; and
> (b) is residing in, and is physically present in, Australia on the date on which he lodges his claim for a pension,
> shall be qualified to receive an invalid pension.

A conflict of evidence

The dispute before the AAT was essentially one of opinion — that is, it involved a conflict between the assessments of Bradley's medical advisers and those of the specialists who examined him for the DSS.

A general surgeon, who had examined Bradley in March and July 1980 and compiled a detailed report, gave evidence on behalf of Bradley. He said that Bradley had suffered an acute low back strain superimposed on mild degenerative disc disease. He had continuing low back pain and restricted movement. He was permanently incapacitated for heavy work but, in the absence of psychiatric problems, would be fit for a suitable light job. But he did have severe psychiatric problems: 'taking the two problems together I doubt if this man would be capable of holding down any full-time job at the moment.' And the surgeon's opinion was that the mental depression was unlikely to improve and, unless it did, his back would not make any progress.

Bradley's psychiatrist, who had seen him

15 times since November 1979, believed that, because of his 'emotional state', he was 'unable to work at the moment and that situation could persist for an indefinite period'.

Bradley's general practitioner, who had treated him for six years, said that, because of the combined effect of his back and psychiatric problems, Bradley was not 'capable of holding down a job at this stage or in the foreseeable future'. Even his capacity for light work was very restricted, because of his inability to concentrate for more than two hours.

Bradley had been examined for the DSS by two specialists. The first of these, an orthopaedic surgeon, had seen Bradley for 25 minutes and concluded that his back disability would not prevent him from doing 'many types of lighter work'. But he conceded that he took no account of any psychiatric problems which Bradley might have had.

A psychiatrist also examined Bradley for the DSS. She, too, had seen Bradley only for a short period — no more than 45 minutes. She concluded that, while Bradley had an incapacity, it was not permanent. But her recollection of her interview with Bradley was 'somewhat vague' (the AAT said) and she had kept no notes of the interview. The AAT reported this exchange during the psychiatrist's evidence:

> When asked whether one visit for one-half or three-quarters of an hour was an adequate basis for a proper assessment of a person's psychiatric state, Dr Taylor answered: 'It leaves something to be desired but that is what I have to do.' She agreed that [Bradley's psychiatrist] would be in the best position to give an opinion about the progress of the applicant's condition.

(Reasons for Decision, para. 19.)

The AAT said that the extent and the weight of the medical evidence,

> particularly of the 'treating' doctors and specialists . . . lead inexorably to the one conclusion . . . [T]he applicant is at present, and was when he applied for invalid pension, incapacitated for work to a degree not less than 85%. We are satisfied on the evidence that he is, and then was, unemployable.

(Reasons for Decision, para. 38.)

(This case did not, the AAT said, raise the same difficulties as *Panke* had: see *Social Security Reporter*, no. 2, p.9; but the AAT expressed agreement 'with what is said in the Reasons for Decision given in that case'.)

The AAT went on to conclude that Bradley's incapacity was permanent in the sense used in *Panke's* case — that is, it was likely to last indefinitely, rather than likely to last only for a time:

> Fluctuations in his psychiatric disorder might conceivably reduce his disability, but it cannot be predicted with any confidence that such an event will occur in the foreseeable future.

(Reasons for Decision, para. 38.)

The AAT accordingly set aside the decision under review and remitted the matter to the Director-General with direction that the invalid pension be granted to Bradley.

Widow's pension: 'cohabitation'

R.C. and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. N80/35)
Decided: 16 July 1981 by J.D. Davies J, E. Smith, M.S. McLelland.

R.E. (as the applicant was then known) had been granted a widow's pension in July 1972. The pension was cancelled in January 1978 (on the ground that she was living with a man as his wife) but re-granted in September 1978.

On 26 February 1979, the pension was suspended by the DSS on the ground that R.C. (as she was then known) was living with a man, K.C., as his wife. R.C. appealed to an SSAT which recommended that the appeal be upheld but, on 7 December 1979, a delegate of the Director-General affirmed the suspension. On 23 January 1980, the DSS cancelled R.C.'s pension.

On 14 April 1980, the Director-General, after re-considering the matter, confirmed the earlier suspension and cancellation of R.C.'s pension. R.C. then applied to the AAT for review of the Director-General's decision.

This application for review centred on the 'cohabitation rule' – that is, on s. 59(1) of the *Social Services Act* which denies a widow's pension to 'a woman who is living with a man as his wife on a *bona fide* domestic basis, although not legally married to him'.

However, the application raised a number of minor issues:

1. Jurisdiction

The AAT decided (as it had in *Gee:* see 2 *SSR* 11) that the AAT did have jurisdiction to review a DSS decision (rejecting an SSAT recommendation) made before 1 April 1980, if that earlier decision had been reconsidered and affirmed by the DSS after 1 April 1980. This question is unlikely to arise in more than a handful of cases: an increasing proportion of applications for review relate to DSS decisions made after 9 September 1980 – for these the only jurisdictional problem is that the DSS decision must have been preceded by an SSAT recommendation (favourable or unfavourable).

2. Stay order

The AAT held that it could make an order, under s. 41 of the *AAT Act,* suspending the operation of the decision under review; and that, although the decision under review was technically the decision confirming the earlier suspension, cancellation, *etc.* decision, the substantial effect of the 'stay order' was to suspend the operation of that earlier suspension, cancellation, *etc.* order.

This is an important decision: it means that the technical form in which the AAT is given its social services jurisdiction does not prevent it from making an effective stay order.

3. Family Court documents

Section 121 of the *Family Law Act* prevents the publication of any account of evidence given in Family Court proceedings except in 'any court proceedings'. The AAT held that, as the AAT was not a court (it 'is an administrative body which exercises powers of the Executive'), the DSS could not use in evidence any documents which had been lodged with the Family Court.

4. The cohabitation issue

A large part of the Reasons for Decision is taken up with a detailed review and criticism of the evidence given by the applicant, R.C., and the person with whom, according to the DSS, she was living and whose surname she had adopted, K.C. The AAT concluded that their evidence was unreliable and based most of its findings on evidence given by other witnesses.

The AAT found that R.C., a divorced woman with a nine-year-old daughter, had started sharing accommodation with K.C. in April 1977. At the same time, she and her daughter had assumed his surname. In February 1978 she gave birth to a child fathered by K.C. Between February and October 1978, R.C. and K.C. did not live together: this separation, the AAT found, had been undertaken because the DSS had cancelled R.C.'s widow's pension in February 1978. The pension was re-granted in October 1978 and, in that month, R.C. and K.C. had resumed living together. (They were still living together at the time of the AAT hearing.) In February 1979 the DSS suspended R.C.'s widow's pension and it was this suspension which the AAT was asked to review.

The AAT rejected evidence given by R.C. and K.C. that they had separate arrangements for buying and cooking food and for household chores, and that they did not sleep together. The Tribunal said that it could not 'come to any conclusions favourable to the applicant on this aspect of the case'. The Tribunal was 'left with the impression . . . that the applicant and K.C. both used their incomes for the welfare of the family unit': Reasons for Decision, p. 35.