functional disorder which totally incapacitated Tsimiklis for work.

Another psychiatrist, who had examined Tsimiklis on behalf of the DSS, described him as malingering—consciously inventing his symptoms. However, the AAT rejected that diagnosis and found that Tsimiklis had 'descended into so depressed a state that he genuinely believes that he suffers from all the conditions which he described': Reasons for decision, para. 13.

To assess Tsimiklis' incapacity for work (in terms of ss.23 and 24 of the *Social Services Act*) the AAT took account of 'his total physical and mental condition and the circumstances of his age, work history and level of education'; and it also took account of evidence given by an officer of the Commonwealth Employment Service that his employment prospects were poor—not so much because of his age and 'lack of English', but because his back injury and his absence from the work force since 1978 would make finding employment very difficult: Reasons for Decision, para. 14.

The AAT concluded that Tsimiklis was an 'extremely poor employment prospect'; that his 'ability to cope with his life, in particular in a work situation, is virtually completely gone'; that he was 'wholly incapacitated for work'; and that he should not be required to undergo rehabilitation: Reasons for Decision, para. 16.

The formal decision

The AAT set aside the decision under review and granted Tsimiklis an invalid pension in accordance with his application.

Overpayment: what was the 'effective cause'?

BABLER and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. A81/5)

Decided: 17 March 1982 by A. N. Hall.

In December 1973, Theresa Babler was granted an age pension, at the reduced rate of $15.70 a fortnight. (She had disclosed to the DSS that her husband was employed and being paid $95 a week.)

When notified of the grant of pension, Babler was told that she should report, to the DSS, any increase in her husband's income (as required by s.45(3) of the *Social Services Act*). Her husband's income did increase within four months (and regularly after that). But she did not notify the DSS of these increases.

In November 1974 the DSS abandoned its pensions entitlement review programme. Under this programme the DSS had reviewed all pensions once a year. This programme was restored at the beginning of 1978, by which time cost-of-living adjustments had increased her fortnightly pension to $72.60. The DSS wrote to Babler in March 1978 asking her if her husband's income had varied. She truthfully answered that his income was now $174 a week. On the basis of this information, the DSS reduced her fortnightly pension to $31.60.

The DSS then collected full details of her husband's income over the preceding four years and calculated that she had been overpaid $4714.70.

In July 1979 Babler's pension was cancelled because of a further rise in her husband's income. The DSS then requested that Babler refund the amount of the overpayment.

After an appeal to an SSAT, she applied to the AAT for review of this decision.

The legislation

The DSS's right to recover this payment depended on s.140(1) of the *Social Services Act*:

> 140.(1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance, endowment or benefit which would not have been paid but for the false statement or representation, failure or omission, the amount so paid shall be recoverable in a court of competent jurisdiction from the person to whom, or on whose account, the amount was paid, or from the estate of that person, as a debt due to the Commonwealth.

Jurisdiction

The Tribunal agreed with the AAT decision in *Matteo* 5 *SSR* 50 that it had jurisdiction to review a DSS decision to demand repayment under s.140(1), and adopted the reasons given in that decision.

Intention

The main argument presented on behalf of Babler (by her son, who appeared for her) was that she had not realised that she was obliged to report changes in her husband's income, that she had not positively misled the DSS and that, therefore, there could be no recovery under s.140(1).

The AAT accepted that her failure to report increases was probably due to her poor English and her failure to understand her obligations under the Act. But the obligation imposed by s.45(3) was an absolute one and it was clear that Babler had not complied with that provision. The AAT said:

> In principle, however, ignorance of the law cannot be a sufficient excuse. Whilst there may be circumstances in which the assumption on which the sub-section is built may be open to quetion (namely, that a pensioner will always be in a position to know what is the income of his or her spouse—cf. *Woodward* [5 *SSR* 49] and will always have the mental or physical capacity to comply), Parliament has nevertheless seen fit to impose the obligation on the pensioner and to do so in unqualified terms.

(Reasons for Decision, para. 15)

Accordingly, intention was not relevant and one of the conditions for recovery under s.140(1) (namely failure to comply with s.45(3)) was satisfied.

'Effective cause' of the overpayment

The argument with the most substance was identical to the argument raised in *Gee*, 5 *SSR* 48; *Woodward*, 5 *SSR* 49; *Forbes*, 5 *SSR* 50; *Matteo*, 5 *SSR* 50; and *Livesey*, 6 *SSR* 62.

This was that the DSS had been placed on notice in December 1973, that Babler's husband had an income and that the DSS had contributed to the overpayment by not reviewing her pension between 1974 and 1978.

The AAT adopted the view expressed in *Matteo*, 5 *SSR* 50, that an overpayment was recoverable under s.140(1) if the pensioner's failure or omission to comply with the Act was 'the effective and not merely a contributory cause of the overpayment'.

The AAT was satisfied that, if the DSS 'had not abandoned the sound administrative practice of periodically reviewing the applicant's pension entitlement', she probably would not now be faced with the demand for repayment of $4714. The DSS's action '[set the scene] for an overpayment to occur if an applicant, for any reason, failed to notify a relevant increase in income': Reasons for Decision, para. 22.

But, adopting what was said in *Matteo*, the AAT doubted that the DSS's failure to review Babler's pension superseded the applicant's failure or omission as the effective cause of the overpayment.

The AAT pointed out that in *Forbes*, 5 *SSR* 50 (where the AAT had found against the DSS), there had been an established pattern of adjustments to a pension, based on periodic DSS reviews. (This, presumably, strengthened the argument that the abandonment of those reviews was the effective cause of the overpayment.) But Babler's situation was different, said the AAT:

> In the present case, by contrast there was no established review pattern and there was nothing in the Department's conduct to convey to the applicant that her husband's income was under independent review.

(Reasons for Decision, para. 24)

The AAT concluded by finding (although the question was 'one of considerable difficulty') that Babler's failure to notify increases in her husband's income remained the effective cause of the overpayment. Further, there were no special circumstances of hardship which would justify waiving or reducing the overpayment.

The formal decision

The AAT affirmed the decision under review.

HANGAN and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/43)

Decided: 5 April 1982 by J. B. K. Williams, C. C. H. Thompson and I. Prowse.

Kathleen Hangan was the mother of four children (born between 1962 and 1969), for whom the DSS was paying child endowment. In July 1972, she and her children left Australia to join her husband who was working in Indonesia.

In July 1973, Hangan returned to Australia and notified the DSS that she and her children had been overseas for 12 months and would be returning overseas for a

further 12 months in August 1973.

The DSS wrote to Hangan on 15 August 1973 in the following terms:

> Your child endowment payments will continue while you are overseas as long as you continue to satisfy the following conditions:
> 1. that your usual place of residence will continue to be in Australia and that your absence is only temporary;
> 2. that you continue to have the custody, care and control of your child(ren);
> 3. that you do not receive a payment similar to child endowment under the law of any other country.
>
> Should you cease to satisfy any of these conditions you must notify this office immediately.

Apart from short periods in Australia, Hangan, her husand and her children continued to live overseas until May 1981. Child endowment continued to be paid to Hangan's bank account (in Toowoomba) and there was no other contact between her and the DSS until July 1978, when she applied for a student family allowance for her eldest child, who had turned 16. This application gave an address in the Philippines and the DSS reviewed her case.

In November 1978 the DSS wrote to Hangan advising her that her prolonged absence overseas meant she was not entitled to child endowment. Indeed, the DSS wrote, her entitlement ended when she first left Australia in July 1972. Accordingly there had been an overpayment of $3373.

Following an appeal to an SSAT, the DSS reduced the claimed overpayment to $2692.20 (allowing for periods spent in Australia and for 'departmental error' in paying endowment for the 12 months from August 1973).

Hangan then applied to the AAT for review of this decision.

The legislation

The claim for the overpayment was based on three sections of the *Social Services Act*, ss.103(1)(d) and (e), s.104A(b) and s.140(1).

Section 103(1) provides that endowment ceases to be payable to an endowee (in this case, Hangan) for a child if—

> (d) the endowee ceases to have his usual place of residence in Australia, unless his absence from Australia is temporary only; [or]
> (e) the child ceases to be in Australia, unless his absence from Australia is temporary only

Section 104A(b) obliged an endowee (in this case, Hangan) to notify the DSS within 14 days of a child, for whom endowment was being paid, ceasing to be in Australia.

Section 140(1) provided that if an endowment was paid 'in consequence of a failure or omission to comply with any provision of this Act', and that payment 'would not have been paid but for the . . . failure or omission', the amount paid was 'recoverable . . . as a debt due to the Commonwealth'.

'Overpayment' established

The DSS claimed that Hangan had failed to notify the Department of the various occasions when the children had ceased to be in Australia (as required by s.104A) and that, as a result of this failure, the Department had continued to pay endowment to which (because of s.103(1)(d) and (e)) she was not entitled. The amount of these endowment payments were, therefore, recoverable under s.140(1).

The AAT agreed that, from July 1972, Hangan ceased to have her 'usual place of residence in Australia', her children ceased to be 'in Australia', and that neither of these absences from Australia was temporary. The Tribunal came to this conclusion after considering all the circumstances of the case, particularly the family's extended stay overseas (of some eight-and-a-half years).

Therefore, Hangan ceased to be entitled to endowment for her children in July 1972. Accordingly, there had been an overpayment of endowment.

The 'effective cause'

But was that overpayment recoverable under s.140(1)? The AAT agreed with the view taken in *Matteo*, 5 *SSR* 50, and *Forbes*, 5 *SSR* 50, that

> for an overpayment to be recoverable under s.140(1), a failure or omission by a person to comply with a provision of the Act must be shown to be the effective and not merely a contributory cause of the overpayment.

(Reasons for Decision, para.30)

In this case the action and inaction of the DSS had complicated matters. In the first place, the Department had written to Hangan in August in 1973 in terms which suggested (through the use of the words 'payments will *continue* while you are overseas [so long as] your usual place of residence will *continue* to be in Australia') that her affairs were in order and endowment would be payable in the circumstances of her case. This letter was, said the AAT, 'inaccurate and misleading'.

In the second place, although Hangan's file had been marked 'For review return to Australia 1974', no action was taken on the file between August 1973 and July 1978 because of 'administrative oversight'.

It was true, said the AAT, that Hangan had failed to comply with s.104A, by failing to notify the DSS when her children left Australia (apart from the August 1973 departure):

> On the other hand, the respondent is charged with the proper administration of the Act. We consider that when it was learned that the applicant had been overseas and was again going overseas, a review of her case should then have been undertaken. Instead all that occurred was that she was sent a 'stock' letter (which to say the least of it was apt to be misleading to its recipient) and a decision to review the case at a later time made—a decision which was never implemented. Had a review been undertaken when the department first had knowledge of the circumstances surrounding the applicant's case it seems most probable that the subsequent situation would naver have arisen . . . We accordingly are of the opinion that the effective cause of the overpayment was the department's failure to review when learning of the applicant's circumstances.

(Reasons for Decision, para. 32)

The Tribunal went on to say that the effective cause of payment of endowment between July 1972 and July 1973 was possibly Hangan's omission to comply (in July 1972) with s.104A. But the AAT did 'not think it would be a proper exercise of the [Director-General's] discretion' to recover this part of the overpayment because the DSS's letter of 15 August 1973 stated that the amount had been correctly paid: Reasons for Decision, para. 33.

The formal decision

The AAT set aside the decision under review and decided that the endowment payments, although not payable, were not recoverable under s.140(1) of the *Social Services Act* '(except as to the period referred to in para. 33 hereof)': Reasons for Decision, para. 34.

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The Following AAT decisions will be reported in more detail in the August issue of the *Reporter*.

Hales (No. V81/245). Decided 23 April 1982: The AAT found that an overpayment of supporting mother's benefit was *not* recoverable under s.140(1) because the 'substantial or dominating cause of the overpayment was the DSS's failure to carry out regular reviews of Hales' income from employment, despite having informed Hales that it would carry out those regular reviews.

Mihailov (No. V81/109). Decided 19 April 1982: The AAT found that Mihailov was permanently incapacitated for work and so qualified for invalid pension. The incapacity was produced by a 'combination of orthopaedic disabilities and personality problems' which made him 'virtually unemployable'.

Hadfield (No. Q81/45). Decided 23 April 1982: The AAT found that Hadfield was not permanently incapacitated for work and, therefore, did not qualify for invalid pension. The AAT did not explore a suggested psychiatric disability, emphasising the lack of a physical basis for any disability.

Melier (No. W81/22). Decided 23 April 1982: The AAT found that Melier's physical disabilities and his poor English and education made him totally and permanently incapacitated for work. Accordingly, he was qualified to receive an invalid pension.

Kane (No. V81/147). Decided 19 April 1982: The AAT accepted Kane's medical evidence that a stroke had left him with a 'massive disability', rejected medical evidence produced by the DSS (because it was based on brief examination rather than on long-term treatment) and found Kane qualified to receive an invalid pension.