defines a resident of Australia as including 'a person . . . whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia'.

Physical presence an essential part of 'residence'

The Tribunal pointed to the many different phrases referring to 'residence' in the *Social Security Act*. It felt that the 1974 insertion in s.60(1)(c) of 'and is physically present in' (which controls the date of claim) was unlikely to have been intended to clarify the meaning of 'residing permanently in Australia'.

The Tribunal reasoned that 'the presence of the word "permanently" in association with the conjunction of the spouses (in s.60(1)(d)), to my mind calls for the exclusion of the notion at the one time of residence "in" and residence "out" of Australia': Reasons for Decision, para. 9. Thus the phrase 'residing permanently in Australia' required a physical presence, not just a residential status.

'Absence' must follow initial presence

The Tribunal considered the meaning of s.61. Under s.61(1) the Tribunal stated, as the applicant had conceded, the phrase 'during a period of absence' required an initial presence. More importantly for the applicant here, the Tribunal decided that the phrase 'period of absence' in s.61(2), given that it qualified both the phrase 'continuously resident in Australia' and 'residing permanently in Australia' (s.60(1)(e) and (f)) also required an initial presence.

The Tribunal concluded that the Director-General had been right in deciding that, before Koon Lin Ho 'had left Hong Kong, that being the time during which her husband died, it could not be said that "she and her husband were residing permanently in Australia"': Reasons for Decision, para. 10.

Formal decision

The AAT affirmed the decision under review.

Widow's pension: bigamous marriage

BARON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/173)

Decided: 18 November 1982 by D. G. McGregor J.

Baron applied for review of the Director-General's refusal to grant her a widow's pension.

The applicant had had a bigamous marriage annulled on 14 March 1975 and applied for the widow's pension on 14 July 1980. The Director-General refused to grant the pension. The applicant appealed to the AAT, contending that she was a widow within the meaning of the Act and entitled to a Class B widow's pension.

Legislation

Section 59(1) of the *Social Security Act* contains an expanded definition of the term 'widow' as used in s.60(1) of the Act (which defines the qualifications for widow's pension:

> 'widow' includes—
> (a) a dependent female;
> (b) a deserted wife;
> (c) a woman whose marriage has been dissolved and who has not remarried; . . . and
> (e) a woman whose husband has been convicted of an offence and is imprisoned and has been imprisoned for a period of not less than 6 months . . .

The terms used in paras (a) and (b) are further defined in s.59(1):

> 'dependent female' means a woman who, for not less than three years immediately prior to the death of a man (in this Part referred to as the man in respect of whom she was a dependent female), was wholly or mainly maintained by him and, although not legally married to him, lived with him as his wife on a permanent and bona fide domestic basis;
> 'deserted wife' means a wife who has been deserted by her husband without just cause for a period of not less than six months . . .

Are these categories exclusive?

The Tribunal considered the meaning of the word 'includes' in the above sections. It cited *Dilworth* v *Commissioner of Taxation* [1899] AC 99 at 105 where it was decided that 'include' could mean 'mean and include', that is, that it could be exclusive. The Tribunal decided this was not such a case, because if it were so the primary meaning of 'widow' would be taken away and one would have to imply the words 'means and' for no good reason. It went on to consider whether the applicant was within the 'categories of persons' (see *Lambe* (1981) 4 *SSR* 43) entitled to receive a pension.

It stated that Baron clearly did not come within para. (a) as there was no relevant death; similarly she did not come within para. (b) as there was no desertion either in the legal sense or 'in a broader context of one party leaving his spouse of his own will and decision'. Nor was the applicant a wife as the word is commonly understood: Reasons for Decision, para. 5.

The Tribunal went on to consider para. (c). The Tribunal stated there had been no marriage. There had been participation in a ceremony of marriage but one party was not free to marry. Thus there was no valid marriage. The annulment merely declared the so-called marriage void and did not confer any status on it. Thus the Tribunal decided she was not a widow within para. (c). The Tribunal further decided that Baron was not a 'widow' within the natural meaning of the word, i.e. a woman whose husband is dead and who has not married again.

Formal decision

The Tribunal affirmed the decision under review.

Supporting parent's benefit: cohabitation

CN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/221)

Decided: 3 December 1982 by R.K. Todd.

This was an appeal against three decisions of the Department of Social Security: to cancel the applicant's supporting parent's benefit, to reject a subsequent claim for supporting parent's benefit and to seek recovery of overpayments of supporting parent's benefit and supplementary assistance totalling $21 633.94. The Department alleged that at all relevant times the applicant had been 'living with a man on a *bona fide* domestic basis as his wife without being legally married to him' (s83AAA(1)), which disqualified her from the benefit.

Facts

CN arrived in Australia in 1969 with her nine-year-old son. She commenced a relationship with K and gave birth to his son in April 1973. In March 1973, CN and K bought a house in Preston as tenants-in-common. CN moved into the house with her sons, but K at that stage did not. K did some renovation work on the house, paid the mortgage and paid the applicant $5 a week, later increased to $10 as maintenance for his son.

In September 1973, the applicant made a statement in support of a claim for supporting mother's benefit stating that she did not know where K was and that she paid rent of $10 a week. Both of these statements were untrue. In a later statement (December 1973) she said she received no maintenance and claimed that she paid no rent. Supporting mother's benefit was granted on 7 December 1973.

The Tribunal found that K moved into the house early in 1975 and that the applicant and K had been living under one roof from the beginning of 1975 to March 1978, either in Preston or at a second house they bought in Greensborough. It further found that they recommenced sharing a house in August/September 1980.

It found that K did not give CN money for housekeeping but supported her by providing the bulk of the purchase money of the Preston property and by taking responsibility for its upkeep and paid a small amount of maintenance for their child.

According to CN and K, they did not share groceries or meals, they did not have sexual relations after the applicant became pregnant with their son, and had no social life together. These statements

were described by the Tribunal as 'assertions of two people who have not proved to be wholly truthful'.

The Tribunal found that while CN and K lived under one roof their's was a relationship in which CN lived with K as his wife on a *bona fide* domestic basis.

> While I am faced on the one hand with objective indicia which indicate the existence of a common household conducted as if the applicant and K were man and wife, albeit on unsatisfactory terms, I am on the other hand faced with the assertions of two persons who have not proved to be wholly truthful where their interests dictate that they should not tell the whole truth. So left in doubt, it would be open to find against the applicant, not on the basis of there being an onus of proof strictly so called, but rather on the basis that I have to be very careful before accepting the one sided evidence of the person whose interests are vitally affected and whose evidence can really only safely be accepted by making the subjective evaluation that the witness is a witness of truth. While it would be open to me to decide the case in this way, I have nevertheless come to the conclusion that on the whole of the evidence I must make the positive finding that the relationship between the applicant and K, while they lived and live together under one roof, is and was a relationship which must be found to be one in which she lives and lived with him as his wife on a bona fide domestic basis. I so find notwithstanding that the applicant and K may well have told the truth about their physical relationship and to some degree at least about their domestic arrangements. The facts are however that they live in the one house; that the house is in their common ownership; that it is one of two houses which they have selected, owned and shared since their relationship commenced; and that their household is completed by the presence of their child in respect of whose upkeep K makes a small contribution. It is also true that however deficient the relationship may be there is no suggestion that there is any breakdown in communication between the applicant and K.

Reasons for Decision, para. 43).

Recovery of overpayments

The Tribunal decided to act on the basis that the decision in *Matteo* (1982) 5 *SSR* 50 was correct; i.e., that the Tribunal does have jurisdiction to review the administrative decision to seek recovery in court and the administrative determination of the amount to be recovered (see this issue for the outcome of the Federal Court appeal against *Hangan* (1982) 7 *SSR* 71.)

The Tribunal found that the amount paid by way of supplementary assistance 'would not have been paid but for the false statement of the applicant with regard to rent' and was therefore recoverable.

The Tribunal found that the amount paid by way of supplementary assistance 'would not have been paid but for the false statement of the applicant with regard to rent' and was therefore recoverable.

The Tribunal found with regard to alleged overpayment of supporting mother's or supporting parent's benefit, that the only amount that was recoverable was that paid between January 1975 and March 1978. The applicant's 'failure or omission to comply with any part of this Act' (s.140(1)) entitling recovery was her failure to notify the DSS that she had commenced to live with a man as his wife on a *bona fide* domestic basis although not legally married to him (s.83AAG).

Formal decision

The AAT affirmed the decisions to cancel CN's benefit and to reject her 1981 application for benefit.

The Tribunal set aside the decision to seek recovery of $21 633.94 and remitted the matter for reconsideration with the direction that recovery be limited to the amounts paid as supplementary assistance and the benefit paid between 1 January 1975 and 31 March 1978.

Overpayment: recovery by deduction

WRIGHT and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q82/75)

Decided: 5 November 1982 by J. B. K. Williams.

Thelma Wright, who was a widow's pensioner, had been overpaid $482 as a result of an error by the DSS. The Department decided to recover this overpayment by deducting $5 a fortnight from her current pension.

Wright applied to the AAT for review of this decision.

The AAT pointed out that the decision of the DSS was based on s.140(2) of the Act:

> Notwithstanding anything contained in this Act (other than sub-section (3) of this section), where for any reason, an amount has been paid by way of pension, allowance, endowment or benefit which should not have been paid, and the person to whom that amount was paid is receiving, or entitled to receive, a pension, allowance or benefit under this Act (other than a funeral benefit under Part IVA), that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.

This section, the Tribunal said, allowed recovery if the overpayment had been made 'for any reason' and (in contrast to s.140(1)) was not restricted to overpayments due to some failure on the part of the recipient.

> Accordingly, it is my view that, the admitted fact that the overpayment in this case arose through departmental error or oversight, does not preclude the recovery of the amount by deduction from current entitlement under section 140(2).
>
> The decision to deduct is, however, a decretionary [*sic*] one reposed in the Director-General, a decretion [*sic*] which now falls for exercise by the Tribunal. Public monies which should not have been paid to the applicant have, in fact, been paid to her and I see no reason why a decretion [*sic*] in her favour not to recover from her should be exercised unless it be shown that hardship would otherwise be caused.

(Reasons for Decision, pp.2–3)

The Tribunal went on to assess Wright's financial position and decided that a deduction of $5 a fortnight would not impose hardship on her.

Formal decision

The AAT affirmed the decision under review.

[Comment: This decision should be contrasted with *Buhagiar*, (1981) 4 *SSR* 34, and *Livesey*, (1982) 6 *SSR* 62, where the Tribunal decided that, as a matter of discretion, an overpayment should not be recovered under s.140(2) unless it would also be recoverable under s.140(1)—that is, unless the overpayment was made as a result of some failure on the part of the recipient.

The Tribunal in *Wright* did not refer to those two earlier decisions.]