dren remaining in Australia and the AAT was satisfied that the applicants intended to return to Australia. Thus they had not lost their acquired domicile in Australia by October 1975.

Having regard to section 20(2)(b) of the *Social Security Act* the Tribunal then turned to the *Income Tax Assessment Act* 1936 for a definition of resident. Section 6 of that Act reads:

> 'resident' or 'resident of Australia' means –
> (a) a person, other than a company, who resides in Australia and includes a person –
> (i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia . . .

In the absence of any evidence of the satisfaction of the Commissioner of Taxation that the applicants had their permanent place of abode outside Australia at any time between 1971 and 1975, the AAT concluded that as their domicle was in Australia during that period they were to be regarded as residents for that period.

Reference to Commissioner of Taxation: Fairness

The DSS requested that a certificate be sought from the Commissioner of Taxation so as to ascertain whether or not he is satisfied that the Fremders' permanent place of abode was outside Australia during the relevant period.

The AAT thought it would be unfair to do so in this case.

> . . . Chaim Frender is now 85 years old . . . The applicant is having the whole of his age pension withheld in order to recover the overpayment; so any further delay is a period during which he will continue to receive no income from the age pension . . . [I]t would be unfair to ask the Commissioner to give a certificate at this stage after the effluxion of so much time and with the knowledge that the certificate is being given not for purposes related to liability for income tax but for the purpose of these proceedings . . .

(Reasons, para. 15).

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with a direction that the applicants were resident in Australia during their absence from 1971 to October 1975, that s.83AD is not applicable to them and that therefore no overpayment of pension was made to either of them before the cancellation of their pensions in January 1980.

POLDY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/60)

Decided: 30 May 1983 by G.D. Clarkson.

Mr Poldy came to Australia from Germany in 1939. In 1946 he became naturalised. Unable to practice as a dentist in Australia he left in April 1947 and did not return until May 1981. Upon his return he applied for, and was refused, an age pension on the grounds that he had not satisfied the residence requirement in s.21 of the *Social Security Act*. He applied to the AAT for review of that decision.

The legislation

The relevant parts of s.20 and s.21 of the *Social Security Act* read:

> 20 (1) For the purpose of this Part, a claimant shall be deemed to have been resident in Australia during a period of absence from Australia–
> (a) if the Director-General is satisfied that, during that period, the claimant's home remained in Australia; and
> (b) if the Director-General is satisfied–
> (i) in the case of a married man–
> that, during his absence from Australia, he maintained his wife and such of his children as were under the age of sixteen years . . .
> (2) For the purposes of this Part, a claimant shall be deemed to have been resident in Australia–
> . . .
> (b) during a period of absence from Australia during which the claimant was a resident of Australia within the meaning of an Act relating to the imposition, assessment and collection of a tax upon incomes in force during that period,
> . . .
> 21 (1) Subject to this Part, a person who is not receiving an invalid pension and–
> (a) being a man, has attained the age of sixty-five years, or, being a woman, has attained the age of sixty years; and
> (b) is residing in, and is physically present in, Australia on the date on which he lodged his claim for a pension and has at any time been continuously resident in Australia for a period of not less than ten years, shall be qualified to receive an age pension.
> (2) where
> (a) a claimant has had more than one period of residence in Australia;
> (b) the longest of those periods is less than ten years but is not less than five years; and
> (c) the aggregate of those periods exceeds ten years, the period specified in paragraph (b) of the last preceeding sub-section shall, in relation to that claimant, be deemed to be reduced by the excess.

Residence

Poldy argued that as his home was in Australia during his period of absence he should be deemed to have been resident at that time pursuant to s.20(1)(a). The AAT rejected that argument.

> Nothwithstanding his keen desire to return to Australia, his active preservation of Australian contacts by correspondence and through people who visited him, and his taking Australian citizenship, the fact is that the applicant raised a family elsewhere. For some thirty-four years, the centre of his family was elsewhere. I have no doubt that he desired otherwise, but in fact his home was not in Australia.
> (Reasons, Page 7)

The AAT also rejected an argument that the applicant came within s.20(2)(b) which deems a person to be resident who is a resident for the purpose of income tax Acts. Poldy in fact paid withholding tax on interest earned in Australia by a non-resident and was not called upon to pay tax on his professional income as a resident.

The conclusion was therefore that Poldy's qualification for pension had to be determined under s.21.

Formal decision

The AAT affirmed the decision under review.

Income test

HOY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/256)

Decided: 16 August 1983 by I.R. Thompson

Dorothy Hoy separated from her husband on 13 January 1980. On 15 February 1980 she applied for special benefit. This was approved and benefit was paid from 25 February 1980. On 31 March 1980 Hoy informed the DSS that she had been awarded maintenance by the Magistrates' Court totalling $90 for herself and her two children.

The DSS in calculating the rate of her special benefit took into account the payments made to her as maintenance, pursuant to the court order. The applicant contended that these payments should not be regarded as "income" as they were being applied to mortgage repayments.

An SSAT upheld her appeal against this decision but a delegate of the Director-General affirmed the original decision. Hoy applied to the AAT.

The legislation

Section 125 of the *Social Security Act* reads:

> The rate of a special benefit payable to any person shall be such rate as the Director-General, in his discretion, from time to time determines, but not exceeding the rate of the unemployment benefit or the sickness benefit which could be paid to that person if he were qualified to receive it.

Thus a recipient of special benefit is subject to the income test in s.114 of the Act. 'Income' is determined in s.106 of the Act to mean:

> . . . any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever, within or outside Australia, and includes any periodical payment or benefit by way of gift or allowance, . . .

Were the maintenance payments 'income'?

To be income the payments thus had to be 'for her own use or benefit'.

The AAT concluded that the applicant was obligated to apply the money towards the repayment of the mortgage. This arose on equitable principles which, given the intention of the parties to use the money in that manner, prevented

Hoy using it in any other way.

This did not, however, prevent the money being received 'for her own use or benefit' and thereby being classified as income. The house was owned by the applicant and her husband as joint tenants. This meant that each had an interest in the whole. Thus the payment by the husband of 'his part' of the mortgage repayment at the same time benefited the applicant.

> ... differences between the contributions of the respective joint tenants to the cost of the property are not reflected in their respective beneficial interests in it.

(Reasons, para. 18)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that special benefit paid between 25 February 1980 and 31 March 1980 should have been paid without deduction for income [the DSS conceded that voluntary payments between these dates had not been made by the applicant's husband] but that maintenance payments received by the applicant from 1 April were income for the purposes of Part VII of the *Social Security Act*.

SMITH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/221)

Decided: 25 July 1983 by W.T. Prentice.

Ella Smith had purchased a small business in October 1978. For the year ending June 1979 it ran at a loss of $4562, for the year ending June 1980 it ran at a loss of $465 and for the year ending June 1981 it showed a profit of $2819. However, for the purposes of income tax she was allowed to set off her losses against her income for 1981 so reducing her income.

The applicant had been in receipt of age pension at the maximum rate since 17 July 1980. The DSS on learning of her profit of $2819 in 1981 decided that the sum should be taken into account in assessing her 'income' for the purposes of s.28(2) of the *Social Security Act*. Section 28(2) then read:

> The annual rate at which an age or invalid pension is determined shall . . . be reduced by one-half of the amount (if any) per annum by which the annual rate of the income of the claimant or pensioner exceeds–
> (a) in the case of an unmarried person – $1040 per annum . . .

Accordingly, the DSS decided on 1 October 1981 that as from 4 November 1981 the applicant should be paid the maximum rate of pension reduced by $899. The power to reduce the rate of the pension is contained in s.46(1) of the Act. That section reads:

> If –
> (a) having regard to the income of the pensioner,
> (b) by reason of the failure of a pensioner to comply with section 44 or 45; or
> (c) for any other reason,
> the Director-General considers that the pension which is being paid to a pensioner should be cancelled or suspended, or that the rate of the pension which is being paid to a pensioner is greater or less than it should be, the Director-General may cancel or suspend the pension, or reduce or increase the rate of the pension, accordingly.

'Income': insufficiency of information

To reduce the rate of pension it is clear from s.46(1) that the DSS must have regard to the 'income' of the applicant. However, the DSS only had regard to the 1981 tax return of Smith, there was nothing before the DSS as to when that had been earned and whether it would continue into the 1982 period. There was no knowledge at all (apparently) of the income of Smith between 30 June 1981 and the date of the decision on 1 October 1981. Thus the decision of the DSS was not properly based.

Overpayment: discretion to reocover

There was a possibility that the DSS may seek to recover an overpayment of pension having regard to the income of the applicant in the 1981 tax year. The first question was whether there was such income to take into account.

It was argued for the applicant that that income should be treated under the *Social Security Act* in the same way as it is under the *Tax Act*, that is, that the accumulated losses should reduce her income. It was also put to the AAT that the profits from the business were not put to her own use and benefit but went to such things as the purchase of stock.

The AAT adopted the reasonsing of *Szuts* (1983) 13 *SSR* 128. 'Income' is 'that which comes in'. There is no express provision in the *Social Security Act* as there is in the *Tax Act* which allows business losses to be carried forward from one year to another. Also, the fact that the applicant chose to dispose of the 'profits' by putting them back into the business rather than to her own personal use does not prevent them from being regarded as income for the purposes of the Act.

While the income derived from the business in 1981 may have led to an overpayment the AAT considered that the discretion in s.140(2) should be exercised against recovery.

> ... the fact that a concession has been made as to wrong calculation in the re-assessment process in any event, to the unfortunate state in which the applicant finds herself with her unprofitable business, to the fact that no 'profit' even approaching that of the tax year 1981 had been made since, to the fact that the maximum rate of pension has been paid since February 1983, and to the amount of the alleged overpayment that would be involved; I would consider the preferable course for the Director would be to exercise his discretion against proceeding under s.140(2) in respect of any overpayment of pension calculated in the light of the 1981 tax year's income.

(Reasons, para. 10)

Formal decision

The AAT set aside the DSS decision to reduce the rate of the applicant's pension and remitted the matter to the Director-General with the direction that the applicant's pension be reinstated at the full rate from the date of reduction in 1981 and recommended no action be taken for recovery of any overpayment.

Handicapped child's allowance

GILBY AND GILBY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No.Q82/214)

Decided: 14 June 1983 by J.B.K. Williams.

The applicants were the parents of a child with respect to whom a handicapped child's allowance was granted on 13 February 1979. Following a review the DSS cancelled the allowance on 25 May 1981. The applicants then appealed to an SSAT which formed the view that their son was 'handicapped' within the meaning of the *Social Security Act*, but concluded that the applicants were not subjected to severe financial hardship by reason of the care and attention provided for their son as required by s.105JA to qualify for the allowance. The Gilbys appealed to the AAT.

The legislation

Section 105JA is in the following terms:

> The Director-General may grant a handicapped child's allowance in respect of a handicapped child to a person having the custody, care and control of the child if the Director-General is satisfied that the person–
> (a) provides, in a private home that is the residence of that person and of that child, care and attention in respect of that child only marginally less than the care and attention that the child would need if he were a severely handicapped child; and
> (b) is, by reason of the provision of that care and attention, subjected to severe financial hardship.

Section 105H defines a 'severely handicapped child as a child who by reason of physical or mental disability needs constant care and attention.

Attendance at school: care not constant

The Gilby's son attended a normal primary school from 8.30 to 3.00 each day. This raised the question whether the care and attention being provided to him was only marginally less than constant as required by the combined operation of s.105H and s.105JA.

The AAT referred to its earlier decisions in *Yousef* (1981) 5 *SSR* 55, *Schramm* (1982) 10 *SSR* 98 and *Meloury* (1983) 13 *SSR* 126, which adopted the reasoning in *Schramm*. In *Schramm* the Tribunal had said

> . . . it is true that the meaning of the word 'constant', as explained in *Re Yousef*, admits that the care and attention in question may be less than full nursing care and attention. It admits also that constant watchfulness is a necessary part of the constant