the evidence showed that the child had, since at least 1976, been regularly attending school.

The Tribunal referred to the decision in *Schramm* (1982) 10 *SSR* 98, where the AAT had pointed out that, to qualify for handicapped child's allowance (for a severely handicapped child), the parent or guardian must provide constant care and attention to the child in their private home: *Social Security Act*, s.105J. But, the AAT had said in *Schramm*,

> neither the demand that the requisite care and attention be in fact constant nor the demand that it be in fact provided in a private home are satisfied once it happens that the child goes away from the home to school ...

In this case, the Tribunal pointed out that, even if the child were a handicapped (rather than severely handicapped) child, very much the same requirements must be met – care and attention only marginally less than constant must be provided by the parent or guardian in the private home: *Social Security Act*, s.105JA.

The Tribunal said that it adopted the views expressed in *Schramm* and continued:

> I am satisfied that, because Paul attends school and is therefore absent from home for much of every school day, the applicant is not herself providing in the residence of Paul and herself constant care and attention in respect of Paul. The applicant is therefore not qualified to receive a Handicapped Child's Allowance in respect of Paul under the Provisions of Section 105J while Paul is attending school. It follows that the applicant would not qualify to receive a Handicapped Child's Allowance in respect of Paul under the Provisions of Section 105JA of the Act as she does not satisfy the requirements of Section 105JA (a), for the same reason that she does not satisfy the requirements of Section 105J. Financial hardship by itself is not a qualification.

(Reasons, para. 17)

Formal decision

The AAT affirmed the decision under review.

[**Comment**: Presumably, this Tribunal was not aware of the series of more recent decisions which have modified the restrictive rule laid down in *Schramm* that the allowance cannot be paid for a child who attends school.

This Tribunal did not refer to other AAT decisions such as *Johnstone* (1983) 16 *SSR* 157, *Mrs M* (1983) 16 *SSR* 158 and *Sposito* (1983) 17 *SSR* 166, where the Tribunal took quite a different view of the effect of a child attending school. Nor did this Tribunal refer to *Maroney*, noted in this issue of the *Reporter*, where R.K. Todd (who had decided *Schramm*) abandoned the restrictive view which he had adopted in *Schramm*.

This Tribunal's apparent ignorance of the more recent decisions is disturbing: it suggests that the AAT has not been able to set up an effective system for informing its own members of its decisions. **P.H.**]

Overpayment: discretion to recover

SAMES and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V82/479)

Decided: 10 February 1984 by R. Balmford.

This was an application for review of a DSS decision to recover overpayments of age pension amounting to $1052, of which $624 had been recovered.

The decision to recover was based on s.140(2) of the *Social Security Act* which gives the Director-General a discretion to recover, by deductions from a current pension, an amount of pension which has been overpaid, for whatever reason.

In this case, overpayments of age pensin were made to Dorothy Sames over a period of four years because of the DSS' failure to adjust the level of her pension in response to increases in her husband's income from part-time work.

The Tribunal accepted that the DSS had been informed of these increases and had either not recorded or lost the information. However, the AAT said, the cause of overpayment did not affect recovery under s.140(2). For the purposes of that section, the critical question was whether the recovery would cause financial hardship to the pensioner.

Mr Sames was 79 and Mrs Sames 72. Their only income came from age pensions. Mr Sames had been a diabetic for 37 years which required medication and a special diet. Deductions from Mrs Sames' pension 'had meant that she and her husband had had to do without things, particularly extra food'. Even when no deductions were being made there was a very small margin ($1 or $2 a week) between their income and their necessary expenditure.

The Tribunal noted that the amount involved in the case was public money which had been overpaid; and that the innocence of the applicant and her husband was not relevant to recovery. But, taking account of the age of the couple, Mr Sames' medical condition and 'the bearing which their age and that condition have on their extremely tight financial circumstances' the Tribunal considered that no further recovery should be made.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that no further action be taken for recovery of the overpayment.

GJOMAKAJ and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/152)

Decided: 10 February 1984 by R. Balmford.

Rexhep Gjomakaj had been granted family allowance for three of his children in November 1978. Payments of this allowance were paid directly into his bank account.

In March 1980, he received a letter from the DSS asking him to list all children in his care, custody and control. The letter continued that the DSS would 'then be able to commence paying you family allowance'. He completed the enclosed form with the assistance of a neighbour who inadvertently inserted her address on the form.

Subsequently a cheque arrived at the neighbour's address for Gjomakaj. He confirmed with the DSS that this cheque was intended for him. Over the next 18 months Gjomakaj received and banked regular cheques from the DSS for family allowance. Payments of the allowance were also being made into his bank account.

In September 1981 the DSS realised that Gjomakaj was in receipt of two payments of family allowance. On 2 November 1981 a decision was taken to recover $1132.20 in overpaid allowance by deductions from the allowance paid to Gjomakaj. (This was apparently a decision to recover the overpayment under s.140(2) of the Act.) In April 1982 a further decision was taken to recover the amount at a rate of $75.90 per month, effectively cancelling all family allowance payable to Gjomakaj.

Gjomakaj applied to an SSAT which upheld his appeal; but a delegate of the Director-General did not accept that recommendation although the amount to be recovered was reduced to $7.50 a fortnight.

The applicant then applied to the AAT. (By July 1983 $485.40 had been recovered thus leaving $646.80 outstanding at the date of the hearing.)

Discretion to recover: relevant factors

The AAT was critical of the manner in which the applicant was informed of the decision to recover the overpayment.

> Not only is there no expression of regret or apology for the departmental inefficiency which was the cause of the overpayment; there is no suggestion that the Director-General had any discretion as to whether or not to recover the overpayment, and no request for evidence of hardship or any other matter which might enable him to decide whether, or in what manner, that discretion might be exercised . . . Further, although the file record of the decision to recover the overpayment includes the words 'Don't forget to advise of appeal rights', there is no indication in the letter that the applicant has any right of appeal against the decision.

(Reasons, para. 7)

The Tribunal then referred to its decisions in *Buhagiar* (1981) 4 *SSR* 34 and *Gee* (1982) 5 *SSR* 49 and the Federal Court decision in *Hales* (1983) 13 *SSR* 136. These decisions made it clear that, in exercising a discretion to recover overpayment under s.140(2), all the particular circumstances of the case, including any financial hardship which recovery might cause, should be considered.

The AAT considered Gjomakaj's behaviour was irrelevant. He had 'behaved with substantial honesty but somewhat naively', as the SSAT had concluded. This case was effectively a question of whether the applicant would suffer hardship if recovery was pursued.

The household income was made up of family allowance, supporting parent's benefit and invalid pension for the eldest child. These amounts, together with irregular income from casual work, covered the basic expenses.

Hardship: relevance of Department's treatment

The Tribunal also commented on the DSS's treatment of the applicant in relation to the issue of hardship:

> In considering the question of hardship it is relevant to consider the way Mr Gjomakaj has been treated by the Department. At the time when the substantial amounts were withheld from him, in May-October 1982 he was in employment; the evidence available to the Tribunal does not show whether he was in part-time employment for all of that period, although he clearly was for the latter part of it at least; nor does it indicate what his earnings were. He was, however, a widower, working in a factory, supporting four children, the youngest of whom was twelve years old. The deduction of $75.90 monthly from the income of a household of five people (even allowing for the fact that one of them was probably receiving invalid pension at that time) would, to put it at its lowest, have been noticed. It is hard to see that it would not have caused him hardship.

(Reasons, para. 18)

The Tribunal also concluded that a deduction of $7.50 per fortnight would affect the family's standard of living. Gjomakaj had 'suffered considerable hardship already by the manner in which it had been recovered from him'.

Formal decision

The AAT set aside the decision under review and directed that no further action be taken for recovery of the overpayment of family allowance.

Family allowance: 'residence' and 'absence'

HOUCHAR and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/169)

Decided: 17 February 1984 by I.R. Thompson.

Mayssar Houchar migrated to Australia in 1972, to join her husband who had come here in 1969. By 1977, each of them had taken out Australian citizenship, and she was receiving child endowment (now called 'family allowance') for seven of her eight children.

In March 1977 Houchar travelled to Lebanon with those seven children and in October 1977 her husband joined her there. In November 1977, the DSS learned that she and the children had left Australia and cancelled the child endowment.

In March 1982, Houchar, her husband and eight children (two of whom had been born in 1978 and 1981) returned to Australia, and Houchar was granted family allowance for those eight children from that time. However, the DSS refused to grant her child endowment or family allowance for any of the period of her absence from Australia.

Houchar asked the AAT to review that refusal.

The legislation

According to the Tribunal (following the earlier decision in *Kehagias* (1981) 4 *SSR* 42), the qualifications for initial entitlement to child endowment (or family allowance) were set out in ss.95 and 96 of the *Social Security Act*.

Section 95 provides that a person who has the custody, care and control of a child is qualified to receive family allowance for that child. Section 96 provides:

> 96.(1) Subject to section 104, a family allowance shall not be granted unless –
> (a) the claimant (not being an institution)–
> (i) is in Australia; and
> (ii) if not born in Australia, has, during the period of 12 months immediately preceding the date on which the claim was lodged, had his usual place of residence in Australia; and
> (b) the child in respect of whom the family allowance is claimed –
> (i) is living in Australia, whether or not he is temporarily absent from Australia; and
> (ii) if not born in Australia, has, during the period 12 months immediately preceding the date on which the claim was lodged, been resident in Australia.
> (2) Sub-paragraphs (1)(a)(ii) and (b)(ii) shall not apply where –
> (a) the Director-General is satisifed that the claimant and the child are likely to remain permanently in Australia ...
> (4) A child born out of Australia shall be deemed, for the purposes of sub-paragraph (1)(b)(ii), to have been born in Australia if, at the date of his birth, the usual place of residence of his mother was in Australia and her absence from Australia was temporary only.

The Tribunal said that, once entitlement to child endowment (or family allowance) was established, it would continue until s.103 operated to put an end to it. Section 103 provided that the child endowment (now family allowance) ceased to be payable if –

> (d) the person to whom the family allowance was granted ceases to have his usual place of residence in Australia, unless his absence from Australia is temporary only; [or]
> (b) the child ceases to be in Australia unless his absence from Australia is temporary only ...

The impact of s.103 was modified by s.104 which declared that a person should be treated as if 'in Australia', if the person had her usual place of residence in Australia, and was temporarily absent from Australia and she (or her husband) was also a resident of Australia as defined in the *Income Tax Assessment Act*.

Section 6 of the *Income Tax Assessment Act* defined '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'.

The issues

The result of this complex series of provisions, according to the AAT, was as follows:

(1) Houchar's entitlement to family allowance for the two children born in 1978 and 1981 depended on s.104: was her 'usual place of residence' in Australia and was she temporarily absent from Australia? (If she met the requirements of s.104, the date from which the allowance would be payable would be controlled by s.102 of the Act.)

(2) Houchar's entitlement to child endowment or family allowance for the children she took to Lebanon depended on s.103(1)(d) and (e): had she ceased to have her 'usual place of residence' in Australia; and was her and her husband's absence from Australia 'temporary only'?

'Resident' within Income Tax Assessment Act

The Tribunal said that Houchar should be treated as a resident of Australia within the *Income Tax Assessment Act*: she had maintained her domicile in Australia, despite her absence, and the Commissioner of Taxation had not declared that he was satisfied that her 'permanent place of abode' was outside Australia (A statement from a Deputy Commissioner of Taxation that Houchar 'should be treated as a non-resident from Australia' fell far short of the satisfaction required by s.6 of the *Income Tax Assessment Act*, the AAT said: Reasons, para. 16.)

Accordingly s.140(2) did not prevent Houchar from taking advantage of s.140(1) (if she could satisfy the requirements of that sub-section).

'Usual place of residence'

Both s.103(1) and s.104(1) directed attention to Houchar's 'usual place of residence': if that had remained in Australia while she was in Lebanon, she was entitled to child endowment / family allowance for the children she took with her: s.103(1); and for the children who