were born in Lebanon: s.104(1) – as long as their absence from Australia was temporary only.

The Tribunal referred to earlier decisions in *Kyvelos* (1981) 3 *SSR* 30, *Danilatos* (1981) 3 *SSR* 29, *Kehagias* (1981) 4 *SSR* 42 and *Alam* (1982) 8 *SSR* 80 and said that the word 'residence' carried its accepted legal meaning and that the word 'usual' did not affect that meaning: it was a person's 'settled or usual abode' or where a person 'sleeps and lives'; and a person could have more than one place of residence for the purposes of ss.103(1) and 104(1).

'Temporary absence'

The entitlement to child endowment/family allowance also depended on Houchar's absence from Australia being 'temporary only'. In deciding whether a person's absence was 'temporary', it was necessary to look at the person's intention. Was the absence intended to last indefinitely? If so, it could not be 'temporary'. And was the absence intended to last for a long time, even if that time was not indefinite? If so, it could not be a 'temporary' absence. The Tribunal observed:

> For an absence to be temporary, not only must it be intended not to last indefinitely but the time for which it is intended to last must not be of great length. That involves considerations of question of degree which must be decided by reference to all the circumstances of the particular case. Once a person's absence has come to an end by his return to Australia, it obviously has not lasted indefinitely. It may not have lasted as long as another person's absence which has been accepted as having been temporary. However, the question whether it was "temporary only" has to be decided not by viewing it in retrospect but by reference to the person's intention during his absence, or rather to his intention at different stages of the absence.
>
> (Reasons, para. 24)

The applicant's case

The Tribunal was told that Houchar and her husband had gone to Lebanon to see their families and to sell a house owned by the husband. They had intended to return to Australia after 12 months but their return was delayed by the birth of a child to Mrs Houchar, by the illness of Mr Houchar's mother, by difficulty in selling the house, by the birth of another child to Mrs Houchar, by the loss of Mr Houchar's passport and by the disruption caused by the civil war in Lebanon.

Houchar's counsel also emphasized that she and her husband had taken Australian citizenship, her children had received English tuition in Lebanon, their furniture had been left with relatives in Australia, they had kept bank accounts in Australia and had ensured that their Lebanese-born children were issued with Australian passports.

The Tribunal's assessment

Nevertheless, the AAT concluded that Houchar and her husband had intended their absence to be for an indefinite time and that Houchar's usual place of residence had not remained in Australia. The AAT referred to the earlier decision in *Alam* (1982) 2 *SSR* 80, where a family had travelled to Lebanon with sufficient money to pay for their fares back to Australia, but had stayed in Lebanon for more than four years. The Tribunal said:

> 33. By contrast, in the present case the applicant and her husband did not take to the Lebanon sufficient money to be able to pay for their return fares, nor did they have any reason to believe that they would have the means to pay for them within any forseeable period. They established a residence in the Lebanon; indeed it was in the house where they had had their home before they came to Australia. The house owned by the husband. Although he did not take up work, he quite clearly fitted back into the traditional ways of village life there. So did the applicant. The village once again became the centre of their lives and their only home. On a balance of probabilities I find that at the time the husband left Australia neither he nor the applicant had any firm intention either to return to Australia or not to do so. Consequently neither of them thereafter had his or her usual place of residence in Australia until after they arrived back in March 1982; at no time was their absence from Australia 'temporary only'.

It followed that s.103(1)(d) put an end to the payment of child endowment for the children who had accompanied Houchar to Lebanon. And she could not take advantage of the provisions of s.104(1) for the two children born in Lebanon.

Formal decision

The AAT affirmed the decision under review.

Sickness benefit: loss of income

WOOD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/314)

Decided: 6 March 1983 by I.R. Thompson, R.A. Sinclair and R.G. Downes.

Rosalind Wood enrolled in a full time physiotherapy course in February 1979. She was paid an allowance under the National Employment and Training (NEAT) scheme, based on the applicable rate of unemployment benefit plus a 'training component'.

In June 1982, Wood was forced to give up her course because of illness. She applied to the DSS for sickness benefit. This application was granted by the DSS but the level of her benefit was limited to the rate of unemployment benefit which she would have paid (if she had qualified for unemployment benefit): this was significantly below the standard rate of sickness benefit.

Wood asked the AAT to review the DSS decision fixing the level of her benefit.

Up to 30.12.82: no loss of income

The Tribunal pointed out that the relevant legislation had been amended, with effect from 31 December 1982. Up to 30 December 1982, s.108(1) of the *Social Security Act* declared that a person could qualify for sickness benefit only if he could satisfy the Director-General that he was temporarily incapacitated for work because of sickness or accident 'and that he has thereby suffered a loss of salary, wages or other income).

Moreover, s.113 provided that the rate of sickness benefit paid to a person should 'not exceed the rate of salary, wages or other income per week which, in the opinion of the Director-General, that person has lost by reason of his incapacity'.

'Income' was defined in s.106(1) of the Act so as to include an allowance under the NEAT scheme (except for any 'training component'). This definition was to apply to the sickness benefit provisions, 'unless the contrary intention appears'.

The AAT decided that both s.108(1) and s.113 did disclose a 'contrary intent': because the word 'income' was used in association with the words 'salary' and 'wages' it should be read as referring to reward for services or money paid in return for personal exertions. It did not include an allowance under the NEAT scheme. Accordingly, Wood had not lost 'income' within s.108(1) and did not qualify for sickness benefit between July and December 1982.

(The Tribunal was persuaded to adopt this narrow reading of 'income' in s.108(1) because of the terms of s.122(1) which declared that a cessation of unemployment benefits should be treated as loss of income for the purpose of s.108(1).

That provision, the AAT said, would have been unnecessary if 'income' had carried its full meaning in s.108(1).)

Overpayment?

The AAT considered whether the DSS could recover from Wood the amount of sickness benefit paid to her between July and December 1982.

The Tribunal said that she could properly have been paid a special benefit for that period; and the money she had received should be treated as having been paid to her as sickness benefit. The appropriate rate of special benefit was marginally lower than the rate of sickness benefit which she was paid. The Tribunal commented:

> However, the [excess] amount she received before was small and was paid due to an error by the Department of which the applicant could not have been expected to be aware and through no fault on her part. We think, therefore, that it would not be reasonable to recover it from her now.

(Reasons, para. 20)

From 31.12.82: qualified only for lower rate

Amendments to the legislation which took effect from 31 December 1982 provided that a person could qualify for sickness benefit, even though the person had not suffered a loss of salary, wages or other income, if the person satisfied the Director-General 'that he would but for the [temporary] incapacity, be qualified to receive an unemployment benefit in respect of the relevant period': s.108 (1)(c)(ii).

Further, a new s.113 provided that the rate of sickenss benefit for such a person should not exceed the rate of unemployment benefit payable to the person if the person were receiving unemployment benefit: s.113(b).

It followed that, from 31 December 1982, Wood qualified for sickness benefit and the rate at which this benefit was payable was the rate fixed by the DSS in July 1982 – the relevant rate of unemployment benefit.

Formal decision

The AAT affirmed the decision under review but declared that the applicant had not been qualified to receive unemployment benefit for the period from 5 July 1982 to 30 December 1982.

Child endowment: child in institution

GRAY and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. S83/119)

Decided: 2 March 1984 by E. Smith, F.A. Pascoe and J.T. Linn.

Gerald Gray claimed child endowment (as it was then called) for his children for the period 21 October 1972 to 9 December 1972. During that period the children were inmates of a children's home and the applicant paid that home $10 per week towards the maintenance of each child. The claim was refused and the applicant applied to the AAT for review.

The legislation

Section 95 of the *Social Services Act* then read:

> (1) Subject to this part, a person who has the custody, care and control of a child (not being a child who is an inmate of an institution) or an institution of which children are inmates is qualified to receive an endowment in respect of each such child in accordance with this section.

Section 103 read:

> (1) Subject to Section 104, an endowment payable to an endowee in respect of a child ceases to be payable if –
>
> (a) the endowee ceases to have the custody, care and control of the child;
>
> (b) the child, being a child in the custody, care and control of a person other than an institution, becomes an inmate of an institution;
>
> (c) the child, being a child who is an inmate of an institution, ceases to be an inmate of the institution . . .

These provisions operated to qualify the children's home for payment of child endowment and to disentitle the applicant to that payment. The legislation did not provide for the case where a parent contributed to the maintenance of his children while they were in the home.

Formal decision

The AAT affirmed the decision under review.

Invalid pension: permanent incapacity

RALSTON and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/345)

Decided: 16 March 1984 by B.J. McMahon, A.P. Renouf and I. Prowse.

The AAT *set aside* a DSS decision to cancel the invalid pension held by a 35-year-old former truck driver who had injured his spine in 1977 and had not worked since that time.

The Tribunal accepted medical evidence that Ralston was in constant pain and found that he had quite limited work skills, 'being of dull normal intelligence, with very basic education and very little capacity for expressing himself verbally'.

It was, the AAT said, 'most unlikely that a sympathetic employer could be found who would remunerate him for the limited type of work which he is physically capable of doing'. That inability to attract an employer did 'not stem from the general economic circumstances of the community, but overwhelmingly from the medical causes'. (However, the AAT did not concede that economic considerations were irrelevant when assessing incapacity for work.)

Permanence

The AAT rejected a DSS argument that, because of Ralston's age, his incapacity could not be described as permanent:

> The fact that Mr Ralston's condition has not been alleviated by three surgical operations, the passing of seven years, a period at the Mount Wilga Rehabilitation Centre, including the pain programme in April, 1982 and an assessment at Westmead Centre pain clinic in November, 1982, physiotherapy, Marcain infusions, acupuncture, transcutaneous nerve stimulation and multiple use of analgesics, indicates a degree of permanence which falls well within the concept referred to in *Tiknaz's case*. If ever a condition persisted despite all possible treatment and gave every indication of persisting indefinitely, this would have to be it.

(Reasons, p. 8)

Work motivation

The AAT also rejected a DSS argument that, because Ralson had made little effort to find employment, his incapacity for work was a result of disinterest in working. Adopting the language used in *Vranesic* (1982) 10 *SSR* 95, the AAT said that this was a case where 'a person's perception of himself (rightly or wrongly) as an invalid incapable of work, [has] become so entrenched and so ineradicable as to itself constitute a psychological condition which destroys the person's capacity for work': Reasons, p. 9.

STAMBERG and DIRECTOR-GENERAL OF SOCIAL SECURITY
(V82/412)

Decided: 10 February 1984 by R. Balmford, E. Coates and H.E. Hallowes.

The AAT *set aside* a decision by the DSS to refuse an invalid pension to a 57-year-old former clerical worker and storeman who suffered from arthritis.

Stamberg's unemployability derived initially from his medical condition and combined with his age, the state of the labour market and his self-perception as an invalid to render him permanently incapacitated for work. The AAT said that 'medical considerations form part only of the evidence to be taken into account in determining eligibility for invalid pension'. In the present case, Stamberg's incapacity derived initially from medical factors but was reinforced . . . by the difficulties of a man of his age in the labour market . . .': Reasons, paras 21, 22.