read as controlling the interpretation of the section. The AAT adopted some observations from the earlier decision in *Tiknaz* (1981) 5 *SSR* 47 that 'the *Social Security Act* is welfare legislation which should be administered beneficially and with common sense'.

The AAT rejected an argument raised by the DSS that, because Dixon's claim for family allowance had been accepted and paid and was not outstanding, s.145 could not be used. The Tribunal said that there was nothing in s.145 to suggest that only an outstanding claim could be acted upon under that section; if the section were read in that way, it 'would have a somewhat limited operation'.

Eligibility for invalid pension

The Tribunal then turned to the question whether, at the time when Dixon lodged her claim for continuing family allowance, 'S could be described as 'permanently incapacitated for work' and so qualified for invalid pension.

The Tribunal noted that S had been a 'severely handicapped child' as defined in s.105H(1) of the *Social Security Act* immediately before his 16th birthday: he was a person who, because of his physical or mental disability, required constant care and attention. The probabilities were, the AAT said, that any person who answered that description immediately before his 16th birthday would be 'permanently incapacitated for work' within s.24 of the Act on his 16th birthday.

Dixon's evidence was that S's condition had not changed between his 16th birthday and the grant of invalid pension some 13 months later. On the balance of probabilities, therefore, S had been 'permanently incapacitated for work' at the date of his 16th birthday and had remained incapacitated until the grant of invalid pension some 13 months later.

Criticisms of DSS procedures

The AAT suggested that, given the probability that a 'severely handicapped child' would qualify for an invalid pension after her or his 16th birthday, it would be more appropriate for the DSS to send out an invalid pension claim form to each severely handicapped child immediately before her or his 16th birdday, rather than waste the Department's resources in considering whether or not it would be appropriate to invite a claim for invalid pension.

Moreover, the AAT said, DSS officers –

> should be well aware that suitability for vocational training is not, of itself, sufficient to disqualify an applicant for an invalid pension. It is certainly not a reason not to invite a person to lodge a claim for that pension.

(Reasons, para. 37)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Dixon's son S be granted an invalid pension from the first pension day after his 16th birthday.

Invalid pension: permanent incapacity

ADAMOVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/397)

Decided: 26 June 1984 by R. Balmford.

The AAT *set aside* a DSS decision to cancel an invalid pension held by Ivan Adamovic, a 38-year-old former factory worker who had not worked since 1974.

The medical evidence presented to the Tribunal showed that Adamovic had suffered an industrial injury in 1974, that this injury had not led to any organic disability but that he suffered from a psychiatric condition, on which medical specialists expressed different opinions. The condition was described as a 'severely disabling anxiety neurosis', schizophrenia, 'inadequate personality and anxiety symptoms', and an 'abnormal illness behaviour'. None of the medical specialists maintained that Adamovic was malingering.

The Tribunal said that, whatever medical condition Adamovic suffered, the consequence was that he was a sick person. Apart from some part-time work, he had been living an invalid role for almost 10 years; he had received an invalid pension for 5 years and sickness benefit for 3 years: 'Thus his adoption of that invalid role has been confirmed', the Tribunal said.

Having noted that, in order to qualify for an invalid pension, Adamovic's incapacity must result from his medical condition, the Tribunal said:

> It must be borne in mind that in a case such as the present one, where the applicant's medical condition is essentially psychological, 'a lack of any genuine interest in obtaining paid employment' may itself form part of that medical condition. Even in such case that lack of interest may be soundly based in a realistic appreciation by the applicant that in fact he will never again be able to attract an employer prepared to engage and remunerate him.

(Reasons, para. 28)

This, the AAT said, was one of those cases referred to in *Vranesic* (1982) 10 *SSR* 95: Adamovic's 'perception of himself (rightly or wrongly) as an invalid incapable of work, [had] become so entrenched and so ineradicable as to itself constitute a psychological condition which [destroyed] the person's capacity for work'.

A further factor which affected Adamovic's incapacity for work was the successful worker's compensation claim which he had made following his 1974 injury. That claim, combined with Adamovic's complaints of continuing back pain, would reduce his prospects of finding an employer willing to hire him.

JOSEPH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/428)

Decided: 29 June 1984 by R.C. Jennings.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 51-year-old former clerk who had suffered a neck injury in 1975.

The Tribunal found that Joseph had only a moderate organic disability and that his complaints of pain and immobility were based on conscious exaggeration. The Tribunal said that, unlike the applicant in *Batzinas*, Joseph had 'not become a mental invalid'; nor was there any 'evidence such as was adduced in [*Alchin* (1984) 19 *SSR* 206] that a combination of organic and psychological factors [had] rendered the applicant totally incapacitated for work.'

The Tribunal noted that Joseph was qualified to work as a clerk and as an interpreter, being fluent in English, Arabic and Asyrian;

> 42. I regard this as a case in which it would be appropriate to require the applicant to test the market. I believe he should be required by reason of the conditions imposed on persons who are granted unemployment benefits to take continuing reasonable steps to secure employment . . .

CHEHADE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/342)

Decided: 16 May 1984 by B.J. McMahon, M.S. McLelland and I. Prowse.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 61-year-old man who had worked in Australia as a cleaner though he had been in a clerical position in his native Middle East. He suffered from arthritis, diabetes and a depressive anxiety state.

The possibility of the applicant obtaining work as a translator was canvassed. (He spoke five languages.) The Tribunal heard evidence from a CES employment officer that described

> Mr Chehade's prospects of employment as: 'remote', 'negligible' and 'very remote'. The negligible opportunities available to a 61-year-old man are . . . cancelled by any physical ailments that may afflict him. His talents with languages would not increase his prospects as . . . younger persons would always be preferred for the few jobs available that might require such talents.

(Reasons, p. 8)

The AAT concluded that he no longer had the ability to attract an employer who was prepared to engage and remunerate him.

PARKER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N82/447)

Decided: 1 June 1984 by C.E. Backhouse.

The Tribunal *set aside* a DSS decision to refuse invalid pension to a 59-year-old former labourer who suffered from back problems.

Medical evidence suggested that, while he was incapacitated for work on a full-time basis, he may have been able to do certain work part-time. The AAT commented:

> 16 . . . I am satisfied that the physical impairment to his work capacity resulting from his medical disability would only permit him to engage in limited light duties on a part-time basis only. At best he would be restricted to a sedentary unskilled job and then he would need to have breaks and be able to get up and walk around at will. In these circumstances I find the prospect of his attracting an employer to engage him in paid work of the type open to him with his physical impairment and symptoms is so slight as not to justify the attempt. I have come to this view without regard to the general economic conditions in the community or the depressed conditions and unemployment on the Central Coast.
>
> 17. It is not without significance in the present case that the applicant is in receipt of a sickness benefit. Of course whilst he is on such benefit he is not required to make any effort to find work and the granting of such a benefit is tantamount to an acknowledgement by the respondent that the applicant is unemployable further. Whilst he is on such a benefit he cannot register for employment.

FLETCHER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/254)

Decided: 20 June 1984 by J.O. Ballard.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 56-year-old man who had worked in a variety of unskilled occupations.

The medical evidence before the Tribunal showed that Fletcher suffered from hypertension, bronchitis, kidney stones and deafness. A consulting physician had expressed the opinion that Fletcher was not incapacitated for work but this opinion had not taken account of Fletcher's ability to find and keep a job. (The physician told the AAT that 'in the classification or evaluation of the incapacity by the *Social Security Act* they require assessment irrespective of whether the job is available or not.')

Other medical evidence suggested that a change of medication would improve Fletcher's condition but that medication could produce negative side-effects. The AAT concluded:

> On these facts *McDonald's case* seems to me to provide a very clear precedent. At the very lowest the Tribunal must be in a state of indecision as to the situation after the applicant's medication was changed. On that basis the issue must be resolved in the applicant's favour.

(Reasons, para. 19)

The AAT also handed down Reasons for Decision in the following cases:

Set aside

Atkinson (Q83/6) 6.7.84
Ball (W83/87) 21.6.84
Browning (T83/35) 8.6.84
Cannata (V82/319) 13.6.84
Karagiannis (N82/285) 13.6.84
Kostopoulos (N83/82) 16.7.84
Lisica (N83/314) 6.7.84
Pappas (N82/352) 28.5.84
Peacocke (N82/522) 6.7.84
Pozega (N82/229) 29.5.84
Rached (N82/518) 21.6 84
Smith (N82/316) 16.5.84
Suvajac (N83/613) 1.6.84
Walker (N83/428) 29.6.84

Affirmed

El Mohamed (N82/331) 6.7.84
Stoddart (S83/114) 22.6.84
Young (N83/129) 19.6.84

Income test: 'deprivation of income'

BORTA and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/324)

Decided: 4 June 1984 by W.A.G. Enright.

Maria Borta was granted an age pension from December 1980. The rate of pension paid to her was substantially below the standard rate of pension because the DSS took account of her income from several investments. In January 1982, Borta made a gift of $41 000 from her savings account to her son.

Subsequently, the DSS decided that Borta had deprived herself of income in order to obtain an increase in her pension and, therefore, was not entitled to that increase. Borta applied to the AAT for review of that decision.

The legislation

Section 47(1) provides that the income of a pensioner 'shall be deemed' to include any income of which, in the opinion of the Director-General, 'a pensioner has directly or indirectly deprived himself . . . in order to . . . obtain a pension at a higher rate than that for which he would otherwise have been eligible . . .'

The evidence

Borta told the AAT that she had made the payment to her son in response to repeated requests from him for financial assistance in his purchase of a house; and that she had not known at the time when she had paid the money to her son that the payment could have any effect on the level of her pension. That evidence was confirmed by Borta's son-in-law, who had acted as her financial advisor.

The pensioner's motives are critical

The Tribunal commented:

> It is not simply sufficient to point to a transaction which results in deprivation. Even the fact that the result might have been foreseen does not in my view bring the transaction necessarily within the reach of s.47; there was no evidence that a resulting increase in Mrs Borta's investment income was foreseen by her. It must be established that the disposal was made by the pensioner who has deprived herself of income (in this case by means of depriving herself of income-earning capital) in order to obtain the pension at a higher rate than that for which she would have otherwise been eligible.

(Reasons, para. 17)

The AAT took the view that the applicant was not aware of the consequences which would follow from the disposal of her funds. Following the decision in *Ridley* (1983) 13 *SSR*127, the AAT said that it could not be assumed that her purpose was to obtain a pension at a higher rate.

Formal decision

The decision under review was set aside.