he claimed that pension 'residing in . . . Australia'.

The AAT pointed out that the *Social Security Act* used a variety of different words ('residing', 'resident' and 'residence') in s.21. The AAT referred to several judicial decisions and to the second edition of *Statutory Interpretation in Australia* (by D. C. Pearce), which supported the idea that, where legislation could have used the same word but chose to use a different word, it should be assumed that the legislation intended to adopt a different meaning. Accordingly, the AAT said, the word 'residing' in s.21(1) expressed a more temporary association with Australia than the word 'resident' in the same provision.

Moreover, the Tribunal said, the argument made by the DSS that 'residing in . . . Australia' in s.21(1) involved permanent residence was difficult to reconcile with the portability provisions of the Act (mainly ss.83AB and 83AD).

The Tribunal pointed out that ss.15AA and 15AB of the *Acts Interpretation Act* 1901 now permitted reference to a range of extrinsic material to assist in the interpretation of a provision of an Act.

The Tribunal said that there was some ambiguity in the use of the words 'residing' and 'resident' in s.21(1) and it was therefore appropriate for the AAT to consider the purpose of this provision and of the portability provisions (ss.83AB and 83AD). In order to establish that purpose, the AAT examined second reading speeches made by the Ministers for Social Services at the time when the various provisions were enacted.

For example, the period of continuous residence required to qualify for age pension had been reduced, in 1962 from 20 years to 10 years in order, the then Minister had said, to encourage 'family migration'.

The current portability provisions had been inserted into the *Social Services Act* in 1973, for the purpose of encouraging migration to Australia. The fact that, when those povisions were introduced, an Opposition amendment to restrict portability in the case of returning residents was a clear indication that those returning residents should be allowed to take advantage of the portability provisions, even though their return to Australia may have been solely for the purpose of exploiting those provisions.

The AAT then referred to a decision of the House of Lords in *Shah* v *Barnet London Borough Council* [1983] 1 All ER 226 and said that, in the light of that case and the established purpose of various provisions of the *Social Security Act*, Galati should be regarded as 'residing in . . . Australia' at the time when he claimed his age pension because:

> it can be seen that he adopted his abode in Australia voluntarily and for a settled purpose as part of the regular order of his life for the time being. The fact that that settled purpose was to remain in Australia for a sufficient period to bring himself within a legislative provision is irrelevant to the consideration of whether he was 'residing in Australia' on 11 January, 1983.

(Reasons, para. 40)

'Continuously resident in Australia'

The AAT said, that in the light of the facts of this matter and the purpose of the 1962 amendment to the *Social Services Act* (that is, to encourage 'family migration'), Galati had been 'continuously resident in Australia' for periods which totalled 10 years:

> During those periods when he was in Australia he had a 'settled or usual abode' in this country. Whether or not he had a similar relationship with Italy is not relevant to the consideration of his relationship with Australia.

(Reasons, para. 38)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Galati should be granted an age pension from the date of his application.

Special benefit: migrants

MACAPAGAL and DIRECTOR-GENERAL OF SOCIAL SECURITY (NoV82/51)
Decided: 23 July 1984 by R. Balmford.

Mariano Macapagal had migrated to Australia in January 1980, when he was 70 years of age. Before he was permitted to enter Australia, his son-in-law, D, signed a maintenance guarantee for Macapagal and his wife, promising to the Commonwealth Government that D would be responsible for their maintenance while they were in Australia.

After arriving in Australia, Macapagal and his wife lived with D and his wife and their two children. In April 1980, Macapagal claimed a special benefit from the DSS. When that claim was rejected, Macapagal applied to the AAT for review.

The legislation

Section 124(1) of the *Social Security Act* gives the Director-General a discretion to pay special benefit to any person if the Director-General is satisfied that the person is 'unable to earn a sufficient livelihood'.

Section 125 of the Act provides that the rate of special benefit payable to a person shall be determined by 'the Director-General, in his discretion', but shall not exceed the rate of unemployment or sickness benefit which would be paid to the person if he were qualified.

Qualified for benefit

The Tribunal said that Macapagal satisfied the preconditions for the exercise of the Director-General's discretion to grant a special benefit. In particular, he was unable to earn a sufficient livelihood because of his age and because of the physical disabilities from which he suffered.

In exercising the discretion to grant a special benefit under s.124(1), the Director-General should not use the existence of the maintenance guarantee as the basis for refusing to exercise that discretion. This much, the AAT said, had already been decided in *Blackburn* (1982) *SSR* 53, *Abi-Arraj* (1982) 8 *SSR* 81 and *Sakaci* (1984) 20 *SSR* 221. The Tribunal said that the Australian social security system did not proceed on the assumption that children should support their adult parents. In the exercise of the discretion in s.124(1), the prime consideration should be a compassionate approach to the security in society of the applicant.

The Tribunal rejected a DSS argument that special benefit should be refused to Macapagal because granting him that benefit would allow him to circumvent the restrictions on the other pensions and benefits laid down in the *Social Security Act* (for which he was clearly not eligible). The Tribunal said that the purpose of s.124(1) was, broadly speaking, to provide for people who were in need and for whom the Act did not otherwise provide. It followed that the grant of special benefit should not be restricted to those persons who were eligible for some other pension or benefit under the Act.

The rate of benefit

The AAT also rejected the DSS argument that, in fixing the rate of benefit to be paid to Macapagal, the existence of the maintenance guarantee should be taken into account. The Tribunal said that the practice of the DSS, to take account of the financial capacity of a guarantor to meet his contractual obligations under a maintenance guarantee when fixing the rate of special benefit, was 'quite untenable' and not supported by s.125 of the Act.

The Tribunal said that in the present case, the factors which influenced the rate of special benefit to be paid to Macapagal were –

- Macapagal had no income;
- his wife was dependent on him and had no income; and
- both Macapagal and his wife were presently receiving full board and lodging from their daughter and son-in-law.

The AAT said that it did not want to produce elaborate and artificial calculations of the probable value of the board and lodging which Macapagal and his wife were receiving. But, the Tribunal said, a fair estimate of the value of that board and lodging could be achieved by reducing the amount of special benefit otherwise payable to them by two thirds.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with directions that

Macapagal be granted a special benefit from 14 April 1980; and that the rate of this benefit be the applicable rate of unemployment benefit, less two-thirds for any period when he and his wife were living with their daughter and son-in-law.

Special benefit: drought affected farmer

WATTS and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. Q84/17)
Decided: 3 September 1984 by J.D. Davies J, W.A. De Maria and H. M. Pavlin.

In a majority decision, the AAT *set aside* a DSS decision to refuse special benefit to Ian Watts for a period of 8 months in 1983.

Over that period Watts and his wife had owned and farmed a rural property which had been severely affected by drought and flood. The property had been producing no income and Watts told the AAT that, by borrowing some $15 500, he had exhausted his borrowing capacity. Both Watts and his wife told the AAT that his wife was absolutely opposed to borrowing money on the security of their jointly owned property. That step, his wife had said, would create the substantial risk that they could lose the property and be left with nothing.

The DSS supported its refusal of a special benefit by claiming that Watts had not exhausted his borrowing capacity and that special benefit did not extend to a claimant who was engaged in some uneconomic activity.

The majority members of the AAT, **De Maria and Pavlin**, said that the refusal of Watts' wife to allow their property to be mortgaged was a valid reason for not seeking a further loan; it had, in the words of Pavlin, 'a sound business basis and not merely an emotional one':

> Should they have been expected to risk their very home and livelihood and, thus, way of life, by mortgaging their property when they already saw themselves facing the repayment of massive debts accumulated during the series of climactic disasters? In my view, this is not a reasonable expectation. Nor is it demanded of ordinary non-farming house owners that they should mortgage their home before their level of need is seen as sufficiently great to warrant discretionary social welfare assistance.

(Reasons, p. 22)

Moreover, the majority members said, the farming enterprise was not a long term uneconomic venture but a potentially profitable activity which had been temporarily set back by adverse weather conditions. Accordingly, in their view this was a proper case for the exercise of the Director-General's discretion under s.124 (1).

Davies J dissented. He said that this was not a proper case for the favourable exercise of the discretion in s.124(1): Watts and his wife had an unencumbered property and, therefore, there were avenues of finance available to them during the period for which Watts sought a special benefit. He said that s.124 did not operate to support a person who needed that support because it was not obtainable from any other suitable source:

> Almost all farmers have borrowing potential and financial institutions have come to accept the highs and lows of the businesses of farming or grazing. Financial institutions recognise that such businesses must be supported and even for quite long periods. Therefore, borrowing is a means of subsistence which farmers and graziers have long ago learnt to use.

(Reasons p.7)

Special benefit: psychiatric patient

EZEKIEL and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N84/166)
Decided: 5 September 1984 by B. J. McMahon.

Matilda Ezekiel arrived in Australia in 1976 on a visitor's visa after her sister and brother-in-law had signed a maintenance guarantee, promising (to the Commonwealth Government) to support her. In October 1979 she was admitted as an involuntary patient to a psychiatric hospital and had been there ever since.

Ezekiel was granted a special benefit in August 1979, which was reduced in the light of the maintenance guarantor's financial position. The benefit was cancelled in August 1982 on the ground that she had a sufficient livelihood while a resident of the psychiatric hospital (and not on the ground of the maintenance guarantee—the guarantors were not providing any support to Ezekiel).

The evidence

The senior social worker at the hospital stated that Ezekiel suffered from a chronic disabling schizophrenic illness and was mildly mentally retarded. The social worker said that hospitalisation was inappropriate in her case. The hosptial wished to provide Ezekiel with a social skills training programme and organise accommodation for her in the community, and had wished to do so for some years. The only reason they had not offered Ezekiel such a programme was her lack of income.

The DSS agreed that, after her discharge from hospital, she would be entitled to special benefit. 'The catch 22 situation was that until she was released she could not receive it': Reasons, p.5. The hospital could not release her in these circumstances—'medically it would be unthinkable'.

The legislation

Section 124(1) of the *Social Security Act* provides:

> . . . the Director-General may, in his discretion, grant a special benefit . . . to a person
> (c) with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstances . . . that person is unable to earn a sufficient livelihood.

What is a 'sufficient livelihood'?

The Tribunal criticised the tendency to interpret 'earn a sufficient livelihood' as meaning 'in receipt of a sufficient livelihood' and went on to consider what a sufficient livelihood might be:

> there must be a level between mere subsistence and hedonistic indulgence that should be regarded by the community as tolerable to the person concerned and acceptable to the community generally as existing in its midst. It must be a level of existence that would at least comply with our international obligations. It must be a level of existence of which we would not be ashamed, were it to be known throughout the world as being tolerated in this community. It must be a level of existence consistent with our own conscience and standards that we would apply to ourselves. It must be a level of existence above mere animal survival, recognising other factors that go to sustain life in our community.

The Tribunal then considered what other factors the Director-General should take into account in exercising his discretion, which 'ought to be exercised with compassion'. These included the applicant's health, her sense of security (see *Blackburn* (1982) 5 *SSR* 53) and the fact that, if she lived in a boarding house the people on whom she could depend would be wider, thus increasing her sense of psychological security.

The Tribunal also suggested a number of more public considerations: the cost of maintaining a person in an institution rather than the community; the fact that Ezekiel's release would make an institutional bed available for someone who was more seriously ill; and, finally, the fact that Ezekiel would become eligible for invalid pension in 17 months, when she had completed 10 years residence in Australia—so that special benefit would serve its function as a short term benefit.

The Tribunal recommended that payment of the benefit should be backdated to the date of cancellation, thus allowing Ezekiel a small fund for the exingencies of life outside the hospital and to allow her to buy clothes and other basic necessities. The Tribunal also recommended that the benefit be paid at the full rate, given that the guarantors were not providing any support.

Formal decision

The AAT set aside the decision under review and directed that special benefit be paid at the full rate from its date of cancellation in August 1982.