with Australia as would impose a duty on the Australian tax payer to support him': Reasons, para. 28.

Formal decision

The AAT affirmed the decision under review.

Special benefit: tertiary student

CONDER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V84/286)

Decided: 13 December 1984 by I.R. Thompson.

Ivan Conder completed the first year of a university course in 1983. During that year he had received a TEAS allowance. However, it was not until 19 January 1984 that the Commonwealth Department of Education advised Conder that the allowance would be renewed for 1984. In the meantime, Conder had no income and very little cash: he obtained some support from a magistrates' court poor box and from a charity.

On 4 January 1984 he applied to the DSS for a special benefit; but this application was rejected on the ground that he was a full-time student. Conder asked the AAT to review that decision.

Evidence was given to the Tribunal that Conder had received the first instalment of his 1984 TEAS allowance shortly after 20 January 1984; that Conder had not looked (nor registered with the CES) for full-time employment during the university vacation; but that he had been looking for permanent part-time work.

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 that person 'is unable to earn a sufficient livelihood'.

'Unable to earn'

The AAT referred to the decision in *Te Velde* (1981) 3 *SSR* 23, where the Tribunal had said that a person was 'unable to earn a sufficient livelihood' if, taking account of all the circumstances, that person could not reasonably be expected to earn such a livelihood. The AAT adopted that proposition; and also endorsed the point made in *Te Velde*, that a person could still be described as 'unable to earn a sufficient livelihood' when the circumstances which lead to that inability were within that person's control. (On the other hand, the degree of control which the person had over those circumstances would be relevant when it came to exercising the discretion in s.124(1).)

In the present case, the AAT said, Conder had chosen to become a full-time student and had put himself into the situation in which he was unable to work full-time. However, Conder had done this in the reasonable expectation that, during his course, 'he would have a sufficient – albeit barely sufficient – livelihood [from TEAS] without any regular employment.' It was clear, the AAT said, that Conder would not have chosen to become a full-time student without that assurance of government support.

There was no evidence, the AAT said, that Conder might have obtained a loan from his university to tide him over the three week period that he was without income. The AAT said that, if loans had been readily available from Conder's university at that time, Conder should have relied on that source rather than resorting to social security.

The only remaining possibility for Conder to earn a sufficient livelihood was employment. But the AAT accepted that employment prospects in January 1984 were very poor – most factories were shut down and many other businesses had reduced their activities at that time.

Accordingly, the AAT said, Conder was a person who was 'unable to earn a sufficient livelihood for himself' at the time when he applied for a special benefit.

The discretion

Should the Director-General's discretion have been exercised in Conder's favour? The AAT said that, given the fact that in January 1984 Conder was not in a position to exercise any real control over the circumstances which had led to his inability to earn a sufficient livelihood, the discretion should have been exercised in his favour.

The Tribunal then considerd a DSS argument that special benefit should not be granted to students whose TEAS allowances had been delayed. It was said that granting special benefit would lead to double payment and was likely to involve the DSS in administrative work, the cost of which would be high in proportion to the amount paid by way of benefits. The AAT responded to this argument as follows:

> 16. However, by its scheme of tertiary education assistance the Government encourages persons to undertake full-time study. If at any time it fails to provide through that scheme to anyone who has undertaken such study the financial support which he has been led to expect and if he cannot obtain a short-term loan from his university, it is entirely consistent with the objects of the Act, and it is appropriate, that a special benefit should be granted to him as a safety net to save him from becoming destitute until the allowance is paid under the scheme. Legislation can, if desired, be enacted to provide for amounts paid as special benefits to be recovered from the TEAS allowance when it is paid. In the absence of such provision, it is better that the persons concerned should receive an extra payment for a short period than that they should be allowed to fall into destitution.

Accordingly, it followed that the Director-General's discretion should have been exercised in Conder's favour on 4 January 1984. However, the AAT said, it did not follow that the discretion should be exercised in Conder's favour and a special benefit paid retrospectively to him now, when he was no longer destitute:

> Where another payment, such as a TEAS allowance, has already been made for the period for which the special benefit would be paid, it is inappropriate for the discretion to be exercised to grant the benefit, notwithstanding that it ought to have been granted at the time when it was claimed. That is the situation in the present case . . .

(Reasons, para. 17)

Formal decision

The AAT affirmed the decision under review.

Family allowance: child outside Australia

HAFZA and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/658)

Decided: 26 November 1984 by A.P. Renouf.

Hafza, a married woman with two children, was receiving child endowment for her two children in April 1978, when she and her family left Australia. Before their departure from Australia, Hafza and her husband disposed of their Australian assets and purchased one way tickets to the Lebanon. Hafza told the DSS (before the depature) that she would be away for 3 months but she and her children did not return to Australia until June 1982.

After her return to Australia, Hafza sought payment of child endowment for her two children for the 4 years during which the DSS had suspended payment. When the DSS refused to make that payment, Hafza sought review by the AAT.

The evidence

Hafza told the Tribunal that, although she had intended to be away from Australia for only a short period, her return to Australia had been delayed by the civil war in the Lebanon, by a pregnancy in 1981 and by the family's shortage of funds with which to purchase return tickets. During the family's absence from Australia, her husband had obtained spasmodic work in the Lebanon for a total of

8 to 9 months and the family had lived with her husband's parents in Tripoli.

The legislation

At the time of the decision under review, s.103(1)(d) provided that, subject to s.104, family allowance ceased to be payable to a person if the person ceased to have her usual place of residence in Australia, unless her absence from Australia was 'temporary only'.

Section 104(1)(e) provided that a person and her or his children should be treated as if they were in Australia where that person had a 'usual place of residence' in Australia and was 'temporarily absent from Australia'.

This provision is qualified by s.104(2): family allowance was not to be granted or paid under s.104(1), unless the person was a resident of Australia as defined by the *Income Tax Assessment Act*. Section 6(1) of that Act defined a resident of Australia as a person whose domicile was in Australia.

Domicile

The Tribunal pointed out that the provisions of s.104(2) made it necessary for Hafza to show that, throughout her absence from Australia, she had an Australian domicile. This requirement did not pose any difficulties for Hafza as she and her husband had acquired a domicile of choice in Australia when they had migrated here and they had not relinquished that domicile during their 4 year absence abroad.

Temporary or permanent absence?

Moreover, because Hafza had intended, when she left Australia in April 1978, to return within 3 to 6 months, she had maintained her usual place of residence in Australia and her absence from Australia should be treated as temporary only. Accordingly she was able to take advantage of s.104(1)(e): that is, she and her children should be treated, at the time of their departure from Australia and for some time thereafter, as if they were still in Australia.

However, the AAT decided, when Hafza's husband took up employment in the Lebanon her intention to return to Australia became indefinite; and from that time she should be treated as having abandoned Australia as her 'usual place of residence' and having adopted the Lebanon in its stead. So that, from the date when her husband took up employment in the Lebanon, Hafza could not take advantage of the provisions of s.104(1)(e).

In concluding that, at some time after her arrival in the Lebanon, Hafza had decided to stay there indefinitely and had, accordingly, abandoned Australia as her usual place of residence, the Tribunal drew support from its impression that the reasons offered by Hafza for her extended stay in the Lebanon were unconvincing. The AAT observed that there were times, over the 4 year period, when it would have been safe for the family to leave the Lebanon; that Hafza's pregnancy prevented her from travelling during a limited period only; and that the money to purchase return tickets could have been provided out of Hafza's earnings or by making arrangements with his family.

Formal decision

The AAT affirmed the decision under review.

BADWY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V84/192)

Decided: 10 December 1984 by H.E. Hallowes.

The AAT *affirmed* a DSS decision to cancel a family allowance paid to Elsaid Badwy for his son, M.

M had been born in Australia, and his mother granted a family allowance, in May 1978. In August 1979, the family had travelled to Egypt for a holiday. Soon after, Badwy's wife (M's mother) died in Egypt. Badwy then returned to Australia, leaving M with his mother-in-law (a resident of Egypt).

After Badwy had told the DSS that M was living in Egypt in the custody, care and control of his mother-in-law but that Badwy was maintaining M, the DSS granted him a family allowance for M from December 1979. Four years later, when the DSS learned that M was still in Egypt, it cancelled the family allowance.

The grant of family allowance to Badwy had been based on s.96(5) of the *Social Security Act*, which allows the grant of family allowance for a child living outside Australia, whom the applicant 'intends to bring . . . to live in Australia as soon as it is reasonably practicable to do so.' The AAT said that, during the period of Badwy's visit to Egypt, the child was only temporarily absent from Australia; but, once Badwy had decided to leave M with his mother-in-law and return to Australia, the temporary absence ceased and M was living outside Australia.

Section 103(3) provided that an alloance granted under s.96(5) ceased to be payable if the child was not brought to Australia within 4 years of the grant. Badwy had attempted on 3 occasions to bring his son to Australia; but his mother-in-law, who had been given legal custody of the child under Egyptian law, had refused to allow the child to leave. After observing that Badwy had continued to send money to Egypt to maintain his son, the AAT said that there was no discretion in s.103(3); and, accordingly the allowance had to be cancelled at the expiry of 4 years after it was first paid.

Wife's pension

CAMMILLERI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. A84/91)

Decided: 22 November 1984 by A.N. Hall, A.H. Marsh and D.R. Craik.

Althea Cammilleri had lived in a *de facto* relationship with an invalid pensioner, J, between March and May 1981. During that period. Camilleri was paid a wife's pension under s.31 of the *Social Security Act*. However, that wife's pension was cancelled at Camilleri's request in May 1981 after she had separated from J.

In February 1982, J left Australia to return to Malta, where he continued to receive his invalid pension. In January 1983, Camilleri informed the DSS that she intended to visit Malta with a view to reconciliation with J; and she applied for a wife's pension. The DSS rejected that application.

Camilleri then travelled to Malta and, in April 1983, she lodged a second application for a wife's pension, which application the DSS also rejected. In July 1983, Camilleri and J married in Malta, where they settled.

Camilleri asked the AAT to review the refusal of the DSS to pay her a wife's pension.

The legislation

Section 31 of the *Social Security Act* provides that the wife of an invalid pensioner, if she is not receiving a pension herself, is qualified to receive a wife's pension, if she 'is residing in, and is physically present in, Australia on the date on which she lodges a claim for pension'. However, the section goes on to provide as follows:

> (2)A wife's pension is not payable to a wife who is living apart from her husband.

At the time of the DSS rejection of her application, s.18 of the Act defined 'wife' to include a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

The first decision

The AAT concluded that, at the time of her application for a wife's pension in January 1983, Camilleri was not living with J as his wife on a *bona fide* domestic basis. Her intention to seek a reconciliation with J did not establish that the *de facto* relationship, which had ended some 20 months earlier, was reinstated. Accordingly, as Camilleri was not regarded as J's 'wife' in January 1983, Camilleri could not have qualified for the wife's pension because she was living apart from J: s.31(2).

The second decision

The AAT pointed out, that, at the time of her second application for a wife's pension in April 1983, Camilleri was resident and physically present in Malta. Accordingly, even if she and J had resumed their *de facto* relationship by that