born outside Australia unless that person had her 'usual place of residence' in Australia for at least 12 months before claiming the allowance. This restriction was not to apply, according to s.96(2), where the Secretary was satisfied that the claimant was likely to remain permanently in Australia.

Date of eligibility

The AAT said that, because Elsdon had been a prohibited immigrant in 1976, she might not have been able to establish that Australia had been her 'usual place of residence' for the 12 month period required (by s.96(1)) for an applicant born outside Australia.

However, the facts as they existed in 1976 would have made it more likely than not that Elsdon would remain permanently in Australia within s.96(2), so that she could have satisfied that alternative residence qualification. Although she then had the status of a prohibited immigrant, this had largely arisen because of her carelessness and naivety and not because of any deliberate act on her part.

The AAT noted that, in 1982, a new provision, s.97(2) had been inserted in the *Social Security Act* which expressly prevented the granting of a family allowance to a prohibited immigrant. That provision had remained in force for just over one year, and was repealed in October 1983. The AAT commented that the implication was that, other than between 1982 and October 1983, 'family allowance could be paid to prohibited immigrants provided that they were otherwise qualified': Reasons, para. 13.

Accordingly, s.96(2) avoided the operation of s.96(1) and Elsdon should be regarded as qualified for family allowance in respect of her child, J, from the date of J's birth.

'Special circumstances'

The AAT then turned to the question whether payment of that allowance could be backdated to the date of Elsdon's eligibility, namely August 1976.

The Tribunal said that Elsdon had been aware of the existence of family allowance but claimed that she had been overborne by her *de facto* husband, C, who had opposed her claiming the allowance. The AAT accepted that C was at times violent and that Elsdon did many things at his insistence which she would have been better advised not to have done.

However, the AAT said that, although Elsdon had been influenced by C and he had been violent toward her, Elsdon had not acted under duress from C. The AAT described Elsdon as naive and careless in allowing C to influence her to this extent; and accepted that Elsdon had been

> in difficult and distressing personal circumstances and that her choice of living partner was undesirable. We have a great deal of sympathy for the applicant but we are of the opinion that her circumstances are not so unusual, uncommon or exceptional as to be described as 'special circumstances' in order to justify backpayment of family allowance . . . the fact that she lived in fear of being deported is in some way counteracted by the fact that it was by her own acts or omissions that she found herself in the situation she was in.

(Reasons, para. 20)

Formal decision

The AAT affirmed the decision under review.

Supplementary rent allowance

ALEXANDER & NELSON and SECRETARY TO THE DSS (Nos W85/56 & 57)

Decided: 30 July 1985 by J. R. Dwyer.

Paul Alexander and Michael Nelson were invalid pensioners living at Broome in Western Australia. They had been granted supplementary rent assistance by the DSS but, in January 1985, when the DSS learned that they were living in a tent on Crown land, the DSS cancelled payment of that assistance. Each of them applied to the AAT for review of that decision.

The legislation

Section 30A of the *Social Security Act* provides that a pensioner who pays or is liable to pay rent of more than $10 a week is qualified to receive a supplementary rent allowance.

Section 6(1) defines 'rent' to mean rent paid for premises or part of premises occupied by the person as the person's home.

The evidence

Nelson told the AAT that he and Alexander shared a 2-man tent which was owned by an organization called Kingdom Management. Although this organization was also known as Kingdom Management Pty Ltd, it was not a company nor was it registered as an association or a charitable foundation under any legislation. In fact, it appeared that Kingdom Management was a name used by Nelson to cover certain religious activities (or, at least, activities which Nelson described as religious).

It appeared that Alexander had signed a document transferring all 'my social security income to the religion of Kingdom Management' in return for being allowed to share occupancy of the 2-man tent.

In this application for review, Nelson argued that to deny a supplementary rent allowance to him and to Alexander was to interfere with his 'free exercise of . . . religion' contrary to s.116 of the *Commonwealth Constitution* and contrary to the *Human Rights Commission Act* 1981 (Cth).

The decision

The AAT concluded that, as Nelson was the owner of Kingdom Management, any payments of rent made by him were payments made to himself. Accordingly he could not qualify for supplementary rent assistance.

So far as Alexander was concerned, the AAT said that there was no evidence that he had paid 'rent'. Rather, he had purported to assign the whole of his social security income to Kingdom Management. (It might be, the AAT said, that this assignment was illegal under s.144 of the *Social Security Act* which provides that a pension 'shall be absolutely inalienable'; that Nelson, as owner of Kingdom Management, held those funds in trust for Alexander; and that, accordingly, Alexander was in a similar position to Nelson—if paying 'rent', he was paying it to a partnership of which he was one of the partners.)

The AAT then raised a final point which would prevent Alexander from qualifying:

> 2. Furthermore the 'premises' or 'part of premises' occupied by Mr Alexander are half a 2-man tent with no cooking, washing or toilet facilities. It is on land owned or leased by the Kingdom Management Community. If there were a separate payment of $30 per week for these 'premises' there would be a real question as to whether that was not so inappropriate a figure as to show that it was not a genuine payment of 'rent'.

Formal decision

The AAT affirmed the decision under review.

Handicapped child's allowance: rate of allowance

LANG and SECRETARY TO DSS (No. V84/391)

Decided: 24 July 1985 by I. R. Thompson.

Annette Lang was granted a handicapped child's allowance for her daughter, K, in 1981 on the basis that the child was a handicapped child.

The DSS decided that the allowance should be paid at the rate of $20 a month, and later increased that rate to $30 a month. Lang asked the AAT to review that decision.

The legislation

Section 105L(b) of the *Social Security Act* gives the Secretary to the DSS a discretion as to the rate of handicapped child's allowance payable in respect of a 'handicapped child' (so long as the rate does not exceed $85 a month). On the other hand, s.105L(a) provides that the rate of allowance payable in respect of a 'severely handicapped child' is $85 a month.

Costs incurred

The Tribunal attempted to establish the costs incurred by Lang in caring for her child but observed that Lang was extremely vague about those costs. The DSS acknowledged that Lang's financial circumstances were very poor and said that it was willing to cover the costs incurred by her. Lang claimed that her child needed ex-

tra clothing because of the heavy wear which she placed on her clothes and that it was necessary for her to maintain a telephone to keep contact with the special school which K attended. On the other hand, the Tribunal said that any developing child of K's age (she was now 10) would require regular replacement of clothes. And the principal of K's school said that it was quite unnecessary for her mother to keep in touch by telephone.

The Tribunal concluded, in the light of the evidence, that there was no basis for disturbing the Secretary's decision.

Formal decision

The AAT affirmed the decision under review.

Handicapped child's allowance: late claim

SMITHIES and SECRETARY TO DSS (No. W84/110)

Decided: 12 July 1985 by G. D. Clarkson.

Karen Smithies gave birth to G, the first of her three children, in 1979. In June 1980, G was diagnosed as suffering from asthma and, when Smithies lodged a claim for handicapped child's allowance with the DSS in September 1982, G was accepted as a handicapped child and Smithies was granted the allowance. However, the DSS refused to backdate payment of that allowance to the date of G's diagnosis. Smithies asked the AAT to review that decision.

The legislation

Section 102(1) of the *Social Security Act*, in combination with s.105R, provides that a handicapped child's allowance is payable from the date of eligibility if the claim for that allowance is lodged within six months of that date or if there are 'special circumstances'. Otherwise, the allowance is payable from the date of the claim.

'Special circumstances'

Smithies told the AAT that she had been advised in 1980, by a welfare agency, to apply for handicapped child's allowance. She had understood that the agency and the Perth children's hospital would lodge this claim, which she had signed. Because of a series of health, family and financial problems, Smithies had been obliged to leave the matter in the hands of the agency and the hospital.

This evidence was supported by the welfare agency, which explained that at the time in question it had been inundated with requests for crisis assistance, that its communications with the children's hospital were somewhat defective at that time and that it was not unusual for the children's hospital to lose application forms sent to it by the agency.

The AAT noted that, in *Beadle* (1985) 26 *SSR* 321, the Federal Court had said that

> where the delay beyond six months [in lodging an application for the allowance] was due to . . . the negligence of a third party it might be thought that the normal six months would be inappropriate; that special circumstances had been shown which warranted a longer period.

Here, the AAT said, it was probable that the delay in lodging the application was due to the negligence of a third party—either the welfare agency or the children's hospital. When that negligence was coupled with Smithies' health, family and financial problems, there were sufficient circumstances to justify backdating payments of the allowance.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Smithies was entitled to backpayment of the allowance from 15 June 1980.

Residence in Australia: temporary absence

ISSA and SECRETARY TO DSS (Nos N84/540, N85/161)

Decided: 18 July 1985 by B. J. McMahon, J. H. McClintock and J. B. Nicholls.

M and S Issa (who were husband and wife) had migrated to Australia from the Lebanon with their children in 1970. At the time of their departure from the Lebanon, M had retained ownership of a house in Tripoli (hoping that one of his children might use it in the future).

After arriving in Australia, M established a successful business and, in February 1975, M, S and one of their children took out Australian citizenship. (M and S later told the AAT that it had always been their intention to settle permanently in Australia.)

At the end of 1973, M travelled to the Lebanon for 3 weeks with 2 of his children and, leaving those children with their grandparents, M returned to Australia. Later in 1974, the grandparents advised M and S that war was imminent in the Lebanon and suggested that the 2 children be brought back to Australia. M and S then decided to travel to the Lebanon to collect the children and to visit their families before hostilities broke out.

Because they intended to be absent for at least 3 months, they decided to take their other children and to sell M's business and their family house in Australia. (These sales were made partly to finance the trip and partly because M and S intended to buy a new house and develop a new business on their return to Australia.)

However, within 7 weeks of their arrival in the Lebanon, M was seriously injured by a gunshot wound to his head. From 1975 to 1978, M was bedridden; and it was not until 1981 that he was well enough to contemplate returning to Australia. That return was complicated by lack of money, difficulties in obtaining visas, health problems and the birth of other children. Eventually, however, M and S returned to Australia in February 1983.

On their return to Australia, M lodged a claim with the DSS for invalid pension. The DSS accepted that M was permanently incapacitated for work because of his 1975 injury but rejected his claim on the ground that M had not become incapacitated while in Australia or while temporarily absent from Australia. M asked the AAT to review this decision (the first decision).

When they had left Australia, S had been receiving child endowment (subsequently renamed family allowance) for 4 children. The allowance had continued to be paid until September 1980, when the DSS suspended payment after learning that S was outside Australia. After her return to Australia in 1983, S sought reinstatement of the payments of family allowance for the whole period of her absence. The DSS rejected that application on the ground that S and her children had been outside Australia between April 1975 and March 1983. S asked the AAT to review that decision (the second decision).

The first decision

The legislation: Section 25 of the *Social Security Act* provides that an invalid pension is not to be granted to a person unless the person 'became totally incapacitated for work or permanently blind while in Australia or during a temporary absence from Australia'.

Section 20(b) provides that 'a claimant shall be deemed to have been resident in Australia . . . while the person was an absent resident'.

Section 6(1) defines an 'absent resident' as a person outside Australia who has an Australian domicile, unless the Secretary is satisfied that the person's 'permanent place of abode is outside Australia'.

A temporary absence: So far as M's claim for an invalid pension was concerned, the AAT said, the critical question was whether he was temporarily absent from Australia at the time of his injury. As that injury had occurred within 7 weeks of his departure from Australia, the AAT said, it would not be a correct approach to determine whether his eventual 8 year absence from Australia was a temporary one. The appropriate period to be considered was the 7 week period. On the evidence presented in this case, the AAT had no difficulty in concluding that this 7 week absence was a temporary one. Accordingly, M was qualified to receive an invalid pension.

The second decision

The legislation: At the time when the DSS decided not to pay family allowance to S for the period of her absence from Australia, s.103 of the *Social Security Act* provided that family allowance ceased to be payable if the person ceased to have her usual place of residence in Australia or if the child ceased to be in Australia, unless their absence from Australia was 'temporary only'.