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'.

Section 104(1) provided that a person whose usual place of residence was in Australia and who was temporarily absent from Australia should be treated as if she (and any children in her custody, care and control) were in Australia.

However the operation of s.104(1) was limited by s.104(2). It did not apply to those persons who were residents of Australia as defined by the *Income Tax Assessment Act* 1936.

According to s.6 of the *Income Tax Assessment Act* 1936, a 'resident of Australia' was a person with Australian domicile, unless the Commissioner was satisfied that the person's 'permanent place of abode' was outside Australia.

Usual place of residence: The tribunal said that, so far as S's entitlement to family allowance was concerned, the Tribunal had to decide whether, between 1975 and 1983, her usual place of residence was in Australia and she was temporarily absent from Australia. The AAT observed:

> That concept is subordinate to the test of residency set out in the Income Tax Assessment Act which at the time was incorporated by reference in the [*Social Security*] *Act*.

The central question, the AAT said, was whether S had retained an Australian domicile in Australia. If she had, 'then her absence would be necessarily regarded as temporary': Reasons, p.15.

The AAT said that the question of S's domicile should be settled under the common law rules which provided that a married woman took the domicile of her husband. M had abandoned his original domicile in the Lebanon when he had migrated to Australia in 1970: he had come to Australia with the intention of staying here permanently, and so had acquired an Australian domicile of choice.

M's actions in Australia between 1970 and 1975 (the acquisition of a home, the establishment of a business, entering into long term contracts and, most significantly, taking out Australian citizenship) established on the balance of probabilities that the centre of gravity of his life had shifted from the Lebanon to Australia.

There was no evidence that, on his return to the Lebanon in 1975, M had intended to abandon his Australian domicile. The reasons given for the sale of the house and the business in Australia were sufficient, the AAT said 'to negate any presumption that M's domicile of origin might have been revived by his return visit to Lebanon': p.18.

Accordingly, the AAT said, M and S had retained their Australian domicile during the period of their absence from Australia from 1975 to 1983:

> The consequence so far as Mrs Issa is concerned is that the old sections 103 and 104 could not have any operation.

(Reasons, p.18)

Even if M and S had not retained an Australian domicile, the AAT said, S's 'usual place of residence' had remained in Australia and her absence had been temporary between 1975 and 1983. The AAT noted that, in *Ho* (1983) 17 *SSR* 179, the Federal Court had said that a person would be treated as residing permanently in the place where she had her family or domestic ties. In *Hafza* (1985) 26 *SSR* 321 the Federal Court had said:

> The test is whether the person has retained a continuity of association with the place . . . together with an intention to return to that place and an attitude that the place remains 'home' . . .

In the present case, the AAT said, the attitude of M and S to Australia as their 'home' had been amply demonstrated. Accordingly, Australia was S's usual place of residence.

In determining whether her absence from Australia could be decribed as temporary the AAT said that the intention of S was of vital importance. That is, the Tribural had to look at the intention of S from time to time during her absence, as had been done in *Houchar* (1984) 18 *SSR* 184. If S had intended 'to carry out some formulated purpose not extending into the indefinite future', then, however long the absence, it could properly be regarded as temporary. The AAT noted that a lengthy time interval could be consistent with a temporary absence, as demonstrated by *Alam* (1982) 8 *SSR* 80 (a 5 year absence) and *Mengi* (1984) 22 *SSR* 255 (a 9 year absence).

In the present case it was clear that M and S had travelled to the Lebanon for a specific purpose, that they had always intended to return to Australia as soon as possible and that their return had been frustrated by a series of events outside their control. It followed that S should be regarded as temporarily absent from Australia during that period. Accordingly, because she was at all relevant times domiciled in Australia, usually resident in Australia and temporarily absent from Australia, child endowment or family allowance should have been paid to her during the whole of the time of her absence.

Formal decisions

The AAT set aside the decisions under review and remitted the matters to the Secretary with a direction that an invalid pension be granted to M and family allowance be paid to S for the whole of the period of her absence from Australia.

'Income': payments from daughter

BURMAN and SECRETARY TO DSS (No. A85/28)

Decided: 2 August 1985 by J. O. Ballard.

Gerda Burman held an age pension in 1983, when she was living with her son. In that year, Burman's son sold his house and gave Burman $20 000. Burman then entered into a formal agreement with one of her daughter's, M, and M's husband, D.

Under this agreement, Burman lent M and D $20 000 to enable M and D to purchase a house. The agreement provided that Burman was to rent that house from M and D for $350 a month over two years. Under the agreement, M and D were to pay to Burman interest of 12.5% on the loan—that is $200 a month. The agreement contained the following clause:

> 4. The lender will pay the borrowers an amount of $150 each month which represents the rent money payable by the lender to the borrowers of $350 per month less the interest payable by the borrowers to the lender of $200 per month.

M and D then purchased a house which Burman occupied between January and November 1984; and Burman paid M and D $150 each month during that period.

In November 1984, Burman left this house because M and D were obliged to sell it (because of financial difficulties). Between that date and the sale of the house in March 1985, M and D paid Burman $200 a month as specified in the agreement. Upon the sale of the house, M and D repaid to Burman the $20 000 loan.

The DSS decided that, throughout the period from January 1984 to March 1985, Burman's income included the sum of $200 a month and that her age pension should be reduced accordingly. Burman asked the AAT to review that decision.

The legislation

Section 28(2) of the *Social Security Act* provides that the rate of an age pension is to be reduced by reference to the pensioner's income. At the time of the decision under review, s.18 defined 'income' as meaning—

> any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person . . . and includes any periodical payment or benefit by way of gift or allowance from a person other than the . . . daughter . . . of the first-mentioned person . . .

'Moneys . . . derived or received'

The AAT first decided that the $200 a month in question fell within the basic definition of 'income'. During the first period, when the $200 was being set off against Burman's rent obligations, she 'derived' the $200 a month. And in the second period she 'received' that $200 a month. It was clear that, in both periods, the moneys were for Burman's 'own use or benefit'.

An allowance from her daughter?

However, the AAT said, the real question was whether the moneys derived or received by Burman could be described as an allowance from her daughter. If they answered this description, they were expressly excluded from the definition of 'income' in s.18:

> 17. This matter cannot be determined solely by the terms of the agreement as though it stood between two parties negotiating at arms length. It has to be seen as part of a family arrangement.

Looking at the nature of the arrangements made, first between Burman and her son and, second, between Burman and M and D, the AAT concluded that the reduction in Burman's rent was essentially a gift or an allowance by which Burman's