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

daughter provided her mother with suitable shelter. Even after Burman had left the house, the monthly payments to her of $200 should be seen as a gift or allowance. It was made—

> pursuant to a family arrangement assisting the applicant to have necessary shelter and to which the financial terms were not of the essence.

The fact that Burman's son-in-law was a party to the agreement under which she received this gift or allowance did not affect the fact that it was a benefit provided to her by her daughter. Accordingly, the benefits received by Burman under the agreement fell outside the definition of 'income' in s.18.

Formal decision

The AAT set aside the decision under review and substituted a decision that the benefits received by Burman should not be taken into account in determining her income for the purposes of the age pension income test.

Invalid pension: permanent incapacity

ROESLER and SECRETARY TO DSS (No. S84/94)

Decided: 24 July 1985 by J. A. Kiosoglous.

The AAT *set aside* a DSS decision to reject an application for an invalid pension lodged by a 45-year-old man who had worked for some 30 years in the Whyalla region of South Australia.

The bulk of Roesler's employment had been as a plumber but, towards the end of his career, he had been employed in a supervisory clerical position. In 1982, he had suffered an injury to his right elbow and, when his employer had assigned Roesler to labouring work in March 1983, he had resigned from that employment. He had not worked, but had been on sickness benefits, since then.

According to the medical evidence, Roesler had a permanent disability in each of his elbows and right shoulder, largely due to the heavy work he had done as a plumber. As a result, he was unable to work as a plumber or to engage in manual labour or clerical duties involving extensive writing.

The Whyalla CES told the AAT that the labour market in that region was very depressed, with about 25% of people in the employment market unemployed. Because Roesler was in receipt of sickness benefit, the CES would not refer him to any prospective employers.

The AAT said that many of the cases coming before it in the invalid pension area were now 'marginal cases', with applicants who had relatively minor disabilities which might be translated into an 85% permanent incapacity for work when other factors were taken into account. Although the rate of invalid pension appeals was settling down,

> the trend towards more marginal cases places a greater responsibility upon the Tribunal to gather together and refine the existing and accepted principles in order to arrive at 'an equation . . . involving a sensitive balance of fact and theory' in each particular application . . .

The Tribunal noted that its earlier decisions had pinpointed a number of problem areas and laid down principles to deal with such matters as permanence, percentage assessments, non-medical factors, psychological illnesses and disorders, rehabilitation, self motivation and mobility (both physical and geographical). The Tribunal continued:

> Any or all of these and other potential areas may present themselves in a particular application for review. The more marginal the case, the more likely they are to arise. As the trend continues towards the more difficult 'marginal' cases, the Tribunal is faced with the task of going beyond the application of the established general principles and of the settled collateral or incidental matters to then be in a position to isolate the potential problem areas arising out of a particular application.

In the present case, the AAT said, the major question was whether the variety of non-medical factors made Roesler at least 85% incapacitated for work. (The AAT concluded that, whatever incapacity Roesler had, his incapacity should be regarded as permanent.)

The AAT accepted that, given Roesler's extensive experience, he did have some residual physical capacity for work; but that capacity 'must be translated into the relevant context, taking the "whole person" of the applicant in the circumstances in which he finds himself'. The type of 'light duties' work for which Roesler retained some capacity was unlikely to be available in the Whyalla region and, if available, unlikely to be offered to a person of Roesler's age suffering from some residual disability which carried with it the inevitable workers' compensation risks. It was possible that if Roesler moved to a different locality, such as Adelaide, he would be successful in finding a job in which he could use his residual capacities. However, the AAT said, it was not reasonable to expect Roesler to move himself and his family from Whyalla where he had lived for 44 years.

The AAT concluded that, on balance, Roesler's medical disabilities, rather than any other factor, such as the state of the labour market, made the difference between him working and not working (and the Tribunal referred to *Howard* (1983) 13 *SSR* 134); and those disabilities were 'of such significance that the incapacity can be said to arise or result from the medical condition' (*Sheely* (1982) 9 *SSR* 86).

Although Roesler's physical disability might be regarded as a relatively minor one, in an employment context, when considered against the types of work for which Roesler was qualified and had performed, that disability incapacitated him for work to the extent of 85%, although this was a marginal case.

ALAM and SECRETARY TO DSS (No. N83/697)

Decided: 1 July 1985 by J. A. Kiosoglous.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 44-year-old man who had not worked since injuring his back in 1973.

Alam told the AAT that, since he had injured his back, he regularly suffered acute pain and was unable to sit, stand or walk for extended periods. He also claimed that he was sensitive to noise and suffered from frequent headaches.

According to the medical evidence, Alam suffered from a moderate to significant degree of back disability which left him with, at best, a capacity for light or restricted work which did not involve bending or lifting.

A CES officer described Alam's chances of finding employment as 'extremely difficult' if not virtually impossible, given his disability, the duration of his unemployment and his relatively poor English.

A psychiatrist told the AAT that Alam suffered from a mild personality disorder, as a result of which he had adopted a sick or invalid role reaction to his physical injuries. That reaction showed up in some of Alam's physical symptoms.

The Tribunal concluded that the cumulative effect of Alam's physical and psychological problems (which had been entrenched over the long period of his absence from the workforce) rendered him unable to attract an employer willing to employ him. Referring to the personality disorder from which Alam suffered, the AAT said:

> Although I am satisfied that such personality problems of themselves would not render the applicant permanently incapacitated for work to the requisite degree in the absence of any other physical disability, such a finding can be no more than mere hypothesis for the physical disabilities to exist and the psychological problems must be considered in conjunction with them.