DSS for a handicapped child's allowance for her 2 daughters, S (13) and L (8). After the DSS rejected her application, she asked the AAT to review that decision.

The legislation

Loo's application was based on s.105JA of the *Social Security Act*, which provides that a person is qualified for the allowance if she provides care and attention, 'only marginally less' than constant care and attention, to a handicapped child in their private home and, because of that care and attention, suffers 'severe financial hardship'.

Section 105H(1) defines a 'handicapped child's as one who needs (and is likely to need for an extended period) care and attention 'only marginally less' than constant care and attention.

'Care and attention'

S suffered from chronic asthma. Loo supervised much of her activities and her treatment regime and spent considerable time and money in ensuring that their home was as dust-free as possible. After noting that the 'margin' referred to in ss.105H(1) and 105JA could be broad (as decided in *Mrs M* (1983) 16 *SSR* 158), the AAT said that it was satisfied that S needed care and attention only marginally less than constant care and attention and would need that care and attention for an extended period.

S attended school during standard school hours. The AAT said that there had been divergent views expressed in earlier Tribunal decisions as to the effect of school attendance on eligibility for the allowance. However, the enactment of s.15AB of the *Acts Interpretation Act* in mid-1984 had provided a means of resolving this conflict. As the decision in *Shingles* (1984) 21 *SSR* 230 had demonstrated, s.15AB allowed the AAT to look at Parliamentary debates to discover the purpose and meaning of the provisions which dealt with handicapped child's allowance. Those debates made it 'clear that it was intended that a child's attendance at school should not prevent the care and attention given to him in his home being regarded as constant': Reasons, para. 9.

After examining the care and attention provided to S by Loo (including 'the considerable additional housework which the applicant does in order to reduce the risk of exposure of S to dust'), the AAT concluded that Loo provided sufficient care and attention for the purposes of s.105JA.

However, the AAT said, the care and attention provided by Loo to L was not sufficient to meet the requirements of s.105JA: that child suffered from ear infections, which called for some 20 minutes of care (over and above the care needed by a normal child) a day. That care and attention was 'not far enough along the line of the continuum of care and attention to be regarded as only marginally less than constant care and attention': Reasons, para. 17.

'Severe financial hardship'

The AAT said that it was satisfied that Loo suffered severe financial hardship because of the care and attention provided to S. Loo was an invalid pensioner with 5 children, separated from the children's father; and the money she spent on cleaning materials imposed considerable financial strain because of her difficult circumstances. Accordingly, Loo met the second requirement of s.105JA and was qualified for a handicapped child's allowance for S.

Given Loo's financial circumstances and the financial hardship which provision of the care and attention caused to her, the AAT decided that the discretion in s.105JA should be exercised so that she was paid at the maximum rate.

Backpayment

S had suffered from asthma since about 1974; and, the AAT said, Loo would have qualified for handicapped child's allowance from November 1977, when the allowance was extended to handicapped (rather than severely handicapped) children. But Loo had not lodged her claim until July 1982: were there sufficient 'special circumstances' within s.102(1) to justify backpayment of the allowance?

Section 102(1) provides that, unless a claim for handicapped child's allowance is lodged within 6 months of eligibility, payment of that allowance can be backdated to the date of eligibility only in 'special circumstances'.

Loo, who was an Aborigine, had run away from her foster home at the age of 13, and had begun to live with her *de facto* husband when she was 14. From that time, they were constantly moving around and she suffered from constant ill-health. She said that she had learnt of the allowance in 1980; but that, for two or so years after then, she had experienced so many domestic problems that she had not had the opportunity to consider whether she might be eligible for the allowance for S: she had suffered ill-health, as had 3 of her 5 children; she had been subjected to domestic violence and had moved in and out of women's refuges. None of the medical personnel who had treated S had raised the possibility of the allowance, until a welfare worker advised her in 1982.

> The AAT said that –
>
> mere ignorance of eligibility due to inadvertence on the part of a well educated person with ample opportunity to acquire knowledge of it is not a circumstance which can be regarded as special; it is a very common circumstance. However, the circumstances may be special where there are good reasons for the inadvertence, as exemplified in *Re Johns* and *Re Corbett*. I am satisfied that in the applicant's case there were good reasons for her inadvertence and that there were special circumstances which could have permitted the Director-General to allow a longer period for lodging the claim.
>
> (Reasons, para.22)

However, the decisions in *Johns* and *Corbett* (1984) 20 *SSR* 211 and 210 had said that, even when there were 'special circumstances', the Director-General (and therefore the AAT) had a discretion whether to allow backpayment or not. While those decisions stood (they were on appeal to the Federal Court), they should be followed, the AAT said (see *McGrath* in this issue of the *Reporter*).

In the present case, Loo had borrowed money in order to support her family; but she had repaid that money; and, following *Johns* and *Corbett*, there were no factors which would support an exercise of the discretion to make a retrospective payment for 4½ years.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that a handicapped child's allowance be paid to Loo for S under s.105JA at the maximum rate.

Payment of pensions etc. overseas

APPENZELLER and APPENZELLER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/444)

Decided: 24 September 1984 by R. Smart.

Josefa Appenzeller had migrated to Australia with her husband and son in 1950. They took out Australian citizenship in 1956; but, in 1971, Appenzeller and her husband travelled to Europe, where they established a home.

In January 1977, Appenzeller and her husband returned to Australia and were granted age pensions after declaring they intended to live in Australia permanently. However, in May 1977, they left Australia for Germany without informing the DSS. When the DSS learned of their departure, it cancelled their age pensions.

Appenzeller's husband died in 1980; and Appenzeller and her son then asked the AAT to review the cancellation of her age pension.

The legislation

Section 83AD(1) of the *Social Security Act* provides that where a former resident of Australia returns to Australia, claims a pension and leaves Australia within 12 months of her return, any pension granted to that person is not payable while that person is outside Australia.

However, s.83AD(2) gives the Director-General power to waive the negative provision in s.83AD(1) if the person's

reasons for leaving Australia within 12 months of her return 'arose from circumstances that could not reasonably have been foreseen at the time [her] return to . . . Australia'.

The evidence

The evidence before the Tribunal showed that Appenzeller and her husband had established a home in Germany after leaving Australia in 1971 and that Appenzeller still maintained this home. However, from 1971 to 1983 Appenzeller had derived income in investments in Australia and had lodged regular income tax returns: in these returns she had declared that she was a resident of Germany.

Appenzeller confirmed to the AAT that, on her return to Australia in January 1977, she and her husband had intended to stay in Australia permanently; but, she said, they had found it necessary to return to Germany so that she could seek medical treatment for an illness. However, there was medical evidence that this illness had existed before Appenzeller's return to Australia and that adequate treatment for the illness was available in Australia.

Section 20(2) of the *Social Security Act*, in combination with s.6 of the *Income Tax Assessment Act* 1936 provided that a person should be 'deemed to have been resident in Australia' if the person was domiciled in Australia, unless the Commissioner of Taxation was satisfied that the person's 'permanent place of abode' was outside Australia.

A former resident of Australia?

The Tribunal concluded that Appenzeller and her husband had set up their home in Germany in 1971: that was their 'settled or usual abode' and they could not be regarded as having retained an Australian residence between 1971 and 1977.

Moreover, they had not retained a 'deemed' Australian residence under s.20(2) of the *Social Security Act* and s.6 of the *Income Tax Assessment Act*. Although they had acquired an Australian domicile when they migrated to Australia in 1960, their departure from Australia in 1971 and the establishment of their home in Germany showed that they had abandoned their Australian domicile and acquired a domicile in Germany. In coming to this conclusion, the Tribunal took account of the statements made in Appenzeller's Australian income tax returns that she was a permanent resident of Germany, a statement which was repeated in each of 6 critical years – from 1971 to 1976.

Accordingly, Appenzeller and her husband, as returning former residents, were persons to whom s.83AD(1) applied; and their age pensions could not be paid while they were outside Australia unless they could invoke s.83AD(2).

The reason for leaving

Turning to the medical evidence, the AAT noted that Appenzeller's illness had existed at the time of her return to Australia in January 1977. If it were true that her departure from Australia in May 1977 was caused by that illness (a point on which the AAT expressed considerable doubt), that illness was one which could have been reasonably foreseen by Appenzeller at the time of her return to Australia. Accordingly, she could not take advantage of s.83AD(2).

The discretion

Even if Appenzeller's reason for leaving Australia had been caused by some foreseeable event, the AAT said that s.83AD(2) probably conferred a discretion but that, in the present case, the Tribunal would, if necessary, exercise the discretion against Appenzeller.

The Tribunal noted that earlier decisions, such as *Munna* (1981) 4 *SSR* 41 and *Pasini* (1981) 7 *SSR* 68 had decided that s.83AD(2) conferred a true discretion and that it was not enough for an applicant to show that her or his reasons for leaving Australia arose from unforeseeable circumstances. On the other hand, the AAT had said in *Petropoulos* (1984) 21 *SSR* 235 that there was no general discretion in s.83AD(2). Without expressing a definite preference between these two views of the provision, the Tribunal in the present case said that, 'as presently advised, I incline to view that s.83AD(2) confers a true discretion': Reasons, p. 30.

Amongst the factors which, according to the AAT, counted against Appenzeller in the exercise of any discretion in s.83AD(2) would be the following:

- since 1971, Appenzeller's only connection with Australia had been her income from investment;
- she had continued to live in Germany;
- she had stayed in Australia for only 4 months in 1977; and
- it was clear that Appenzeller had freely chosen not to return to Australia but to remain resident in Germany.

Formal decision

The AAT affirmed the decision under review.

VAITOUDIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/121)

Decided: 27 November 1984 by A.P. Renouf.

Arthur Vaitoudis had migrated to Australia from Greece in 1961. In 1973, he, his wife and 2 children returned to Greece. In 1981, Vaitoudis and his wife divorced and Vaitoudis was given custody of his son.

In November 1981, Vaitoudis returned to Australia with his son, intending to enter into a business partnership with a friend. That plan fell though and Vaitoudis applied for and was granted supporting parent's benefit.

In January 1982, Vaitoudis (who claimed that he had excellent health before returning to Australia) was diagnosed as suffering from a heart condition. He decided to return to Greece where his mother and sister could look after his son if his condition became worse; and he left Australia on 8 February 1982. The DSS then cancelled Vaitoudis' supporting parent's benefit.

The legislation

Section 83AD(1) of the *Social Security Act* provides that a pension (including a supporting parent's benefit) is not payable outside Australia to a former Australian resident who has returned to Australia, claimed the pension and left Australia 'before the expiration of the period of 12 months that commenced on the date of his return to, or his arrival in, Australia'.

However, s.83AD(2) gives the Director-General a discretion to waive s.83AD(1) where the person's reasons for leaving within the 12 month period 'arose from circumstances that could not reasonably have been foreseen at the time of his return to, or arrival in, Australia'.

Should the discretion be exercised?

The AAT accepted that Vaitoudis had not known of his heart condition at the time of his return to Australia, November 1981. Accordingly, his reason for leaving Australia in February 1982 was not one which Vaitoudis could reasonably have foreseen in November 1981: it was not, to use a phrase adopted in *Munna* (1981) 4 *SSR* 41, a 'real possibility which could eventuate'.

However, the AAT pointed out that s.83AD(2) involved a discretionary power, to be exercised in the light of all the circumstances in the matter; that is, the Tribunal agreed with the approach taken in *Munna* (above) and *Pasini* (1982) 7 *SSR* 68, and implicitly disagreed with the view expressed in *Petropoulos* (1984) 21 *SSR* 235, that there was no discretionary element in s.83AD(2).

In the present case, the AAT said, the discretion in s.83(AD(2) should not be exercised in Vaitoudis' favour for the following reasons:

- Vaitoudis had lived and worked for 11 years in Australia;
- after his return to Australia, Vaitoudis had stayed only 2 months;
- Vaitoudis had been warned that his supporting parent's benefit would be cancelled if he left Australia;
- Vaitoudis' reasons for leaving Australia did not tally with the reasons that he had given for returning to Australia – in particular, the prognosis for his heart condition had not been so serious as to warrant the drastic step of returning to Greece rather than continuing with his project to settle in Australia (a project which had been undertaken to provide for the welfare and future of his son); and
- there were some doubts, in the mind of the AAT, about the truth of parts of Vaitoudis' evidence.

The Tribunal concluded that, given the relatively short period of Vaitoudis' residence and work in Australia, it could not be said that he had 'such connection

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