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