she moved to Melbourne where she lived in a boarding house, managed by S. In October 1983, Chapman and S. advised the DSS that they intended to marry and confirmed that advice in February 1984.

In January 1985, Chapman and S, Chapman's 2 children and S's son moved out of the boarding house into a jointly rented house and the DSS then cancelled Chapman's pension.

In support of her application for review, Chapman and S told the AAT that they had become engaged to marry in mid-1984 but had broken off their engagement by the time that they moved into the jointly rented house in January 1985. They also told the AAT that they had occupied separate rooms in that house, taking individual responsibility for their washing, cooking, cleaning and shopping and had each part half of the household bills.

However, notes taken by the chairman of the SSAT during an appeal before that Tribunal in February 1985 indicated that their engagement had not been broken off at that time and that their domestic arrangements had been more consistent with a shared life style.

Chapman and S agreed that, to the outside observer, they had the appearance of a family unit and said that Chapman's children treated S as their father. Chapman also told the AAT that she and S had a continuing sexual relationship; but that her reason for living with S was primarily financial. On the other hand, S said that they continued to live together because there was still a very close friendship between them and because Chapman's children had come to depend on him.

On the basis of this evidence, the AAT concluded that Chapman and S and their respective children were living as a family unit, in which Chapman and S lived as man and wife on a *bona fide* domestic basis although not legally married. The AAT referred to the general difficulty of deciding whether unmarried people were living as man and wife:

> 'It is our view that the changing of community attitudes to the sharing of accommodation by persons of different sexes and the growing variety of household structures both within and outside formal marriages have led to the words of the Act now being most difficult to apply.

> We do not pretend to see a solution to the problem but we feel that it requires further consideration by policy makers.'

(Reasons, para.47)

The AAT indicated that an important reason why it had concluded against Chapman was its substantial doubts as to her credibility. There were conflicts and inconsistencies between the evidence given by Chapman and S and between their evidence and the notes taken at the SSAT hearing.

Handicapped child's allowance: eligibility

DAWSON and SECRETARY TO DSS (No.W85/53)
Decided: 14 February 1986 by H.E. Hallowes.

Dawson asked the AAT to review a DSS refusal to pay her handicapped child's allowance for her son, R, who was 15.

R suffered from recurrent ear infections, enuresis, hearing difficulty and some school attendance problems. Dawson said she had to get up to R every night, change his bed, comfort him when his ears ached, and give him extra assistance with schoolwork. Extra costs incurred include washing costs, replacement of bed linen, cost of ear drops plus petrol for regular attendance at hospital.

The legislation

The AAT concentrated on the question whether Dawson could qualify under s.105JA, which provided (at the relevant time) that the Secretary could grant a handicapped child's allowance to a person who had the custody, care and control of a 'handicapped child', if the Secretary was satisfied that the person provided care and attention only marginally less than constant, and that the person was suffering severe financial hardship.

According to s.105H(1), a 'handicapped child' is a child with a physical or mental disability requiring care and attention only marginally less than constant.

Section 105L gives the Secretary a discretion to determine the rate of allowance to be paid for a 'handicapped child', but not exceeding $85 a month.

'Constant care and attention'

The AAT adopted the explanation of the phrase 'constant care and attention' from *Youssef* (1981) 5 *SSR* 55: 'if the need for care and attention is continually recurring the statutory requirement is satisfied'.

The AAT noted that, although R had recurrent ear infections, he was old enough to tell his mother when these occurred and she did not have to be continually watchful, except for supervising his swimming: this care and attention was not continually recurrent.

The AAT said that extra time spent with R on his homework was not as a result of a physical or mental disability, but arose out of his dislike of school. On the other hand, his bed-wetting did constitute a physical or mental disability, and the care and attention needed because of this, together with the ear infections, indicated that he was a child who required care and attention only marginally less than the care and attention that he would need if he were a severely handicapped child; and that need was likely to continue for an extended period.

Severe financial hardship?

During the relevant period, Dawson's *de facto* spouse was either on unemployment benefit, or on a basic income from labouring work. The AAT examined the DSS guidelines on financial hardship, and the AAT decision in *Nannup* (1985) 28 *SSR* 342, which considered these inappropriate where the family was large (there were 6 dependent children in Dawson's household), and the extra costs involved in the care of Robert. The AAT the concluded that Dawson was subject to severe financial hardship.

Formal decision

The Tribunal set aside the decision under review, and directed that Dawson be granted handicapped child's allowance pursuant to s.105JA, at a rate to be determined by the Secretary.

Family allowance: late claim

OZCAGLI and SECRETARY TO DSS (No.V84/425)
Decided: 16 December 1985 by H.E. Hallowes

Melek Ozcagli appealed against decisions of the DSS to refuse to allow backpayment of family allowance for 2 of her children.

Ozcagli applied for student family allowance for her 18-year-old son, H, in February 1983 and payment commenced in March 1983. In September 1983, Ozcagli applied for family allowance for her daughter, M, born in September 1982. Payment commenced in September 1983. Ozcagli requested payment for H from November 1980, when he turned 16, and payment for M from September 1982, when she had been born.

The evidence

Ozcagli had arrived in Australia in 1970 with 2 children. Two others were born in Australia. She had limited under-

standing of English, and her husband, who could speak English, had difficulty reading documents in English.

Ozcagli said that she had received a form relating to H's student family allowance but the form was too difficult for anyone to read and the form had been lost when the family moved. Eventually, she had completed an application for H in February 1983. When M was born, an interpreter who was to assist Ozcagli in applying for family allowance had suffered an accident and the form had not been filled in. H had realized in 1983 that Ozcagli was not receiving family allowance for M and the family had visited the local DSS office and completed the form.

The legislation

At the time of the decision under review, s.103(1) of the *Social Security Act* provided that family allowance ceased to be payable if -

> '(f) the child attains the age of 16 years unless the Director-General is satisfied, before the expiration of 3 months after the child attains that age, that the child became a student child on attaining that age ...'

Student family allowance

Ozcagli's representative relied on the AAT decision in *Ellis* (1985) 24 *SSR* 283, to argue that payment of student family allowance should resume from the date of eligibility, once the DSS had been informed of H's status. But the AAT preferred the view in *Michael* (1982) 10 *SSR* 98: the applicant had either to inform the DSS within 3 months of the child becoming a student child, or make a claim within 6 months, or come within the 'special circumstances' provision.

Since Ozcagli had not informed the DSS within 3 months or claimed within 6 months, she tried to establish that her circumstances were special. She relied on her difficulties with the English language, the role played by a wife in a Turkish family, her husband's lack of organizational ability and the family's difficult financial situation.

The Tribunal did not accept that her circumstances were special. It noted that claim forms for the other children had been completed, that the family was not isolated in the Australian community (Mr Ozcagli ran a fruit shop), that the family had coped with the administrative difficulties of selling one shop and buying another, and that they had sought the assistance of an accountant to help with various tax forms:

> 'The delay in this application in relation to H's student family allowance is over 2 years - a lengthy delay requiring weighty facts to establish special circumstances (*Beadle* (1985) 26 *SSR* 321). The claim form for student family allowance includes an invitation in a number of languages, including Turkish, for applicants to seek assistance with the translation of the form. An applicant who acknowledges that a form was received from the Department but who fails to observe that invitation cannot claim that special circumstances exist because of difficulties in understanding the form.'

(Reasons, para.18)

Child family allowance

The AAT stated that the same considerations applied to the claim for family allowance for M.

[The Tribunal made no reference to the fact that the delay was only 12 months for this claim.]

Formal decision

Both decisions of the DSS were affirmed.

Widow's pension: 'custody, care and control'

DA COSTA and SECRETARY TO DSS
(No.D85/7)
Decided: 17 February 1986 by R.A. Layton.

Elisa Da Costa had been granted a widow's pension in February 1983, on the basis that she was a divorced woman with the 'custody, care and control' of her son, G, who was then 14 years old. When G turned 15, he left school, ceased living with his mother and began to live with friends. From then until December 1983, Da Costa paid some $7 a week to G, who meet the bulk of his living expenses by selling fish which he had caught.

In February 1984, the DSS was alerted to the possibility that G was no longer living with Da Costa and, after lengthy inquiries, the DSS cancelled her widow's pension from April 1984. The DSS then decided that there had been an overpayment of widow's pension to Da Costa - which was eventually calculated at $3429, representing the amount of widow's pension paid between July 1983 and February 1984. Da Costa then asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.60(1)(a) of the *Social Security Act* provided that a widow (which included a divorced woman) was qualified to receive widow's pension if she had the 'custody, care and control' of a child under 16 years of age.

Section 59(4) provided that a child who was 'being maintained by widow' should be deemed to be in the 'custody, care and control' of the widow.

Section 74(5) obliged a pensioner to notify the DSS within 14 days of a child ceasing to be in her 'custody, care or control' or of a child 'ceasing to be maintained' by her.

At the relevant time, s.140(1) provided that an amount paid by way of pension in consequence of a failure or omission by any person to comply with the Act was recoverable from the person to whom it had been paid as a debt due to the Commonwealth.

'Being maintained'

The AAT first dealt with Da Costa's claim that she had been qualified for widow's pension during the period in question because she had been maintaining G. The AAT said that the term 'being maintained' should not be interpreted in the limited sense of merely a payment of maintenance. In ordinary usage, and in the legal sense, the AAT said, this term meant more than payment of money. And the AAT adopted the meaning given to the term in *Kallin* v *Kallin* [1944] SASR 73:

> '"Maintenance" means the act of maintaining, and denotes the regular supply of food, clothing or lodging; the provision of the necessaries and of the conveniences of life.'

Such an interpretation, the AAT said,

> 'would render the combination of ss.59(4), 60(1)(a) and 74(5) of the Act more intelligible and would not allow a person only paying maintenance to be entitled to a pension in preference to another who may, in every other way, provide the food, lodging, clothing, care, custody and control of the child.'

(Reasons, para.34)

In the present case, the AAT said , the payment of $7 a week by Da Costa could have supplied very few of the necessities of life for G. Accordingly, Da Costa had not been maintaining G and he could not be treated as in her 'custody, care and control' from the time that he moved out of their home. It followed that Da Costa had been in breach of s.74(5) in failing to notify the DSS when G had ceased to be in her 'custody, care and control'.

Recovery of overpayment

Because Da Costa had been in breach of the notification requirements in s.74(5), the widow's pension paid to her after July 1983 was recoverable as an overpayment. There were, the AAT said, no grounds on which the discretion to waive recovery of the overpayment could be exercised in Da Costa's favour. Although she had claimed ignorance of the basis on which her pension had been paid and the notification provisions, 'ignorance of the law [was] no excuse.'

So far as financial hardship was concerned, Da Costa had told the AAT that her current net income was about $160 a week and that she had weekly commitments of $175.

The AAT said that, although Da Costa's expenditure appeared to be 'approximately equivalent to her income', she was 'both employable and employed, and [had] no dependants