Formal decision
The AAT set aside the decision under review and substituted a decision which suspended payment of Hatzipashalis' pension for only 5 fortnightly periods.

Special need pension

MILLER and SECRETARY TO DSS (No. N85/542)
Decided: 10 July 1986 by B.J. McMahon, C.J. Stevens, and G.P. Nicholls.
Phillip Miller was born in Israel in 1904 and migrated to Australia in 1927. He worked in Australia until 1966 when he returned to Israel. Following his return to Israel he worked for a period but, because he was over 60 when he returned to that country, he was not eligible for an Israeli age pension.

In August 1983, Miller applied to the DSS for an age pension. Following the rejection of that application, he sought review from the AAT.

The legislation
Section 21A of the *Social Security Act* provides that a person who is outside Australia and who meets a series of residence requirements will qualify to receive an age pension if the person is, in the opinion of the Secretary, 'in special need of financial assistance'.

'Special need of financial assistance'?
In the present case, there was no dispute that Miller met all of the requirements of s.21A, apart from the requirement that he be 'in special need of financial assistance'.

Miller's current income, from a private insurance fund, was $1200 a year. He was supplementing that by running down his savings and, at the time of the hearing of this application for review, he had $1400 left in his savings account. In addition to his depleted savings accounts, Miller owned his own home, which was valued at $50 000.

According to evidence given by the Israeli consul, the bare minimum necessary for existence in Israel would be around $74 a week: and the average weekly income for an age pensioner in that country was between $100 and $130 a week.

The DSS had developed guidelines for assessing whether a person was 'in special need of financial assistance'. These guidelines involved the calculation of the person's 'deemed income', which consisted of the person's actual annual income (in Miller's case $1200) plus 10% of the value of the person's home plus the total value of other property of the person in excess of $400.

Applying those guidelines to Miller's situation at the time of the hearing of this matter, his 'deemed income' would have been $7200. According to the guidelines, a person could only be judged as 'in special need of financial assistance' if the person's 'deemed income' was below the current standard rate of age pension (at that time approximately $5000 a year).

The AAT said that the DSS guidelines were not an appropriate guide on the question of whether a person was 'in special need of financial assistance'. The guidelines suffered from three deficiencies.

First, the guidelines paid no regard to the different standards of living in various countries, which were likely to vary considerably. Secondly, the guidelines made no allowance for inflation and there was evidence that the current rate of inflation in Israel was between 20 and 25 per cent a year:

> 'If the guidelines were to be applied inflexibly, this would mean that presumably the value of the house would increase at a similar rate and the deemed income of the applicant would therefore increase. This seems to us to be an unreal approach. It would mean that the more desperate his financial position became the richer he would be presumed to be, unless, of course, he sold his house.'

(Reasons, p.7)

Thirdly, the guidelines treated the applicant's home as if it were an ordinary investment item. Given Miller's age and his very poor health, it was unreasonable to expect him to sell his house and it was 'quite fanciful' to expect him to let out any part of the house in order to increase his income.

It was also relevant to note that where an age pension was granted to a person resident in Australia an assets test was applied when fixing the rate of the pension. But s.6AA of the *Social Security Act* specifically excluded the value of the person's home from the calculation of the value of that person's property.

In the present case, the AAT said, it would be reasonable for the DSS to exclude the value of Miller's home when deciding whether he was 'in special need of financial assistance'. In exercising the discretion under s.21A it would be reasonable and preferable for the DSS to treat pensioners inside and outside Australia 'as being on the same footing': Reasons, p.11.

The AAT said that Miller's circumstances were sufficiently severe to take him out of the common run of cases and he should be regarded as 'in special need of financial assistance' within s.21A. These circumstances included the extremely low level of his income, his poor health, and his 'long and significant contribution to Australia': Reasons, p.13.

The Tribunal concluded with the following critical comments on the guidelines:

> 'Whilst guidelines may be administratively desirable where a large number of applications must be dealt with, in the long run each case must be looked at individually. We are not aware of the number of applications made under s.21A of the *Social Security Act* but we would imagine that they will be relatively rare. Guidelines dealing with such applications must take account of economic conditions of the country in which the applicant lives, and must, in our view, take a realistic approach to the ownership by the applicant of his principal home.

(Reasons, p.13)

Formal decision
The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Miller be granted an age pension.

TEOHAREVSKI and SECRETARY TO DSS (No. N84/526)
Decided: 14 May 1986 by B.J.McMahon, M.E. Hallowes and C.J.Stevens.
Janko Teoharevski sought review of a DSS decision to refuse him a pension under section 24A of the *Social Security Act.*

That section provides that a person who is residing outside Australia and meets a series of other residence requirements, and who had become 'permanently incapacitated for work or permanently blind' while in Australia, will qualify for invalid pension if he or she 'is a person who, in the opinion of the Secretary, is in special need of financial assistance'.

In the present case, there was no dispute that Teoharevski met the residence requirements.

'Permanently incapacitated for work'
The applicant was almost 78 years old. He suffered from back problems, an amputated left toe, high blood pressure, chronic bronchitis and at least one eye cataract. The AAT concluded that he was permanently incapacitated for work.

Permanently incapacitated in Australia?
Teoharevski had suffered an injury at work in Australia in 1965, which led

to his left toe being amputated and his receiving worker's compensation payments for partial disability over a 2-month period. He then worked for about 3 months before leaving Australia in 1965, aged 57, and had not worked since.

In the absence of contrary medical opinion, the AAT could not infer from this evidence that the cause of Teoharevski's permanent incapacity had arisen in Australia.

Was the applicant 'in special need'?
The AAT referred to *Hanahoe* (1983) 12 *SSR* 118, *Schlageter* (1985) 26 *SSR* 317; *Harris* (1985) 25 *SSR* 299; and *Buttigieg* (1984) 17 *SSR* 178.

Harris established that 'special need' was not measured by comparing the difference between the pension provided by the applicant's home country and what he would receive from the Australian pension. *Buttigieg* suggested that 'special need' referred to the contribution an applicant had made to Australia which made him or her deserving of some financial support.

The AAT concluded that Teoharevski had made no contribution to Australia apart from 4 years' employment 19 years ago. He was compensated for the injuries he had suffered then and was medically treated so that he was able to return to work for a short time before he left Australia. He was in no greater need than any other person in similar circumstances.

Formal decision
The AAT affirmed the decision under review.

Invalid pension: 'permanently blind'

COWLEY and SECRETARY TO DSS (No. V86/19)
Decided: 5 September 1986 by I.R. Thompson.

Michael Cowley had been granted an invalid pension in 1980 on the ground that he was permanently incapacitated for work. He was suffering from a number of complaints, including chest and back pains, depression, claustrophobia, irritability and headaches; but his most significant disability was defective eyesight.

In early 1985 the DSS discovered that Cowley was working full-time as a tractor driver in an orchard and it cancelled his invalid pension. Cowley asked the AAT to review that decision.

The legislation
Section 24 of the *Social Security Act* provides that a person who meets age and residence requirements is qualified for an invalid pension if the person 'is permanently incapacitated for work or permanently blind'.

Section 28(2) provides that the rate of an invalid pension is to be reduced by reference to the person's income, unless the person is 'permanently blind', in which case his invalid pension is free of the income test.

Permanently blind?
Expert evidence was given to the AAT that, without glasses, C's visual acuity was 7% in the right eye and 20% in the left eye; but that, with glasses, his right visual acuity improved to 15% and his left visual acuity to 40%. However, taking into account his loss of visual field, his corrected visual function had been assessed at less than 5% in the right eye and only 20% in the left eye.

The AAT decided that Cowley was not 'permanently blind' as that term was used in the *Social Security Act*. After referring to a number of previous decisions, the AAT said that it preferred -

> 'the view expressed . . . in *Leach* (1983) 13 *SSR* 135 that 'permanently blind' means totally blind, subject to the qualification that a person is to be regarded as totally blind where he is so severely blind that the effect of the blindness on his day-to-day living is essentially the same as the effect of total blindness. I have no doubt that, in order to ascertain whether a person is permanently blind, his vision has to be tested when corrected by glasses or contact lenses, unless he cannot for any reason wear glasses or use contact lenses.'

(Reasons, para.11)

On that approach, the AAT said, Cowley could not be regarded as 'permanently blind', even though his total functional visual disability had been calculated as exceeding 85%, because he was able to go about his day-to-day living in a fairly normal manner.

Permanently incapacitated for work?
Cowley had worked as a fruit picker during the 1984 fruit picking season and as a tractor driver during the 1985 fruit picking season. On each occasion he had performed his work adequately.

But his former employer told the AAT that, in view of Cowley's defective vision, he would not re-employ him as a tractor driver: and an eye specialist said that Cowley's eyesight was so bad that he should not drive a tractor. In any event, as Cowley did not hold and could not obtain a driver's licence, it would be impossible for him to travel from his home to the orchard where he had worked.

Cowley told the AAT that, from about November 1985, he had been employed as the manager of a pinball parlour in the country town where he lived, being paid $151 for working some 90 (ninety!) hours a week.

Cowley was 41 years of age, had only received a minimal education, had never held any employment which required more than elementary literacy or numeracy and had received no trade training nor had he performed any skilled or semi-skilled work.

The AAT said that the question whether a person was 'permanently incapacitated for work' within s.24 of the *Social Security Act* depended on whether the person was able to obtain work. In the present case, because Cowley was unable to obtain a driver's licence and because his poor eyesight made it unsafe for him to ride a bicycle on a public road, work as a fruit picker or other farm work must be regarded as out of the question.

In assessing a person's ability to obtain work, it was necessary (the AAT said) to test the person's capacity to attract an employer -

> 'by reference to the open labour market, not to employment situations where jobs are provided only out of sympathy or because of personal relationships or other special circumstances related to particular individual employees. Similarly, I am satisfied, it is not to be tested by reference to employment situations where employees' inability to attract employers to employ them on the terms and conditions on which able-bodied employees are normally employed is exploited and the terms and conditions of their employment are grossly subnormal. The fact that the applicant is currently employed to manage the pinball parlour does not, therefore, establish that he has an ability to attract an employer on the open labour market.

(Reasons, para.23)

The AAT said that, taking into account Cowley's age, his poor education, his limited work experience, his lack of skills and qualifications and his physical disabilities, he was unable to 'attract an employer to employ him on proper terms and conditions in any work that he has capacity to do': Reasons, para.25. Applying the test in *Panke* (1981 2 *SSR* 9, he should be regarded as incapacitated for work within s.24 of the *Social Security Act*. That incapacity was properly described as permanent for there was no suggestion that his condition would improve.

The AAT said that, although Cowley's past and current employment did not prevent a finding that he was qualified to receive invalid pension, his income from that employment would have to be taken into account under s.28(2) in determining the rate at which his invalid pension should be paid.