In 1978, the DSS had suspended an invalid pension held by Vasilios Petropoulos, then a 55-year-old immigrant from Greece.

This suspension had followed a medical examination by a government doctor, and had occurred during the DSS reaction to what was known as 'the Greek conspiracy'. The examination had reported that Petropoulos was not 85% permanently incapacitated for work.

Petropoulos then travelled to Greece for treatment to his back. In 1979, the DSS cancelled Petropoulos' pension. He returned to Australia in 1985, was granted sickness benefits and appealed to the AAT against the suspension and cancellation of his invalid pension.

The evidence

There was very little medical evidence relating to Petropoulos' condition at the time of the suspension and cancellation of his pension - other than the report of the government doctor who had examined him in 1978. There was conflicting opinion about his present condition: at most, it appeared that he was now physically incapable of heavy manual work and had a chronic anxiety state.

It appeared that the Commonwealth government had agreed to pay Petropoulos compensation of $5,040 because of the circumstances surrounding the suspension and cancellation of his pension. His counsel argued that this fact, and the general atmosphere surrounding the 1978 medical examination, should be used to discount the report from that examination.

The Tribunal's view

The AAT refused to discount the 1978 medical examination, which it said was confirmed by some of the more recent medical opinions. It said that there was no evidence that the government doctor had been prejudiced by the the 'public atmosphere' generated by the accusation that a 'Greek conspiracy' existed. And the payment of compensation to Petropoulos did not help him prove that his pension should not have been suspended or cancelled, because the compensation only related to the *way* in which the DSS had handled the suspension and cancellation:

> 'As we understand the position, compensation has been awarded as redress for the way in which the applicant was treated (humiliation, administrative abuse, deterioration in health and economic hardship) when his pension was suspended and in the immediately following period of roughly two months. The cancellation of the pension is an issue separate from that of the compensation.'

(Reasons, para.27.)

Formal decision

The AAT *affirmed* the decision under review.

'Income'

Re KELLENERS and SECRETARY TO DSS
(No.V86/520)
Decided: 4 June 1987 by H.E. Hallowes.

The AAT *affirmed* a DSS decision that a pension from the Netherlands government, paid to Amalia Kelleners as compensation for war-time persecution at the hands of Japanese military forces, was 'income', within s.6(1) of the *Social Security Act*, for the purposes of the widow's pension income test.

The relevant Netherlands legislation provided that the pension was paid where a person was unable to earn an income through work, as a result of war-time persecution. The AAT followed the decision in *Zolotenki* (noted in this *Reporter*) and cited the Federal Court decisions in *Marsh* (1986) ASSC 90,211 and *Read* (also noted in this *Reporter*) and described the Netherlands pension as 'moneys . . . received by' Kelleners, which amounted to a 'periodical payment' within the s.6(1) definition of 'income'.

Re ZOLOTENKI and SECRETARY TO DSS
(No.S86/96)
Decided: 26 April 1987 by F.R. Fisher J., R.A. Layton and D.B. Williams.

Zbigniew Zolotenki had been granted an age pension in 1979. At the time, the DSS had treated as 'income' a war restitution pension being paid to him by the West German government.

In 1985, following the AAT decision in *Kolodziej* (1985) 26 *SSR* 315, Zolotenki asked the DSS to reassess his pension. When the DSS continued to treat his war restitution pension as 'income', Zolotenki appealed to an SSAT and then to the AAT.

The legislation

This appeal raised the single question whether a war restitution pension, paid under German legislation should be treated as 'income' under s.6(1) of the *Social Security Act*, which defines the term as meaning -

> 'personal earnings, moneys, valuable consideration or profits *whether of a capital nature or not* earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever, within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance . . .'

The italicised words were added to the definition following the AAT's decision in *Read* (1986) 33 *SSR* 420, with effect from 27 October 1987.

'Income' includes war restitution pension

The AAT noted that the German pension was paid largely as compensation for his loss of earning capacity, caused by ill-treatment during the Second World War. The Tribunal said that if, as the Federal Court had decided in *Read* (noted in this issue of the *Reporter*) the word 'income' should be given a broad meaning so as to include receipts of a capital nature, the periodical payments received by the applicant would constitute income within that definition, as a 'payment . . . by way of allowance'. The 1986 amendment of the definition, the AAT said,

> 'merely reinforce[s] the view that the definition of "income" in sub-s.6(1) of the Act is a broad definition which did not exclude payment by way of capital . . .'

(Reasons, para.39.)

Even if the term 'income' were given a narrow meaning so as to exclude receipts of a capital nature, the pension being paid to the applicant, as compensation for loss of earning capacity, would fall within that meaning, the Tribunal said. In coming to this conclusion, the Tribunal followed the earlier decision in *Teller* (1985) 25 *SSR* 298; and declined to follow the two decisions in *Artwinska* (1985) 24 *SSR* 287 and *Kolodziej* (1985) 26 *SSR* 315.

Formal decision

The AAT *affirmed* the decision under review.

Re NEMAZ and SECRETARY TO DSS
(No.N86/719)
Decided: 28 May 1987 by C.J. Bannon, J.H. McClintock and G.P. Nicholls.

Oliviero Nemaz and his wife had migrated to Australia from Italy in 1957. They were granted age pension by the DSS in 1985. The DSS decided that Italian social security pensions paid to each of them should be treated as income under the age pension income test.

Nemaz appealed directly to the AAT against this decision. This was one of the very few cases in which the

Secretary to the DSS certified, under s.15A(2)(b) of the *Social Security Act*, that the appeal raised an important principle of general application.

The legislation
This appeal hinged on the question whether the Italian social security pensions should be regarded as 'income' as that term was defined in s.6(1) of the *Social Security Act*. The terms of this definition are set out in *Zolotenki*, noted in this issue of the *Reporter*.

The Italian pension scheme
Before migrating to Australia, Nemaz had worked in Italy and had made contributions from his earnings to INPS, a national body whose directors were nominated by the Italian government from employer groups, trade unions and civil servants.

INPS maintained a fund, to which workers, employers and the government contributed, and from which pensions (including age pensions) were paid to persons who had established their entitlement through contributions. Pensions were paid in quarterly instalments, with an extra 'Christmas' payment each year. Under the rules of INPS, the level of pension paid to an eligible person related to that person's wages rather than to her or his contributions to the fund.

The AAT's decision
The Tribunal decided that the pension payments did amount to 'income' within s.6(1):

> 'In our opinion the periodicity of the payments, their lack of relationship to the contributions of the member and the general scheme of the Italian social welfare as applied to INPS members make it apparent that such pension payments are income within the meaning of s.6(1) of the Act as well as in the ordinary sense of the word "income".'

(Reasons, p.7.)

The AAT also held that Italian income tax, deducted from the Italian pension at source, should be included in the calculation of the applicant's 'income' because, under the terms of the Australian-Italian double tax treaty, that tax was refundable to the applicant:

> 'If the applicant had derived his income in Australia there would be no question but that pay-as-you-earn tax deductions from salary would be treated as earnings derived by a person for his own benefit insofar as they are credited against any tax assessment or refunded if no tax is payable. We see no different result when the tax is deducted in Italy and subsequently refunded.'

(Reasons, p.8.)

Formal decision
The AAT *affirmed* the decision under review.

[redacted]

Re EVANS and SECRETARY TO DSS (No.S86/187)
Decided: 28 May 1987 by J.A. Kiosoglous and D.B. Williams.

The AAT *affirmed* a DSS decision that a war disability pension, paid by the United Kingdom government to an Australian invalid pensioner was 'income' within s.6(1) of the *Social Security Act*.

Accordingly, the AAT concluded, the pension should be taken into account in assessing the rate of invalid pension payable to Evans. This was despite the fact that the pension was intended to compensate the applicant for interference with his normal living and was not intended as compensation for any loss of capacity for work. The AAT referred to the Federal Court decision in *Read* (see this issue of the *Reporter*), which established that -

> 'the definition of "income" is not to be restricted to receipts which would ordinarily be income but must be construed to include some capital receipts. Thus even if the UK war pension is properly classified as compensation for pain and suffering (that is a payment of a capital nature) rather than compensation for loss of income, it still may be income within the meaning of the Act.'

(Reasons, para.19.)

The pension payments could be described as 'moneys . . . received . . . from any source whatsoever, within or outside Australia'; and as 'a periodical payment or benefit by way of . . . allowance', the AAT said.

Family allowance: temporary absence

MAHFOUZ and SECRETARY TO DSS
(No. N86/531)
Decided: 20 February 1987 by R.A. Hayes, J.H. McClintock and M.T. Lewis

Shahid Mahfouz applied to the AAT for review of a decision to cancel the payment of family allowance in respect of his three children in Lebanon. The applicant first came to Australia in 1968, married and had three children. In 1978 they visited Lebanon to be with the applicant's ill father and remained there until the applicant returned in 1985 and the rest of the family in August 1986.

Family allowance had been paid prior to 1978 and was suspended prior to their departure in 1978 as at that time it was not expected that they would be absent for more than twelve months. On his return the applicant claimed family allowance for his children in Lebanon. The DSS eventually conceded that he was entitled to family allowance from the date of his departure in 1978 to March 1980 and from the date of his application on his return in September 1985.

The reason why the DSS accepted eligibility until March 1980 was that the main purpose for the applicant and his family returning to Lebanon was to be with his ill father. The father died in September 1979. Allowing for a customary three month mourning period, March 1980 could be taken to be the date beyond which the applicant's absence from Australia could not be described as temporary for the purpose of being with his ill father.

The question for the AAT to determine was whether the applicant was entitled to arrears of family allowance for the period between 1980 and 1985.

The legislation
The legislation had been amended a number of times over the relevant period. The Tribunal decided that the appropriate provision to apply was that which existed at the time that the original decision to cancel payment would have been made.[The Tribunal referred to the 'conceptual decision' made in this case. Apparently this is in reference to the absence of clarity as to at what point cessation of payments actually took place after the applicant and his family had returned to Lebanon. It was only upon the new application being made upon his return that caused a 'decision' to be made that cancellation should have been made in March 1980.]

Thus the relevant provision to be applied was s.103(1)(d) and (e) of the *Social Security Act* which provided:

> '...An endowment payable to an endowee...ceases to be payable