Immigration and asked for permanent residency. This was granted on 12 May 1988.

The Decision

The AAT accepted that, when Toli arrived in Australia, she did so with the hope of settling here permanently. Changes in the *Social Security Act* necessitated splitting the application into 3 periods, 15 May 1982 - 14 August 1982, 15 August 1982 - 24 October 1983 and 25 October 1983 - 15 September 1987. It was not disputed that no entitlement to family allowance existed for the second period.

During the first period, s.96(1)(a)(ii) required a claimant not born in Australia to have had, during the immediately preceding 12 months, her usual place of residence in Australia. This did not apply if the Secretary was satisfied that the claimant and child were likely to remain permanently in Australia: s.96(2)(a). The AAT rejected Toli's argument that s.96(2)(a) should be applied to establish an entitlement to family allowance for the first period. Her own false statement made the section irrelevant, and if the Secretary had been aware of her prohibited non-citizen status he would not have been satisfied she was likely to remain permanently in Australia.

Toli argued that during the third period she met the criteria in the then s.96(1)(a)(ii). The AAT rejected this on the ground that her residence in Australia was 'highly unusual in that it was not lawful'. Illegal residence in Australia could not found an entitlement to family allowance, the AAT said.

Formal decision

The AAT affirmed the DSS decision to cancel Toli's family allowance and recover $4881 from her.

[B.W.]

Invalid pension: special needs

PORCARO and SECRETARY TO DSS

(No. S85/38)

Decided: 2 August 1988 by J.A. Kiosoglous.

Domenico Porcaro appealed against a decision by the DSS to refuse his claim for a special needs invalid pension, on the ground that he had not become permanently incapacitated for work whilst in Australia. Porcaro did not appear before the AAT.

The evidence

Porcaro was a 50-year-old Italian-born single man who migrated to Australia in 1956. He returned to Italy in 1968 and had not been back to Australia. It appeared that he had an operation for a right inguinal hernia and removal of the right testicle in 1957, the hernia arising from his employment in Australia. Porcaro had a number of employers after this incident, in both Australia and Italy, although he said that he continued to suffer severe pain.

Porcaro's Italian doctor confirmed he was treating Porcaro for pain and persistent tumefaction. The Australian doctor who had performed the operation in 1957 said that there had been no post-operative complications and he would have expected no sequelae from the operation.

Porcaro had complained of interference with his sex life from the operation; the Australian doctor suggested this was entirely psychological. Other Italian medical reports confirmed anxiety depression and psychogenic impotence.

The legislation

The then s.24A of the *Social Security Act* [now numbered s.29] provided that a person who was permanently incapacitated for work, who became permanently incapacitated for work while in Australia, who had not resided in Australia since 7 May 1973 and who was 'in special need of financial assistance' was eligible for an invalid pension.

The AAT's decision

The DSS conceded and the AAT accepted that Porcaro was permanently incapacitated for work. The AAT also accepted that Porcaro had not resided in Australia since 7 May 1973. It also appeared that the DSS conceded and the AAT found that Porcaro's incapacity for work arose whilst in Australia (para.22).

However, the AAT apparently changed its mind on two of these points. While considering the question of Porcaro's financial need, the AAT asserted (inconsistently with its previous finding, but consistently with the evidence that Porcaro had worked after the operation in both Australia and Italy) that Porcaro had not become permanently incapacitated for work while in Australia. The AAT also found that, given Porcaro's employment or receipt of Italian sickness benfit payments, he was not in financial need.

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Income test: Indian pensions not 'derived'

HOOGEWERF and SECRETARY TO DSS

(No. Q88/63)

Decided: 10 August 1988 by D.W. Muller.

The AAT *set aside* a DSS decision that Indian pensions paid into the Hoogewerf's bank account in Bombay fell within the definition of 'income' as defined in s.3(1) of the *Social Security Act*, as 'moneys earned [or] derived' by them.

Mr Hoogewerf had worked from 1947 until 1974 in the Indian Customs Service. On retirement he and his wife were entitled to Indian pensions which were paid into their joint bank account in India. Indian Exchange Control Regulations prevented the funds being remitted abroad.

When the Hoogewerfs left India in 1974, they were permitted by the Indian Government to take only three pounds sterling each. Applications to the Reserve Bank of India to take out more were refused. They arrived in Australia in August 1974 and both worked here until they retired in 1986 and 1987. Both applied for age pension in early 1987.

The Hoogewerfs took holidays in India in 1976, 1979, 1982 and 1987. On each occasion they used money from the Indian pensions for certain living expenses. They were obliged to use Australian funds to pay their air fares and hotel accounts as these had to be paid for in 'foreign currency'.

Mrs Hoogewerf now suffered from Parkinson's disease and was unlikely to visit India again. Mr Hoogewerf did not rule out the possibility that he might visit India again, but pointed out that the cost of travelling to India exceeded the annual value of their Indian pensions.

The AAT said it was impractical for the Hoogewerfs, at their age and with their reduced resources, to purchase air tickets to fly to India every three years to use their Indian pensions. The