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

prospect of the pension moneys ever being transferred to Australia was so remote as to make the entitlement to them either nugatory or of no relevant benefit. The Indian pensions were not 'moneys earned' nor 'moneys derived' as they were now of no 'use or benefit' to the Hoogewerfs. This was enough to distinguish the present case from the Federal Court decision in *Inguanti* (1988) 44 *SSR* 568.

[B.W.]

Recovery of overpayment: double punishment

COLMER and SECRETARY TO DSS

(No. S87/253 and 254)

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

The applicants appealed against decisions to recover overpayments of invalid and wife's pension pursuant to s.140 of the *Social Security Act*. Both had worked under false names and had failed to advise the DSS of their employment. As a result Mr Colmer was overpaid $8463 and Mrs Colmer $5528. Each was convicted of fraud and sentenced to 12 months' imprisonment with a non-parole period of 9 months.

At the time of their imprisonment the financial affairs of the Colmers were 'in a very poor state' brought about by mortgage arrears on their home and arrears of outstanding domestic accounts. Both were in ill health.

Mr and Mrs Colmer were in gaol from 27 March 1986 until 9 September 1986. On 4 August 1986 their adopted son committed suicide. This and the ill-health of another son led to the Colmers being released from gaol for 'compassionate' reasons.

Following their release, the DSS again sought to recover the overpayments from on-going pension entitlements. An appeal to the SSAT succeeded on the grounds of financial hardship and that in sentencing them to imprisonment the magistrate meant this to be a 'once-only punishment'.

The AAT was given details of the Colmers' financial circumstances. The DSS argued that the only issue for determination was whether it was appropriate for the decision-maker to exercise his discretion to waive or write-off or defer the debt to some future date. It disputed argument for the Colmers that, if they were obliged to repay the overpayments, this would amount to a further punishment in addition to the term of imprisonment. The AAT felt it appropriate to consider the issue of double punishment.

In so doing it approved the case of *Letts* (1984) 23 *SSR* 269 in which Davies J considered the concept of 'double punishment'. The failure on the part of the prosecution to ask for reparation did not bind the Secretary to the DSS. There was no evidence that the trial judge imposed a sentence upon the view that Letts would not have to repay the moneys which he improperly received.

The AAT agreed. There was no evidence that, when the magistrate imposed the sentence, she did so with the view that the Colmers would not have to repay the overpayment. The fact that the prosecution had omitted to ask for an order seeking reparation did not restrain the DSS from exercising its powers under s.140(2).

> 'Accordingly, in this Tribunal's view the respondent has every right to pursue recovery action in this matter, provided only that the applicants' financial circumstances are such that recovery does not cause them undue hardship.'

The AAT went on to consider the financial circumstances of the appellants. It found that they had received public moneys to which they were not entitled; the overpayments arose as a result of dishonesty; though their financial circumstances were 'strained' they were not in 'extreme hardship'. But their financial circumstances did indicate that recovery should be delayed. The AAT rejected the DSS argument that the Colmers' home could be used to secure a further debt to repay the overpayment as 'this would only increase the debts already outstanding'. However, the AAT saw no reason why the house should not be used as equity at a future date after the mortgage had been fully repaid.

The Tribunal said the case was one in which there was a clear case of fraud and dishonesty, yet it was inconsistent with social welfare principles to impose an undesirably heavy burden on the applicants. The AAT decided against the exercise of the discretion in s.146 but recommended the Colmers make an acceptable offer to the DSS to repay half the overpayments and that the Secretary exercise the discretion under s.146 to accept part repayment.

[B.W.]

Recovery of overpayment

GIDDENS and SECRETARY TO DSS

(No. W87/178)

Decided: 29 April 1988 by R.D. Nicholson.

The AAT *varied* a DSS decision to recover an overpayment of widow's pension, amounting to $1325, from Maureen Giddens.

The overpayment had occurred because of changes in Giddens' earnings from part-time employment, and her failure promptly to inform the DSS of these changes.

Giddens was now earning about $190 a week, net, and had regular outgoings of about $170. Her only assets were an old car, furniture and personal effects. She had offered to pay off the overpayment at the rate of $5 a week.

The AAT said that the debt should not be waived or written off, under s.186(1) of the Social Security Act, because of Giddens' offer to pay it off.

However, bearing in mind Giddens' marginal finances, the presence of negligence, rather than fraud, on her part and the fact that public money was involved, the overpayment should be recovered by instalments, 'in amounts and for periods determined by the Respondent': Reasons, p.7.

[P.H.]

Supporting parent benefit: custody, care, and control

LEAHY AND SECRETARY TO DSS

(No. D87/2)

Decided: 4 August 1988 by R.C. Jennings.

Mary Leahy was receiving invalid pension on the ground of schizophrenia. She was refused additional pension for her 16-year-old daughter Loanne, as the delegate considered Mary did not have 'custody, care and control' of Loanne. Leahy asked the AAT to review this refusal.