care of his grandparents. The field officer prepared a written statement, in English, and had Mr Hakala sign it.

Leppala gave evidence that she lived with her parents from R's birth until he was about 9. She lived at various addresses but returned with R to her parents' home when he was 10, and again for a period when he was 11. She was in gaol for about 4 months in late 1981 and during this time R was looked after by her parents. Upon her release she lived with her parents for a while and then, in about 1981, moved out and then back to her parents. Throughout the period in question R attended a special school. Leppala said that during the times she and R lived with her parents she looked after R.

Leppala said that, before the 2 younger children were removed from her care in November 1980, she was visited regularly by a welfare worker, and she thought that 'the welfare' dealt with pensions as well as child welfare matters and therefore the DSS knew about the children being removed from her care.

Mr Hakala was elderly, in poor health, and gave vague answers to the AAT. His wife had died 3 years earlier. He said R did not always live at his place, but lived with his mother. When his mother was in prison, R was looked after by Hakala and his wife. He remembered signing a document at the request of field officers but said he did not know what was in it. Mr Hakala identified his late wife's signature on another statement in which it was noted that Mrs Hakala had the care, custody and control of R for the last 2 years.

An officer of the State Department of Family and Community Services testified that from May 1981 he had supervised Leppala's 3 children for about 18 months. All his conversations at the home had been with Mr and Mrs Hakala and R, and he saw Leppala at that home on one occasion only. He had arranged access for the Hakalas to the other 2 children and on one occasion Leppala had unexpectedly attended an access meeting. He had understood from the Hakalas and from R that the applicant could not be located.

The decision

The AAT found the evidence to be sketchy and incomplete. Leppala's inability to tell the whole story could be explained by her alcoholism, rather than because she was untruthful.

The Tribunal found, 'not without some hesitation', that on the balance of probabilities R was in his mother's care except for the period of her imprisonment. As R was not in her custody, care and control during her imprisonment she was overpaid the whole of the widow's pension for that period.

In addition she was overpaid in respect of her 2 younger children from 11 November 1980 until 11 February 1982. There was no evidence that she had notified when the children ceased to be in her custody, care and control and accordingly the total amount overpaid was recoverable.

The AAT said that it could not determine the exact amount recoverable, the extent to which it should be recovered, and the manner of recovery, in the absence of an accurate calculation of the overpayment, and of evidence which might have bearing upon the exercise of the discretion.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with its findings and directions.

[B.W.]

Dependent children overseas - additional pension?

CALLEYA and SECRETARY TO DSS

(No. T88/113)

Decided: 5 May 1989 by R.C. Jennings.

Calleya appealed against a decision to cancel his additional invalid pension for dependent children.

Calleya first received an invalid pension in 1976. At that stage he was married and had 2 Australian-born children. In December 1978 he returned to Malta, and 2 more children were born there.

Until 1 October 1987, Calleya received additional pension for his dependent children, the *Social Security Act* providing for payment if the children were living with him and were dependent on him.

Legislative changes

During 1987 and 1988, a number of amendments were made to the *Social Security Act*, (see Act Nos 88, 130 and 58 of 1988) affecting the definition of 'Australian resident' and 'dependent child'. The effect of these changes was that, from 1 October 1987, a person was only to be treated as a 'dependent child' if, as well as fulfilling the basic definition in s.3(1), the person met one of the following requirements, set out in s.3(10):

> '(a)the child is an Australian resident;
>
> (b) the child is living with the person while the person is an Australian resident;
>
> (c) the child had been an Australian resident and is living with the person outside Australia; or
>
> (d) the child has been living with the person in Australia and is living with the person outside Australia.'

'Australian resident' is defined in s.3(1) as meaning a person who resides in Australia and who meets one of the requirements as to legal status - either an Australian citizen, the holder of a non-temporary entry permit or a return visa under the *Migration Act*, or a person covered by s.8(1) of the *Migration Act* (which was not relevant here).

No additional pension payable

The Tribunal concluded that extra payments for the 2 younger children had been correctly cancelled. Although they had visited Australia for 3 months with Mrs Calleya, there was no evidence that they had lived with their father in Australia as required by the two provisions relied on (s.3(10)(b) and (d)) nor were they Australian residents.

The Tribunal stated:

> 'It is apparent that it was the intention of the legislative changes which began in Parliament in May 1987 to deprive overseas pensioners of benefits for their children except in special circumstances. In my opinion the legislation which has been enacted has achieved that purpose at least so far as this applicant is concerned.'

(Reasons, p.6)

Formal decision

The AAT affirmed the decision under review.

[J.M.]