incapacity 'is directly caused by a permanent physical or mental impairment of the person'.

The evidence

Jarrett had worked in a number of relatively unskilled jobs — as a waitress, cleaner, hospital orderly, kitchen hand, and process worker. She had last worked in 1981 when a combination of problems had obliged her to stop working.

These problems included carpal tunnel syndrome in her right hand (which had resulted in a substantial loss of strength in that hand), a degenerative disc disease in her lumbar spine and degeneration in the cervical spine. An orthopaedic specialist expressed the opinion that Jarrett was capable of light work but could not work as a cleaner. Another orthopaedic surgeon expressed the opinion that Jarrett was at least 85% permanently incapacitated for work because of a variety of conditions, including her spinal and wrist problems, arthritis in her feet and toes, a hiatus hernia, anxiety and an ulcer. Jarrett's treating general practitioner supported this assessment.

Jarrett told the Tribunal that she had serious difficulties in performing heavier household tasks, that she was only able to sit for short periods and had difficulty using her hands. A social work report was presented to the AAT. According to this report, it was unlikely that Jarrett could attract an employer; and, even if she were able to find employment, it was unlikely that she could work through a normal working day, even on light duties.

The AAT's decision

The Tribunal noted that Jarrett was 55 years of age and had completed only 7 years of education. Her only significant work experience had been as a cleaner and in heavy domestic work. There was no evidence that she had the skills needed for light work, such as operating a telephone.

Taking into account all Jarrett's disabilities, her age, previous work experience and the type of paid work available in the community, the AAT was satisfied that she was at least 85% incapacitated for work. At least 50% of that incapacity, the AAT said, was 'due to a permanent physical incapacity' [sic]: Reasons, para. 34.

Formal decision

The AAT set aside the decision of the Secretary and substituted a decision that Jarrett was entitled to invalid pension from July 1987.

[P.H.]

Overpayment waiver: 'double punishment' and delay in recovery

FORD and SECRETARY TO DSS (No. 5553)
Decided: 19 December 1989 by D.W. Muller, K.J. Lynch and J.D. Horrigan.

Paul Ford sought review by the AAT of a decision permitting the DSS to recover overpayments which arose between 1975 and 1977.

The facts

In 1977 Ford was sentenced to a total of 2 years' imprisonment on 18 counts of imposition on the Commonwealth. As a result of committing those offences, he was overpaid a total of $5453.

After considering a transcript of the sentencing proceedings, the AAT was 'in no doubt that, when Mr Ford was sentenced in 1977, he was given an extra punishment because the sentencing judge took the view that restitution was out of the question' Reasons, para. 8.

The decision to raise this overpayment was made in later 1977 and some benefits were withheld from Ford in November 1977. On 21 October 1985 a delegate of the Minister for Finance approved the write-off of the debt, then standing at $5319.54, subject to recovery from any future benefits that might be granted to Ford. No civil proceedings for recovery of the overpayments were ever instituted.

Ford lived in Italy from 1980 until 1986. In 1987 he received unemployment benefit and, by the time of the AAT hearing, 22 August 1989, he was receiving invalid pension from which $36.20 per fortnight was being withheld in recovery of the overpayment that arose between 1975 and 1977. (It would have taken about five and a half years to repay the debt at that rate.)

It was argued for Ford that there were a number of reasons for waiving the debt still owing but the AAT only relied on two of those — the delay in recovering the debt and double punishment because the unlikelihood of restitution led to Ford receiving extra punishment in 1977.

The legislation

Sections 251(2) and (3) of the *Social Security Act* set a 6-year limit on the commencement of proceedings for recovery of a debt under the Act. No such limit is referred to in ss. 246(1) and (2), the latter of which permits recovery by withholdings from ongoing social security payments. The discretion to waive a debt is contained in s.251(1)(b).

Delay in recovery action

Ford's barrister conceded that the DSS was entitled to recover the debt by way of the fortnightly withholdings from his invalid pension and pointed to the delay as a factor in favour of waiver. The AAT formed the view that 'twelve to fourteen years is an inordinately long period to wait before attempting to recover a debt': Reasons, para. 7.

Double punishment

The AAT found that 'if Mr Ford is now forced to repay the debt of 1977 he will be twice punished for the same series of offences insofar as the sentence of imprisonment was imposed on the basis that the applicant would not repay the money': Reasons, para. 8.

The AAT decision in *Letts* (1984) 23 *SSR* 269 was distinguished because in that case there was no evidence that the trial judge imposed a sentence on the assumption that the applicant would not have to repay the moneys which he had improperly received.

Formal decision

The AAT set aside the decision under review and decided that the right of the Commonwealth to recover any debt owing to it arising out of the overpayments during 1975, 1976 and 1977 which still remained unpaid after 1 January 1990 should be waived.

[D.M.]

Special benefit: resident of Australia

SECRETARY TO DSS and ETHEREDGE and HEMPLE (No. 5567)
Decided: 21 December 1989 by G.L. McDonald.

The Secretary to the DSS applied for review of an SSAT decision that Etheredge and Hemple were each eligible to receive special benefit.

The facts

Etheredge and Hemple were members of a Roman Catholic lay community. In 1984-5 the community lived in Israel; and in August 1985 they decided to sail to Vanuatu. Because of the weather they decided to travel around the south of Australia and obtained temporary entry permits to enter Australia between 1 December 1985 and 31 January 1986. On 22 January 1986 they berthed at Albany. Etheredge and Hemple were arrested on the following day and held in custody until 10 February 1986, pending an application for extradition to Israel. They were released on bail until 1 August 1986 and then were returned to custody until 8 April 1988 when they were extradited to Israel to face criminal charges.

After the Israeli criminal proceedings were concluded, Etheredge and Hemple returned to Australia on 12 June 1989, entering under temporary entry permits of 3 months duration. Those permits expired on 12 September 1989. On 23 October 1989 they were issued with a further permit for a 2-year period under which they were granted permission to work.

An Immigration Department officer gave evidence that she would not regard Etheredge and Hemple as *prima facie* eligible for permanent residence at the conclusion of the 2 year period. However, on 6 October 1989 the Minister for Immigration said in the Senate in answer to a question that 'short of criminality ... I imagine there will be a grant of permanent residence in 2 years time'.

Etheredge, Hemple and their community had expressed a strong desire to remain in Australia on a permanent basis. They were part of a lay community recognised by the Roman Catholic diocese of Bunbury and rented accommodation provided by the diocese. They were carrying out missionary work.

The legislation

Under s.129(3) of the *Social Security Act* 1947

> 'a special benefit is not payable to a person in respect of a period unless:
>
> (a) the person is a resident of Australia throughout that period; and
>
> (b) the person is not, at any time during the period, a prohibited non-citizen within the meaning of the *Migration Act* 1958.'

Decision under review

Apparently, the DSS rejected Etheredge's and Hemple's claims for special benefits solely on the basis of their residence status, without reference to the 'unable to earn a sufficient livelihood' criterion in s.129(1)(c) or the discretion under s.129(1). The SSAT dealt only cursorily with the sufficient livelihood issue and not at all with the discretion. As a result the AAT was 'of the view that the only "decision" which should be considered on this application was whether or not the respondents qualify pursuant to s.129(3) of the Act': Reasons, p.2.

Prohibited non-citizens

The AAT said that 'it is a requirement of the *Migration Act* 1958 that a non-citizen hold an entry permit and that unless a non-citizen holds an entry permit he or she is classified as a prohibited non-citizen'. (Reasons, p.7)

The AAT formed the view that neither Etheredge nor Hemple held such a permit for the period 12 September 1989 to 23 October 1989. In forming that view it was not accepted that correspondence tendered amounted to acknowledgment of the issuance of a new permit or an extension of the permit which expired on 12 September 1989. Consequently for the period 12 September to 23 October 1989, Etheredge and Hemple did not qualify for special benefit because of s.129(3)(b).

Resident of Australia

According to the AAT, the departmental guidelines on the meaning of 'a resident of Australia' should be regarded as inclusive but not as exclusive. The AAT said that

> '"residence" signifies a place or abode where a person lives on a voluntary basis. Its meaning has however been regarded as ambiguous as it may be susceptible to different interpretations depending on the context. It is often qualified in legislation by words such as "permanent", "temporary" or "ordinary". However, as used in s.129 of the Act it is unqualified and there is no reason to give it a restricted meaning.'
>
> (Reasons p.6)

The AAT decided that having regard to all the circumstances Etheredge and Hemple were 'residents of Australia' from 23 October 1989 onwards.

Formal decision

The AAT set aside the decision of the SSAT, substituted a decision that Etheredge and Hemple were residents of Australia for the purposes of s.129(3) from 23 October 1989 and remitted the matter to the DSS for further consideration.

[D.M.]

Child disability allowance: 'substantially more' care and attention

KYMANTIS and SECRETARY TO DSS
(No. 5625)
Decided: 15 January 1990 by H.E. Hallowes.

The issue presented in this appeal was whether the applicant, George Kymantis, was eligible for child disability allowance for his daughter, T.

Kymantis' wife had been granted handicapped child's allowance for T in 1979. In 1986, following the death of his wife, payment of the allowance was transferred to Kymantis. In 1987, payment was transferred to T's aunt, after T had gone to live with her.

In April 1988, Kymantis lodged a claim for child disability allowance after T returned to live with him. However, the DSS decided that the allowance was not payable because T did not need more care and attention than a child of the same age without a disability.

Kymantis appealed unsuccessfully to the SSAT and then asked the AAT to review the SSAT decision.

The legislation

Section 102 of the *Social Security Act* provides that a person is qualified to receive child disability allowance for a child where family allowance would be payable to the person for the child, the child is a 'disabled child' and the person provides care and attention for the child on a daily basis in their home.

Section 101 defines 'disabled child' as a child who has a physical or intellectual disability and who needs (permanently or for an extended period) daily care and attention from another person substantially more than the care and attention needed by a child of the same age without such a disability.

The evidence

T had a congenital defect, right hemiparesis, which had permanently weakened the right side of her body and removed her right field of vision. In 1987, she began to have epileptic seizures, for which she required regular medication.

Kymantis told the AAT that he constantly helped his daughter with