than be an expense to the community. He could have changed his mind, but did not do so until January 1991.

While the AAT considered that the DSS Policy Manual's interpretation of s. 125(2) was too restrictive, being concerned only with cases where there was a particular reason for failure to lodge within 14 days (such as bush fires, floods etc), it nonetheless concluded that Morse had not established grounds for the 5-month delay which would make it reasonable to pay his claim back to 16 August 1990.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Appeal out of time to AAT

GARVEY and SECRETARY TO DSS

(No. 7533)

Decided: 29 November 1991 by S.A. Forgie.

On 30 July 1991 Mr Garvey applied to the AAT for an extension of the time allowed for lodging an application for review of an SSAT decision made on 10 April 1991.

The legislation

Under s.29 of the *AAT Act* 1975 an applicant to the AAT is required to lodge an application within 28 days of the decision to be reviewed (here the SSAT decision). Section 29(7) states that the AAT may extend that time.

The facts

In December 1989 Mr Garvey was unsuccessful in a Full Federal Court Appeal (*Secretary to DSS v Garvey* (1989) 53 *SSR* 711) in which it was decided that losses from his rental properties could not be offset against other sources of income earned by himself and his wife. Accordingly his claim for invalid pension was rejected.

On 28 September 1990, Mr Garvey again applied for invalid pension which was again rejected by the DSS. The SSAT affirmed this decision on 10 April 1991.

Before the expiration of the 28-day period for applying to the AAT for review of the SSAT decision, Mr Garvey was hospitalised and remained in hospital until 12 June 1991. He did not apply to the AAT for an extension of time to lodge an application for review until 30 July 1991 because he was confused about the proper course to take as the SSAT had been given independent determinative powers since his last case. The AAT accepted as reasonable his explanations for delay in applying.

The principles to be applied

The AAT applied the principles relating to an application for extension of time under s.11 of the *Administrative Decisions (Judicial Review) Act* 1977, enunciated by Wilcox J. of the Federal Court in *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 58 ALR 305. These included, amongst other factors, that there be an acceptable explanation of the delay, the need for finality in disputes, prejudice to the respondent and the merits of the substantial application.

The AAT found that Mr Garvey was seeking to re-open the issues decided against him by the Full Federal Court in 1989. Mr Garvey argued that the definition of 'income' in the *Social Security Act* 1947 had been amended considerably since he lodged his first claim for an invalid pension by the addition of the words 'whether of a capital nature or not' after the words 'personal earnings, moneys, valuable consideration or profit'.

The AAT decided that this amendment merely clarified the meaning of 'income' rather than altering it and did not affect the considerations relevant to the issue of how to treat Mr Garvey's losses.

As there had been no other judgment of the Full Court or of the High Court since *Garvey*'s case was decided in 1989, the AAT concluded that his prospects of success on the substantive application were negligible and granting the extension 'would lead simply to re-litigation of the same issues which have already been argued and the conclusion inevitable': Reasons, para. 15.

Formal decision

The AAT refused the application for an extension of time within which to lodge the substantive application for review.

[D.M.]

Family allowance: payment of arrears

SECRETARY TO DSS and GARRATT

(No. 7463)

Decided: 10 October 1991 by T.W. Haines, J. Campbell and D. Coffey.

On 14 October 1989, the DSS sent a form to Garratt's last known address concerning her family allowance. (The nature of the form is not specified in the Reasons.) The form was returned on 27 October 1989 marked 'not at this address'.

DSS then cancelled Garratt's family allowance on 22 November 1989 and a letter notifying her of the decision was sent on that date to the same last known address. On 1 December 1989 it too was returned marked 'not at this address'.

Garratt later lodged a new claim for family allowance on 28 July 1990 and payment commenced from 25 July.

The issue in the present appeal was whether the family allowance was payable from the date of cancellation, 19 October 1989. In reliance on s.168(4) of the 1947 Act, the DSS submitted that arrears could not be paid because Garratt had not sought review of the cancellation decision within 3 months of being given notice of the decision.

The AAT said that the DSS had acted properly in cancelling Garratt's family allowance on the ground that it had lost contact with her. The question was whether Garratt had been given notice of that decision for the purpose of s.168(4)(a)(i). If so, a determination that payment be made from the date of effect of the earlier determination (the cancellation decision of 19 October) could only be made if the applicant sought review within 3 months after that notice was given.

No notice of cancellation

The AAT looked at the decisions in *Todd* (1989) 52 *SSR* 691 and *Shanahan* (1991) 61 *SSR* 691. In *Todd* a notice was found not to have been properly addressed within the meaning of s.29 of the *Acts Interpretation Act* 1901 (Cth) because Todd had notified the DSS that she was leaving that address.

In *Shanahan* notice was held to have been given even though Shanahan had

left the address. The AAT distinguished Shanahan because in that case no mail had been returned to the DSS, while in the present case the DSS was on notice, from the time that the letter of 14 October 1989 was returned, that Garratt was no longer living at that address.

The AAT said that the DSS could not rely on the last known address for the purpose of a notice under the Act. Accordingly, no notice was given to Garratt of the decision to cancel. Since the AAT was satisfied that Garratt remained qualified for the allowance at all relevant times, the AAT concluded that family allowance should be restored from the date of cancellation.

Formal decision

The AAT affirmed the SSAT decision that family allowance be restored from the date of cancellation.

[Comment: The AAT did not state which decision it was reviewing: the cancellation decision of 19 October (which it appeared to agree with) or the later decision to grant the claim of 28 July with effect (only) from 25 July. It appears not to have been the later decision, since the law relating to payment from a date earlier than the date of claim was not discussed.

If it was the cancellation decision that was under review, the question of arrears does not arise if that decision was affirmed. Section 168(4) of the *Social Security Act* 1991 limits payment of arrears by restricting the date of effect of a decision on review that sets aside or varies an earlier decision.

It would have been open to the AAT to set aside the DSS decision to cancel Garratt's family allowance: cancellation may not have been the preferable action on the part of the DSS when it was unable to locate Garratt; rather, suspension may have served the Department's purposes without unduly compromising Garratt's rights.]

[P.O'C.]

Double orphan's pension: father unknown

WILLIAMS and SECRETARY TO DSS

(No. 7719)

Decided: 31 January 1992 by P.W. Johnston, T.E. Barnett and J.G. Billings.

Jeanette Williams had held the lawful custody and guardianship of her grandson since he was about 6 months old. She was receiving family allowance for her grandchild.

The child's mother suffered from paranoid schizophrenia and had sustained a serious spinal injury. She was a mental hospital patient and was expected to remain so indefinitely. The identity of the child's father had never been known. (It appeared that the child was conceived while his mother was hitchhiking across Australia.)

Williams claimed a double orphan's pension for her grandchild. The AAT rejected the claim, and the SSAT affirmed that decision. Williams then appealed to the AAT.

The legislation

Section 95(1) of the *Social Security Act 1947* provided that a double orphan's pension was payable to a person qualified to receive family allowance for a child, where the child was a 'double orphan'.

According to s.94(1), a 'double orphan' was a child, both of whose parents were dead.

Section 94(4) declared that, where one of a child's parents was dead, the other parent should be deemed to be dead if–

(a) the whereabouts of the other parent are not known to the claimant; or

(b) the other parent is serving a life sentence or a sentence of not less than 10 years; or

(c) the other parent is a mental hospital patient, and the Secretary is satisfied that he or she will require care or treatment indefinitely.

Child's father not dead

There was, the AAT said, no ambiguity in the meaning of the term 'dead' in the 1947 Act, and that term should be confined to the physical or biological condition of death. It did not refer to a person whose identity was not known and who was therefore 'no longer in existence or use', to quote one of dictionary definitions of 'dead'.

Similarly, the term 'parent' in s.94 of the Act referred to the natural or biological mother or father of the child and not to a person who, as well as being the biological parent, took some parental responsibility for the child.

It followed that the unidentified father of Williams' grandchild was a 'parent' for the purposes of the *Social Security Act*, but could not be regarded as 'dead'.

The AAT said that, under s.94 of the *Social Security Act 1947*, at least one of a child's parents had to be dead in the conventional, biological sense, and the other parent deemed to be dead, before the child could be regarded as a double orphan.

There was no evidence, the AAT said, from which it could infer that the child's father (never identified) was now dead. An unexpected disappearance might suggest the possibility of death; but the father's disappearance in the present case was not unexpected – it was the very thing that was likely to have occurred, the AAT said.

Nor was the tribunal prepared to apply a presumption of death. There was nothing in the known facts which provided any basis for the presumption's application. There was nothing in the primary facts which pointed to the possibility of death as something reasonably open.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Special benefit: discretion

SANDHU and SECRETARY TO DSS

(No. 7849)

Decided: 26 March 1992 by J.R. Dwyer.

Tedja Sandhu migrated to Australia with his wife in May 1989. They had been sponsored by their daughter, who signed an assurance of support as did her husband.

At first, Mr and Mrs Sandhu lived in a provincial Victorian city with their daughter and son-in-law. However, because of friction within the family and because they could not practise