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

their religion in that city, they moved to Melbourne, where they rented a flat with an unmarried daughter. Mr and Mrs Sandhu paid their share of the rent from sickness benefits granted to Mr Sandhu.

In December 1990, Mr Sandhu turned 65 and ceased to be eligible for sickness benefit. He then applied for special benefit. The DSS rejected this claim and Mr Sandhu appealed to the SSAT. A majority of the SSAT affirmed the DSS decision and Mr Sandhu asked the AAT to review that decision.

**The legislation**

Section 129(1) of the *Social Security Act 1947* provided that the Secretary could 'in his discretion' grant a special benefit to a person to whom unemployment and special benefit were not payable, if the Secretary was satisfied that the person was 'unable to earn a sufficient livelihood'.

**The discretion**

It was accepted that Mr Sandhu met the basic eligibility criteria for special benefit – he was unable to earn a sufficient livelihood. The only question was whether the Secretary's discretion to grant special benefit should be exercised.

The AAT held, following *Sakaci* (1984) 6 ALD 383; 20 *SSR* 221, that the existence of the assurances of support signed by Mr Sandhu's daughter and son-in-law was irrelevant to the exercise of the discretion. The AAT also followed the approach outlined in *Sakaci*, that the actions of Mr and Mrs Sandhu were the best guide as to whether it was proper and reasonable for them to move out of the home of their daughter and son-in-law.

The AAT accepted, as the tribunal had in *Abi-Arraj* (1982) 4 ALD 604; 8 *SSR* 82, that Mr Sandhu's children had no obligation to support their parents.

Although Sandhu's unmarried daughter was now supporting them (from her nett income of $352 a week), this should not be permitted to affect the exercise of the discretion: she had undertaken to support them rather than put them out of the flat when special benefit was refused; she was suffering hardship through the provision of this support (she had been obliged to postpone her wedding); and she had at all times expected to be repaid the amounts spent in supporting her parents.

These factors persuaded the AAT that the present situation fell within para 24.353 of the DSS Benefits Manual. That paragraph declared that special benefit should not be refused where a person was receiving temporary assistance, especially where a claim for special benefit was pending. The AAT said that, where guide-lines were lawful and consistent with the Act, it was desirable for the tribunal to follow those guide-lines so as to promote consistency in decision-making.

The AAT said that to refuse special benefit to Mr Sandhu would impose an unjust burden on his unmarried daughter, who had never agreed to support her parents and could only do so with considerable hardship. To use her support of Mr and Mrs Sandhu as the reason for rejecting the claim would be to impose on her an obligation not imposed on adult children generally under the Australian social security system, namely an obligation to support her parents.

**The rate of benefit**

The AAT distinguished *Macapagal* (1984) 6 ALD 409; 21 *SSR* 236, and *Bahunek* (1985) 7 ALN N102; 24 *SSR* 287, which supported a reduced rate of benefit where the applicant was receiving board and lodging was being provided by a relative. That approach did not apply here, the AAT said, because Mr Sandhu had jointly leased the flat with his unmarried daughter and she was only providing her father and mother with temporary support. The maximum rate of benefit was the appropriate rate.

**Payment of arrears**

The AAT decided that Mr Sandhu should be paid special benefit from the time of his claim in January 1991, even though this involved payment of some 14 months of arrears of special benefit. The AAT discounted the observations in *Blackburn* (1982) 4 ALN N76; 5 *SSR* 53, to the effect that a retrospective payment would not be appropriate; and adopted the following passage from *Guven* (1983) 5 ALN N373; 17 *SSR* 173:

> 'Any applicant for special benefit in respect of a period in the past who succeeds after review by an SSAT or before the AAT will necessarily receive a retrospective payment, in view of the inevitable delays involved in the preparation, hearing and determination of applications for review.'

The AAT said that it followed logically from its decision that Mr Sandhu was entitled to be paid special benefit that he be paid that benefit as if his claim lodged on 22 January 1991 had been granted instead of being rejected: Reasons, para. 40.

**Formal decision**

The AAT set aside the decision under review and decided that special benefit be granted to Mr Sandhu pursuant to his claim lodged on 22 January 1991.

**[P.H.]**