social security legislation operated unjustly in their circumstances. Those cases were unusual.

Although the AAT considered that the application of the formulae was unfair to Chamberlain because she would have to pay more than she had received by way of compensation for economic loss, Kiefel J considered that this factor would be present in most cases and therefore could not in itself amount to a special circumstance.

> The basis for the Tribunal's view was its acceptance of what the parties to the settlement said had been offered and accepted for the economic loss component. It was far less than the statute assumed to be the case in applying the formulae. Again, however, this will be so in many, if not most, cases to which the act applies. Further, the extent of the difference from the basis upon which the parties acted could not provide the necessary 'special circumstance'. The statute has selected a figure which may operate in an arbitrary way.
>
> The statutory objectives in utilising the formulae, referred to above, must also be borne in mind. It is not intended that a decision-maker be required to consider contentions about what part of the compensation reflected the economic loss component. That is so whether one has regard to the application of the formulae or the discretion under s.1184. The latter does not alter the objective and must be read in light of it.
>
> In my view the Tribunal was in error in its assessment of 'special circumstances' and its decision must be set aside.

The Federal Court also considered that the AAT had failed to look at Chamberlain's personal circumstances in its assessment of the application of s.1184 of the Act and it was therefore appropriate to remit the matter back to the AAT for reconsideration of the question of 'special circumstances' in light of that information.

Formal decision

The decision of the AAT was set aside and the matter remitted to it for further consideration of the application of s.1184.

[A.T.]

Disability support pension: residential qualification; continuing inability to work

SECRETARY TO THE DFaCS v MICHAEL
(Federal Court of Australia)

Decided: 18 December 2001 by Drummond, Kiefel and Dowsett JJ.

Michael was born in Iran in May 1984. His family entered New Zealand as refugees and were citizens of that country. On 16 February 1999 Michael was diagnosed as suffering from autism, significant intellectual impairment, epilepsy and nocturnal enuresis. On 19 February 2000, Michael and his mother arrived in Australia and obtained permanent resident visas. When Michael approached 16 years of age he lodged a claim for disability support pension which was refused on the basis that he did not satisfy the residential qualifications for that pension. This decision was upheld by the SSAT, but set aside by the AAT.

The law

The qualification requirements for disability support pension are set out in s.94 of the *Social Security Act 1991* (the Act) as follows:

> **94.(1)** A person is qualified for disability support pension if:
>
> (a) the person has a physical, intellectual or psychiatric impairment; and
>
> (b) the person's impairment is of 20 points or more under the Impairment Tables; and
>
> (c) one of the following applies:
>
> (i) the person has a continuing inability to work;
>
> (ii) the Health Secretary has informed the Secretary that the person is participating in the supported wage system administered by the Health Department, stating the period for which the person is to participate in the system; and
>
> (d) the person has turned 16; and
>
> (e) the person either:
>
> (i) is an Australian resident at the time when the person first satisfies paragraph (c); or
>
> (ii) has 10 years qualifying Australian residence, or has a qualifying residence exemption for a disability support pension; or
>
> (iii) is born outside Australia and, at the time when the person first satisfies paragraph (c) the person:
>
> (A) is not an Australian resident; and
>
> (B) is a dependent child of an Australian resident;
>
> and the person becomes an Australian resident while a dependent child of an Australian resident.
>
> **94.(2)** A person has a **continuing inability to work** because of an impairment if the Secretary is satisfied that:
>
> (a) the impairment is of itself sufficient to prevent the person from doing any work within the next 2 years; and
>
> (b) either:
>
> (i) the impairment is of itself sufficient to prevent the person from undertaking educational or vocational training or on-the-job training during the next 2 years; or
>
> (ii) if the impairment does not prevent the person from undertaking educational or vocational training or on-the-job training — such training is unlikely (because of the impairment) to enable the person to do any work within the next 2 years.

The decision of the AAT

It was common ground that Michael satisfied ss.94(1)(a), (b), (c) and (d). Michael asserted that he also satisfied s.94(1)(e)(i). The Secretary argued that the condition which led to Michael's impairment for the purposes of ss.94(1)(a) and (b) had already been diagnosed in 1999 and his continuing inability to work for the purposes of s.94(1)(c) had therefore also arisen prior to his becoming an Australian resident. The AAT rejected that view and said:

> Given the focus of the concept of a 'continuing inability to work' upon a person's present ability and not upon some hypothetical ability in the future, it seems to me that a consideration of when a person first had that continuing inability must be grounded in a time when it would be expected that the person might work if he or she were able to do so and minded, when faced with the choice of furthering his or her studies, to do so. It would follow that it would not be relevant to consider the person's capacity for work as an infant when there would be no such expectation. That this is what is intended is confirmed by reference to the Minister's Second Reading Speech where the emphasis is upon people's moving into the labour market rather than remaining on what had until then been the invalid pension.

The AAT concluded that the provision requires assessment of inability as at 16 years of age. It was only at that time that Michael could be said to have an inability to work for the requisite period.

The decision of the Federal Court

The Secretary argued that s.94(2) requires that in order that there be a continuing inability to work, the relevant impairment be 'itself sufficient to prevent the person from doing any work

within the next two years' and this necessarily implies that other factors which might prevent a person from working were not relevant. In particular it was submitted that the person's age at the relevant time cannot be a relevant factor.

Michael's submission on the other hand was that he would not have worked, or perhaps could not legally have worked, until his 16th birthday and therefore had no continuing inability to work until that event, by which time he was an Australian resident.

The Federal Court rejected Michael's submission as being incorrect in law. As to the Secretary's submission, the Court considered that it failed to recognise the importance of the identified two-year period in the operation of section. The expression 'first satisfies paragraph (c)' could refer either to the first occasion on which a claimant is impaired from any cause so as to be unable to work for any two-year period, or it could refer to the time at which he or she first suffers the actual impairment which causes the continuing inability to work for the identified two-year period. The Court considered that the former approach was less satisfactory. On the other hand, the latter approach focused only upon the impairment relevant to the purposes of s.94(1)(c) and its effect during the identified period.

The Court therefore favoured a construction of s.94(1)(e)(i) which requires the decision maker to determine when the actual impairment identified for the purposes of ss.94(1)(a),(b) and (c) was first such as to prevent a claimant from doing any work within the two-year period identified for the purpose of s.94(1)(c). The Court noted that in most cases the decision maker would only have to determine whether or not the impairment, as it is at the relevant time, was present at the time at which the claimant became an Australian resident. It was only where the condition had become more or less acute, for example, that the matter would become more difficult.

As the AAT accepted that Michael was incapacitated so that he could not work as at the date when he became an Australian resident, but did not make a decision about incapacity for work during the appropriate two-year period, the appeal was allowed and the matter was remitted back to the AAT for further consideration.

Formal decision

The Federal Court allowed the appeal and remitted the matter back to the AAT for further consideration.

[A.T.]