8 to 9 months and the family had lived with her husband's parents in Tripoli.

The legislation

At the time of the decision under review, s.103(1)(d) provided that, subject to s.104, family allowance ceased to be payable to a person if the person ceased to have her usual place of residence in Australia, unless her absence from Australia was 'temporary only'.

Section 104(1)(e) provided that a person and her or his children should be treated as if they were in Australia where that person had a 'usual place of residence' in Australia and was 'temporarily absent from Australia'.

This provision is qualified by s.104(2): family allowance was not to be granted or paid under s.104(1), unless the person was a resident of Australia as defined by the *Income Tax Assessment Act*. Section 6(1) of that Act defined a resident of Australia as a person whose domicile was in Australia.

Domicile

The Tribunal pointed out that the provisions of s.104(2) made it necessary for Hafza to show that, throughout her absence from Australia, she had an Australian domicile. This requirement did not pose any difficulties for Hafza as she and her husband had acquired a domicile of choice in Australia when they had migrated here and they had not relinquished that domicile during their 4 year absence abroad.

Temporary or permanent absence?

Moreover, because Hafza had intended, when she left Australia in April 1978, to return within 3 to 6 months, she had maintained her usual place of residence in Australia and her absence from Australia should be treated as temporary only. Accordingly she was able to take advantage of s.104(1)(e): that is, she and her children should be treated, at the time of their departure from Australia and for some time thereafter, as if they were still in Australia.

However, the AAT decided, when Hafza's husband took up employment in the Lebanon her intention to return to Australia became indefinite; and from that time she should be treated as having abandoned Australia as her 'usual place of residence' and having adopted the Lebanon in its stead. So that, from the date when her husband took up employment in the Lebanon, Hafza could not take advantage of the provisions of s.104(1)(e).

In concluding that, at some time after her arrival in the Lebanon, Hafza had decided to stay there indefinitely and had, accordingly, abandoned Australia as her usual place of residence, the Tribunal drew support from its impression that the reasons offered by Hafza for her extended stay in the Lebanon were unconvincing. The AAT observed that there were times, over the 4 year period, when it would have been safe for the family to leave the Lebanon; that Hafza's pregnancy prevented her from travelling during a limited period only; and that the money to purchase return tickets could have been provided out of Hafza's earnings or by making arrangements with his family.

Formal decision

The AAT affirmed the decision under review.

BADWY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V84/192)

Decided: 10 December 1984 by H.E. Hallowes.

The AAT *affirmed* a DSS decision to cancel a family allowance paid to Elsaid Badwy for his son, M.

M had been born in Australia, and his mother granted a family allowance, in May 1978. In August 1979, the family had travelled to Egypt for a holiday. Soon after, Badwy's wife (M's mother) died in Egypt. Badwy then returned to Australia, leaving M with his mother-in-law (a resident of Egypt).

After Badwy had told the DSS that M was living in Egypt in the custody, care and control of his mother-in-law but that Badwy was maintaining M, the DSS granted him a family allowance for M from December 1979. Four years later, when the DSS learned that M was still in Egypt, it cancelled the family allowance.

The grant of family allowance to Badwy had been based on s.96(5) of the *Social Security Act*, which allows the grant of family allowance for a child living outside Australia, whom the applicant 'intends to bring . . . to live in Australia as soon as it is reasonably practicable to do so.' The AAT said that, during the period of Badwy's visit to Egypt, the child was only temporarily absent from Australia; but, once Badwy had decided to leave M with his mother-in-law and return to Australia, the temporary absence ceased and M was living outside Australia.

Section 103(3) provided that an alloance granted under s.96(5) ceased to be payable if the child was not brought to Australia within 4 years of the grant. Badwy had attempted on 3 occasions to bring his son to Australia; but his mother-in-law, who had been given legal custody of the child under Egyptian law, had refused to allow the child to leave. After observing that Badwy had continued to send money to Egypt to maintain his son, the AAT said that there was no discretion in s.103(3); and, accordingly the allowance had to be cancelled at the expiry of 4 years after it was first paid.

Wife's pension

CAMMILLERI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. A84/91)

Decided: 22 November 1984 by A.N. Hall, A.H. Marsh and D.R. Craik.

Althea Cammilleri had lived in a *de facto* relationship with an invalid pensioner, J, between March and May 1981. During that period. Camilleri was paid a wife's pension under s.31 of the *Social Security Act*. However, that wife's pension was cancelled at Camilleri's request in May 1981 after she had separated from J.

In February 1982, J left Australia to return to Malta, where he continued to receive his invalid pension. In January 1983, Camilleri informed the DSS that she intended to visit Malta with a view to reconciliation with J; and she applied for a wife's pension. The DSS rejected that application.

Camilleri then travelled to Malta and, in April 1983, she lodged a second application for a wife's pension, which application the DSS also rejected. In July 1983, Camilleri and J married in Malta, where they settled.

Camilleri asked the AAT to review the refusal of the DSS to pay her a wife's pension.

The legislation

Section 31 of the *Social Security Act* provides that the wife of an invalid pensioner, if she is not receiving a pension herself, is qualified to receive a wife's pension, if she 'is residing in, and is physically present in, Australia on the date on which she lodges a claim for pension'. However, the section goes on to provide as follows:

> (2)A wife's pension is not payable to a wife who is living apart from her husband.

At the time of the DSS rejection of her application, s.18 of the Act defined 'wife' to include a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

The first decision

The AAT concluded that, at the time of her application for a wife's pension in January 1983, Camilleri was not living with J as his wife on a *bona fide* domestic basis. Her intention to seek a reconciliation with J did not establish that the *de facto* relationship, which had ended some 20 months earlier, was reinstated. Accordingly, as Camilleri was not regarded as J's 'wife' in January 1983, Camilleri could not have qualified for the wife's pension because she was living apart from J: s.31(2).

The second decision

The AAT pointed out, that, at the time of her second application for a wife's pension in April 1983, Camilleri was resident and physically present in Malta. Accordingly, even if she and J had resumed their *de facto* relationship by that

date (of which there was no clear evidence before the Tribunal), she did not meet the residence and presence requirements of s.31(1) and could not qualify for a wife's pension at that date.

Formal decision

The AAT affirmed the decision under review.

Invalid pension: permanent incapacity

KIKI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/144)

Decided: 25 September 1984 by J. Dwyer.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 38-year-old man who had suffered an injury to his spine, as a result of which he was unable to perform any physical work.

There was medical evidence that Kiki's condition might respond to radical treatment, consisting of a laminectomy and steroid injections. However, he was not prepared to undergo this treatment because of the very strong opposition of his wife – 'because what she has seen from friends and what she has heard about these operations . . . she said if you want to do the operation, I take the kids, I run away.'

The Tribunal said that Kiki's refusal to undergo the treatment 'was genuinely based on grounds which in fact compel him acting honestly so to refuse'. These were 'his wife's fear of the procedures and her extreme reaction to any suggestion . . . that he should undergo an operation in the hope of relieving his symptoms.' Applying the decision of the Federal Court in *Dragojlovic* (1984) 18 *SSR* 187, the AAT said that Kiki's refusal to undergo those treatments could not prevent the Tribunal concluding that his incapacity was permanent.

KRUPIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V84/112)

Decided: 26 November 1984 by J.R. Dwyer, H.E. Hallowes and L.J. Cohn.

Anton Krupic had migrated to Australia in August 1977, when he was 75 years of age. Up to the time of his migration, Krupic had worked on his own farm in Yugoslavia for 30 years; but, by 1977, he was finding difficulty in coping with the farm work. A medical examination immediately before his migration to Australia had shown that Krupic was suffering a cardiac problem, deterioriation of the spine, emphysema and suspected skin cancer.

After his arrival in Australia, Krupic did not attempt to find employment. In September 1982, Krupic applied for an invalid pension; but the DSS rejected this claim on the ground that Krupic had become permanently incapacitated for work prior to his arrival in Australia. Krupic asked the AAT to review that decision.

The legislation

Section 25(1)(b) of the *Social Security Act* provides that an invalid pension should not be granted to a person unless that person became permanently incapacitated for work while in Australia.

The AAT's assessment

The Tribunal said that, in order for Krupic to avoid the impact of s.25(1)(b) he must have had a capacity for work when he arrived in this country; that is, he must have been fit to engage in paid employment and he must have had the capacity to attract an employer willing to engage him at that time.

But, the AAT said, the evidence showed that Krupic had no capacity for earning when he arrived in Australia:

> The total picture of Mr Krupic on arrival here must be that of a man with no capacity to attract an employer in Australia. He was 10 years over the retiring age, he had found looking after himself in Yugoslavia after his wife died, 'getting a bit out of hand', he had no work skills for work other than heavy work, his English was not good . . . and he had degenerative changes of the spine, deterioration of the heart due to old age, ostearthritis and emphysema. It would have been unrealistic to expect to find employment here and Mr Krupic made it clear that he did not look for work in Australia because he was over retiring age.

(Reasons, para. 13)

Formal decision

The AAT affirmed the decision under review.

ANDRIOPOULOS and SECRETARY TO THE DEPARTMENT OF SOCIAL SECURITY (No. V389/293)

Decided: 21 December 1984 by J.R. Dwyer.

The AAT *affirmed* a DSS decision to reject a claim for invalid pension lodged by a 50-year-old woman who appeared to suffer from a series of minor physical and psychological disabilities. The AAT concluded that the major element in Andriopoulos' incapacity (such as it was) was physiological; but the AAT was unable to say whether Andriopoulos was genuinely unfit for work or whether she had a 'consciously assumed condition'.

Andriopoulos had not given evidence to the AAT. She had asked the Tribunal to deal with the matter in her absence. The Tribunal had agreed to do this although it said that –

> as a general principle, I believe that this Tribunal should not engage in review of administrative decisions in the absence of an applicant or a representative of the applicant except where the applicant's absence results from good reasons such as the applicant living outside Australia, or being unable, for reasons of health or distance, to attend a hearing.

(Reasons, para. 2)

The Tribunal referred to the statement in *Baldt* (1984) 21 *SSR* 240, that it was not appropriate for the AAT to reject an application for review in the absence of evidence, where the applicant was outside Australia and ignorant as to evidence required to support a claim. In this case, the AAT said, there was no reason to suppose that the inadequacy of evidence was due to Andriopoulos' ignorance and, accordingly, the matter had to be decided on the basis of the evidence available to the Tribunal from the DSS documents and other medical reports.

The AAT then referred to the decision of the Federal Court in *McDonald* (1984) 18 *SSR* 188. In that case the Court said that, while there was no formal onus of proof before the AAT, if in a matter such as the present applicant the AAT found itself in a state of uncertainty after considering all the available material, 'then it has failed to be satisfied that the person ever was permanently incapaciated for work.' The AAT concluded as follows:

> Without hearing evidence from Mrs Andriopoulos herself, it is not possible for me to be satisfied that she is permanently incapacitated for work. It is equally possible that she may or may not have some symptoms but is able to work but prefers not to do so or that she believes herself to be unable to work but is, in fact, able to work or even that she is pretending to be incapacitated.

(Reasons, para. 15)

SRECKOV and SECRETARY TO THE DEPARTMENT OF SOCIAL SECURITY (No. V83/449)

Decided: 20 December 1984 by I.R. Thompson, H.W. Garlick and R.G. Downes.

The AAT *set aside* a DSS decision to reject a claim for invalid pension lodged by a 36-year-old former fitter who had injured his back in an industrial accident.

Sreckov had migrated to Australia in 1977. He was illiterate in English and unable to speak or understand that language. However, the AAT described him as 'a man of considerable intelligence' and observed that he was quite capable of learning English reasonably quickly, given the motivation and the necessary facilities.

On the medical evidence, the Tribunal accepted that Sreckov was incapacitated for heavy or repetitive work; but that, nevertheless, Sreckov retained 'a considerable residual physical capacity for work'.

However, because of his limited language and work skill, the AAT was satisfied that Sreckov would be unable to attract an employer willing to employ him, unless he received vocational and language training. That is, he was incapacitated for work as that term had been explained in such decisions as *Panke* (1981) 2 *SSR* 9.