Collins asked the AAT to review the February 1984 cancellation of his unemployment benefit. In this application for review, the AAT was asked to decide Collins' qualification for unemployment benefits between 27 February 1984 and 25 November 1984.

The legislation

Section 107(1) of the *Social Security Act* provides that a person who meets age and residence requirements is qualified to receive unemployment benefits if that person satisfies the Secretary that,

> (i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Secretary, was suitable to be undertaken by the person; and
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

The evidence

Collins told the Tribunal that, during the 9 months when he was enrolled as a college student, he had applied for some 15 employment positions and had finally been successful in obtaining employment as a student nurse commencing from January 1985.

During the 9 month period, Collins had attended the CES office on each working day and had attended at his college on 4 days a week. He had devoted some 30 hours a week to his course. This was substantially less than the recommended time because of the time which he had spent in looking for employment vacancies and attending interviews. He attributed his failure in the college course to the amount of time that he had spent in looking for employment.

Qualified for unemployment benefit

The AAT said that, in *Thomson* (1981) 38 ALR 624, it had been established that one of the important considerations in deciding whether a person, who was engaged in studies, could be 'unemployed', was that person's intention. On the evidence presented in this case, there was no doubt that Collins'

> aim was to obtain employment and that he was continuing on with his Institute course only to keep his mind occupied and that he would have given up that course at any time if a full-time position had been found by him or been available to him.

There was also no doubt, the Tribunal said, that Collins was capable of undertaking and willing to undertake paid work. Finally, 'his regular attendances at the CES employment agency, together with his regular viewing of newspapers, as well as his written letters to employers', indicated that he had taken reasonable steps to obtain employment. For these reasons, the AAT said, Collins fulfilled all of the necessary requirements in s.107 of the *Social Security Act*.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Collins be paid unemployment benefits for the period from 27 February 1984 to 25 November 1984.

PHIPPS and SECRETARY TO THE DSS (No. N84/546)

Decided: 5 June 1985 by A. P. Renouf.

The AAT *affirmed* a DSS decision to recover the sum of $296 paid to the applicant by way of unemployment benefit.

The central question was whether payments of unemployment benefit should have been made to Phipps between 16 November and 16 December 1982. Phipps had finished full-time schooling at the end of 1981 but had re-enrolled as a private student at a local technical college, so that he could re-sit the HSC examination at the end of 1982. When Phipps applied for unemployment benefit in November 1982, he claimed that he had given up his studies in August.

Phipps had last attended formal classes on 12 October 1982, and sat for the HSC examinations ending on 3 November 1982 and had enrolled as a full-time university student in February 1983. On the basis of this information, the DSS concluded that Phipps ceased his full-time secondary studies on 3 November 1982 and that, because of s.120A of the *Social Security Act*, unemployment benefit should not have commenced until 15 December 1982.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified for unemployment benefit if the person meets age and residence requirements and passes the 'work test'—that is, the person must be unemployed, capable of undertaking and willing to undertake paid work and have taken reasonable steps to obtain such work.

Section 120A provides that unemployment benefit is not payable to a former full-time secondary student during the period of 6 weeks after the person ceased to be a full-time secondary student. Section 120(3) provides that a full-time secondary student undertaking a course at the end of which examinations are held,

> shall not be taken for the purposes of this section to cease to be a full-time secondary student until . . . the last of those examinations has been held.

The postponement rule

The AAT rejected an argument raised by Phipps that s.120A did not apply to private students and concluded that, on the basis of s.120A(3), he did not cease to be a full-time secondary student until the last of his HSC examinations on 3 November 1982. Accordingly, the postponement provisions of s.120A(1) should be applied against Phipps and he was not entitled to receive benefit until 6 weeks after 3 November, namely, 16 December 1982.

The work test

The AAT said that, in its view, Phipps had not satisfied the requirements of s.107(1) during that period. Although he had been unemployed, he had not been willing to undertake paid work nor had he taken reasonable steps to obtain such work because—

> the overriding, long-term commitment of the applicant throughout was not to obtain employment but to pursue his studies at the tertiary level.

(Reasons, para. 19)

Family allowance: late claim

ELSDON and SECRETARY TO DSS (No. S84/69)

Decided: 7 August 1985 by J. A. Kiosoglous, F. A. Pascoe and J. T. B. Linn.

Margaret Elsdon had come to Australia with her *de facto* husband, C, and his daughter in October 1975. At the time of her arrival in Australia, she had held a 2 month entry permit; although she believed (because of information given to her by C, who had handled the paperwork for their trip to Australia) that she had a permanent entry permit. Two months after her entry into Australia (in December 1975) Elsdon became a prohibited immigrant under s.7(3) of the *Migration Act* 1958 (Cth). However, Elsdon did not learn of her prohibited status for some 4 years.

In the meantime, Elsdon gave birth to a child, J, in August 1976; but she did not claim family allowance for this child because C destroyed the family allowance claim form handed to Elsdon whilst she was in hospital.

As mentioned above, Elsdon learned that she was a prohibited immigrant in 1979. In December 1980, Elsdon ceased to be a prohibited immigrant (because s.7(4) of the *Migration Act* provided that a person who had overstayed a temporary entry permit ceased to be a prohibited immigrant after 5 years). However, because Elsdon continued to believe that she was a prohibited immigrant, she allowed herself to be persuaded by C not to claim family allowance for her child. (Elsdon later told the AAT that, during this period, she lived in fear of C's acts of violence and of C reporting her to the migration authorities.)

In June 1983, Elsdon separated from C and retained custody of the child, J. Following advice from her solicitor, Elsdon applied for and was granted a permanent entry permit by the Department of Immigration and Ethnic Affairs. In November 1983, Elsdon claimed and was granted family allowance in respect of J. The DSS dated the payment of that allowance from November 1983, refusing to backdate payment to the date of J's birth. Elsdon asked the AAT to review that refusal.

The legislation

Section 102(1)(a) of the *Social Security Act* provides that family allowance is payable to a person from the date of eligibility if a claim is lodged within 6 months of that date or, if the claim is lodged after that 6 months period, 'in special circumstances'. In any other case, the allowance is payable from the date when the claim is lodged.

Section 96(1) provides that a family allowance is not to be granted to a person

born outside Australia unless that person had her 'usual place of residence' in Australia for at least 12 months before claiming the allowance. This restriction was not to apply, according to s.96(2), where the Secretary was satisfied that the claimant was likely to remain permanently in Australia.

Date of eligibility

The AAT said that, because Elsdon had been a prohibited immigrant in 1976, she might not have been able to establish that Australia had been her 'usual place of residence' for the 12 month period required (by s.96(1)) for an applicant born outside Australia.

However, the facts as they existed in 1976 would have made it more likely than not that Elsdon would remain permanently in Australia within s.96(2), so that she could have satisfied that alternative residence qualification. Although she then had the status of a prohibited immigrant, this had largely arisen because of her carelessness and naivety and not because of any deliberate act on her part.

The AAT noted that, in 1982, a new provision, s.97(2) had been inserted in the *Social Security Act* which expressly prevented the granting of a family allowance to a prohibited immigrant. That provision had remained in force for just over one year, and was repealed in October 1983. The AAT commented that the implication was that, other than between 1982 and October 1983, 'family allowance could be paid to prohibited immigrants provided that they were otherwise qualified': Reasons, para. 13.

Accordingly, s.96(2) avoided the operation of s.96(1) and Elsdon should be regarded as qualified for family allowance in respect of her child, J, from the date of J's birth.

'Special circumstances'

The AAT then turned to the question whether payment of that allowance could be backdated to the date of Elsdon's eligibility, namely August 1976.

The Tribunal said that Elsdon had been aware of the existence of family allowance but claimed that she had been overborne by her *de facto* husband, C, who had opposed her claiming the allowance. The AAT accepted that C was at times violent and that Elsdon did many things at his insistence which she would have been better advised not to have done.

However, the AAT said that, although Elsdon had been influenced by C and he had been violent toward her, Elsdon had not acted under duress from C. The AAT described Elsdon as naive and careless in allowing C to influence her to this extent; and accepted that Elsdon had been

> in difficult and distressing personal circumstances and that her choice of living partner was undesirable. We have a great deal of sympathy for the applicant but we are of the opinion that her circumstances are not so unusual, uncommon or exceptional as to be described as 'special circumstances' in order to justify backpayment of family allowance . . . the fact that she lived in fear of being deported is in some way counteracted by the fact that it was by her own acts or omissions that she found herself in the situation she was in.

(Reasons, para. 20)

Formal decision

The AAT affirmed the decision under review.

Supplementary rent allowance

ALEXANDER & NELSON and SECRETARY TO THE DSS (Nos W85/56 & 57)

Decided: 30 July 1985 by J. R. Dwyer.

Paul Alexander and Michael Nelson were invalid pensioners living at Broome in Western Australia. They had been granted supplementary rent assistance by the DSS but, in January 1985, when the DSS learned that they were living in a tent on Crown land, the DSS cancelled payment of that assistance. Each of them applied to the AAT for review of that decision.

The legislation

Section 30A of the *Social Security Act* provides that a pensioner who pays or is liable to pay rent of more than $10 a week is qualified to receive a supplementary rent allowance.

Section 6(1) defines 'rent' to mean rent paid for premises or part of premises occupied by the person as the person's home.

The evidence

Nelson told the AAT that he and Alexander shared a 2-man tent which was owned by an organization called Kingdom Management. Although this organization was also known as Kingdom Management Pty Ltd, it was not a company nor was it registered as an association or a charitable foundation under any legislation. In fact, it appeared that Kingdom Management was a name used by Nelson to cover certain religious activities (or, at least, activities which Nelson described as religious).

It appeared that Alexander had signed a document transferring all 'my social security income to the religion of Kingdom Management' in return for being allowed to share occupancy of the 2-man tent.

In this application for review, Nelson argued that to deny a supplementary rent allowance to him and to Alexander was to interfere with his 'free exercise of . . . religion' contrary to s.116 of the *Commonwealth Constitution* and contrary to the *Human Rights Commission Act* 1981 (Cth).

The decision

The AAT concluded that, as Nelson was the owner of Kingdom Management, any payments of rent made by him were payments made to himself. Accordingly he could not qualify for supplementary rent assistance.

So far as Alexander was concerned, the AAT said that there was no evidence that he had paid 'rent'. Rather, he had purported to assign the whole of his social security income to Kingdom Management. (It might be, the AAT said, that this assignment was illegal under s.144 of the *Social Security Act* which provides that a pension 'shall be absolutely inalienable'; that Nelson, as owner of Kingdom Management, held those funds in trust for Alexander; and that, accordingly, Alexander was in a similar position to Nelson—if paying 'rent', he was paying it to a partnership of which he was one of the partners.)

The AAT then raised a final point which would prevent Alexander from qualifying:

> 2. Furthermore the 'premises' or 'part of premises' occupied by Mr Alexander are half a 2-man tent with no cooking, washing or toilet facilities. It is on land owned or leased by the Kingdom Management Community. If there were a separate payment of $30 per week for these 'premises' there would be a real question as to whether that was not so inappropriate a figure as to show that it was not a genuine payment of 'rent'.

Formal decision

The AAT affirmed the decision under review.

Handicapped child's allowance: rate of allowance

LANG and SECRETARY TO DSS (No. V84/391)

Decided: 24 July 1985 by I. R. Thompson.

Annette Lang was granted a handicapped child's allowance for her daughter, K, in 1981 on the basis that the child was a handicapped child.

The DSS decided that the allowance should be paid at the rate of $20 a month, and later increased that rate to $30 a month. Lang asked the AAT to review that decision.

The legislation

Section 105L(b) of the *Social Security Act* gives the Secretary to the DSS a discretion as to the rate of handicapped child's allowance payable in respect of a 'handicapped child' (so long as the rate does not exceed $85 a month). On the other hand, s.105L(a) provides that the rate of allowance payable in respect of a 'severely handicapped child' is $85 a month.

Costs incurred

The Tribunal attempted to establish the costs incurred by Lang in caring for her child but observed that Lang was extremely vague about those costs. The DSS acknowledged that Lang's financial circumstances were very poor and said that it was willing to cover the costs incurred by her. Lang claimed that her child needed ex-