The AAT said that there was an inconsistency in this statement: when the last child of a supporting father turned 16 or finished full-time education, the father was no longer entitled to supporting parent's benefit but was 'in comparable difficulties' to those of a woman in the same position. Unless he was 65 years of age (and could qualify for an age pension) he would be left with unemployment benefit ($78.60 a week in October). But a woman in the same position could qualify for a widow's pension (then $89.40 a week). It would appear, the AAT said, that the *Social Security Act* discriminated between men and women in similar circumstances by assisting

> a less advantaged group' [a term used in a 1981 explanation of Australia's reservation to the *International Covenant on Civil and Political Rights*], namely, women, who had been left in 'necessitous circumstances', but ignoring the possibility that men might find themselves in similar circumstances . . . 19. While recognising that the payment of this form of pension to members of one sex only reflects long-established social attitudes, the Tribunal would nonetheless note, in the light of [the international covenants], that the time may be approaching when this policy should be reconsidered as those attitudes change with changing circumstances.

(Reasons, para 15, 19).

Sickness benefit

STEWART and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/754)

Decided: 18 October 1984 by R. Balmford.

Clive Stewart had been seriously injured in 1967, as a result of which he continued to suffer significant disabilities. In April 1980 the DSS granted Stewart a sickness benefit which continued until August or September 1982, when the DSS 'terminated' the benefit on the ground that Stewart had not supplied the DSS with his correct residential address (an allegation which Stewart denied).

In April 1984, Stewart again applied for and was granted sickness benefit on the basis of a medical certificate which showed that he was unfit for work for the period 1 March 1984 to 1 June 1984.

Meanwhile, Stewart applied to the AAT for review of the DSS decision of August or September 1982. In August 1984, the DSS varied that decision and reinstated Stewart's sickness benefit from the date of its 'termination'. However, the DSS went on to decide that Stewart should not be paid sickness benefit for the period from 7 to 27 August 1982, because he was outside Australia over that period; and that his sickness benefit should be cancelled from 2 October 1982, because there was no evidence (in the form of regular medical certificates) of Stewart's medical condition after that period. However, at the time that this decision was made (August 1984) the DSS had in its possession a medical certificate dated 6 March 1984 which declared that Stewart had been and continued to be unfit for work since 1967.

The legislation

Section 108(1) provides that a person is qualified to receive a sickness benefit if the person meets an age requirement, resided in Australia throughout the relevant period and satisfies the Director-General that, during the relevant period, he was temporarily incapacitated for work by reason of sickness or accident and had thereby suffered a loss of income.

Section 117(1) provides that a claim for sickness benefit shall be supported by a medical certificate 'certifying as to such matters, and containing such information as the Director-General requires.'

Section 129, in force in August and September 1982, required a beneficiary to provide information 'relating to any matter which may affect the payment to him of his benefit' whenever required by the Director-General.

Section 131(1) provided, at that time, that the Director-General could cancel or suspend the benefit if a beneficiary failed to comply with s.129 of the Act.

The original decision

The AAT said that the original decision, to 'terminate' Stewart's benefit, had no legal basis. There was no power in the Act to 'terminate' a sickness benefit and, in any event, the Director-General had no power to require a beneficiary to furnish her or his residential address:

> If there is a suspicion that a fraud is being committed on the Department, different considerations arise: but I have no reason to suppose that there was any such suspicion here . . . Further, when the beneficiary appears at the counter of the Department's regional office, complaining that he has not received his benefit, it is hardly consistent with the administration of social welfare legislation to tell him that he will not receive it any more until he gives an address at which he is living. Why should he not collect it from the counter? Why is it thought desirable that he should be found to be resident at the address from which he collects his mail? If the benefit were paid to a bank account the Department would not be concerned to know where he lived.

(Reasons, para 14).

Stewart's absence from Australia

The Tribunal said that the word 'reside' in s.108(1) should be read according to its ordinary meaning – that is, as referring to the place where a person had her or his settled or usual place of living. A person's place of residence was not lost merely because the person left that usual place of living from time to time. In the present case, the AAT said, the evidence showed that Stewart had his settled or usual place of living in Sydney and the suggestion that he had not 'resided' in Australia during his 3 week trip overseas could not be sustained.

The need for medical certificates

The AAT said that, although at one time there were several periods not covered by medical certificates certifying that Stewart was incapacitated for work, the medical certificate of 6 March 1984 provided adequate evidence of Stewart's incapacity.

The Tribunal rejected the DSS argument that a retrospective certificate could not meet the requirements of s.117(1):

> If the *Social Security Act* required the medical certificate to be contemporaneous with the claim and to relate only to the future and not to the past, then Mr Stewart would, effectively have no right of review of the decision [to cancel his sickness benefit as from 2 October 1982]. However, there is no such requirement in s.108, s.117 or elsewhere in the Act and I have no reason to assume or to imply such a requirement. A certificate describing the past is as good evidence of incapacity for work by reason of sickness or accident as a certificate predicting the future. In many cases it would be easier for a doctor to describe the past condition of a patient than, with any confidence, to predict the patient's future condition.

(Reasons, para 30).

Formal decision

The AAT set aside the decisions to suspend Stewart's sickness benefit during his absence from Australia and to cancel his sickness benefit from 2 October 1982 and remitted the matter to the Director-General with a direction that Stewart was qualified to receive sickness benefit while out of Australia and from October 1982 until the recent grant of sickness benefit to him in April 1984.

MENGI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/100)

Decided: 25 October 1984 by J.A. Kiosoglous, J.H. McClintock and A.P. Renouf.

Mehmet Mengi had migrated to Australia from Turkey, with his wife and 3 of his 8 children, in 1970. His other children joined him in 1973, by which time his wife had developed an ulcer in the abdomen.

In 1975, Mengi, his wife and 3 of their children returned to Turkey, in the hope that Mrs Mengi might regain her health there. Mengi returned to Australia within the 12-month period on his re-entry visa but his wife and 3 children did not, as she was unfit to travel. Mengi returned to Turkey for 6 months in 1978 and for 3 years in 1980, on each occasion attempting to arrange his wife's travel to Australia – but without success, as Australian immigration authorities would not allow her to enter Australia because of her health.

In July 1983, Mengi was granted a sickenss benefit but the DSS refused to pay an extra benefit for his wife and he asked the AAT to review that decision. (Before the hearing of this application for revew, that is on 24 June 1984, the Department of Immigration and Ethnic Affairs approved the entry of Mrs Mengi to Australia; and on 25 June 1984 Mengi was granted an invalid pension.)

The legislation – uniformity

Section 112(2) of the *Social Security Act* provides that the rate of sickness benefit payable to a married person is to be increased by a fixed amount where that person 'has a spouse who is resident in Australia', who is dependent on the married person.

The AAT said that, although there was no extended definition given to 'residence' as used in s.112(2), Parliament had not intended it to have a narrower meaning than it had in other parts of the *Social Security Act*, particularly Part III, which deals with age and invalid pensions. This meant that a person could be 'resident' in Australia, although not physically present in Australia (s.21, in Part III, clearly distinguished between residence and physical presence); and that a person would be resident in Australia if he or she was domiciled in Australia. Section 20, in Part III, extended 'residence' to include 'domicile', by incorporating s.6(1) of the *Income Tax Assessment Act*. Although there was no such incorporation in Part VII, the AAT took

> the legislature's intention throughout the entire Act to be one of uniformity insofar as the interpretation of 'residence' is concerned . . . In our opinion, therefore, the legislature, when enacting the Social Security Act, intended the word 'resident' to include a person whose domicile in in Australia.

(Reasons, paras 23-4).

Domicile

The AAT said that Mr and Mrs Mengi had acquired a domicile of choice in Australia when they migrated here in 1970 – they had intended to reside here permanently. And that domicile had not been lost when they returned to Turkey or when Mrs Mengi stayed in Turkey, because Mrs Mengi had not intended to stay in Turkey. The AAT pointed out that a domicile of choice could only be lost where the person 'cease[d] to reside in the country of domicile *and also* [ceased] to have the intention to return to it as his permanent home': Reasons, para. 28.

Residence and temporary absence

The AAT then referred to amendments to the *Social Security Act*, effective from 1 August 1984. Under these amendments, the extended meaning of 'residence' in Part III of the Act (so as to include 'domicile') operated only where the Director-General was not satisfied that the person had a 'permanent place of abode . . . outside Australia': ss.6, 20. This, the AAT said, meant that it had 'also to determine Mrs Mengi's residence status': Reasons, para. 31.

The AAT said that her initial absence from Australia did not deprive Mrs Mengi of her Australian residential status: her absence was intended to be temporary. But did her 9-year absence from Australia convert it from a temporary to a permanent one? The fact that Mr and Mrs Mengi had consistently tried, over that period, to have her admitted to Australia was the important factor, the AAT said: it was only 'physical preclusion preventing Mrs Mengi's return to Australia', just as in *Alam* (1982) 8 *SSR* 80 the civil war in the Lebanon had prevented the applicant realizing her intention of returning to Australia for more than 4 years.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a recommendation that Mengi be granted sickness benefit at the married rate from the date of its original grant until the grant of his invalid pension.

Compensation award: refund of sickness benefit etc

FARTHING and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/319)

Decided: 27 August 1984 by B. J. McMahon.

The AAT *affirmed* a DSS decision to recover from Carol Farthing sickness benefits amounting to $904 from an award of damages recovered by her.

The decision had been made under s.115 of the *Social Security Act* (repealed from August 1982), which permitted the DSS to recover payments of sickness benefit from a person who had received compensation (including a damages award) for the same incapacity and the same period to which the sickness benefit related.

The Tribunal said that there were no 'special circumstances' which would justify the exercise of the discretion in s.115(4A) to waive recovery. Farthing had no assets and was currently unemployed—'I am a married woman and my husband prefers me not to work', she said. But the Tribunal thought that to require her to repay in 1984 money which she had first received in 1977 would not impose undue financial hardship:

> She has had the benefit of the use of the money all these years and is simply being asked to repay a debt in inflation-eroded dollars, interest free. In my view this more than compensates for any financial hardship which she may suffer by being required to pay the amount in one sum at long last. The public purse has been kept out of its money for no good reason for too long.

(Reasons, p.14)

IZARD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. T84/2)

Decided: 19 July 1984 by RC Jennings.

Robin Izard had been injured in an industrial accident in 1975 and had been paid weekly workers' compensation for 1 year until his employer's insurers had stopped operating because of severe financial problems. (It appeared that, if the insurers had continued to operate, Izard would have continued to receive weekly workers' compensation until about 1979, when the maximum amount of compensation payable to him ($19 511) would have been exhausted).

During 1981, Izard received rehabilitation training from the DSS and, as a result of that training, he returned to work for 16 months. However, in April 1983, he was obliged to stop working and was granted an invalid pension.

In 1982, Izard recovered the sum of $15 702 as a lump sum workers' compensation award from a special fund established to meet claims on insolvent insurers.

The DSS then decided to recover from Izard the cost of the rehabilitation training provided to him, namely $3282.

The legislation

Section 135R of the *Social Security Act* obliges a person, to whom the DSS has provided rehabilitation treatment or training and who has recovered compensation for the same disability, to repay to the DSS the cost of that treatment or training. However, the Director-General has a discretion to release the person from that liability in 'special circumstances': s.135R(1B).

'Special circumstances'

The Tribunal said that, in deciding whether to exercise the discretion in s.135R(1B), it should be guided by the approach developed in the context of the discretion to waive recovery of sickness benefits under s.115(4A) of the *Social Security Act*.

That is, in the exercise of that discretion, the decision maker should 'be prepared to respond to the special circumstances of any particular case by reason of which strict enforcement of the liability created by the section would be unjust, unreasonable or otherwise