'the Applicant had custody, care and control of his children, they being nevertheless in Vietnam, and that he maintained the requisite intention to bring the children to Australia'.

Formal decision

The AAT set aside the decision under review, referring the matter back to DSS for determination in accordance with the reasons for decision.

[R.G.]

Assets test: 'principal home' and 'encumbrances'

SAMEK and SECRETARY TO DSS (No. N88/474)

Decided: 13 October 1988 by R.A. Hayes.

Mr and Mrs Samek asked the AAT to review the application of the assets test in determining their rates of invalid and wife's pensions.

This review dealt with two issues:

(1) what was their 'principal income' for the purposes of the assets test; and

(2) whether an unsecured loan of $16 000 should be regarded as an encumbrance that reduced the value of assessable property, home units in Toowoomba, in which they did not live.

The legislation

The AAT said that the decision under review had been made under the assets test provisions contained in the old s.6(3) and (4) and s.6AA(1), (7) and (8). However, the AAT made no reference to the wording of any of these provisions.

Principal home

It appears that the applicants had owned a house in Haberfield, a Sydney suburb, for about 16 years. They and their children each had their own rooms in that house.

The applicants had also owned some land in the country in Inverell (the 'bush block') which had been sold sometime between July 1987 and the date of the AAT hearing.

Throughout 1985, 1986 and 1987 the applicants spent varying periods at Inverell and Haberfield.

They were never away from their Haberfield house for more than 12 months and, when in Haberfield, stayed there for periods of time varying from a few weeks to a couple of months.

They lived at different places in Inverell. At first, they camped on their bush block. At some time between January 1985 and March 1987 they moved into rented premises in Inverell and later into a house in Inverell owned by their children (apparently rent free).

Their children remained in the Haberfield house and the applicants' furniture and most of their belongings were kept there.

The AAT said:

> 'The concept of "the principal home" assumes . . . that there is more than one property which is used as a home. If one moves from home to home, then the home in which one spends most time would, logically, be the principal home. But in the context in which it appears, to talk of one home being a principal home, and another being a secondary home, the respective "homes" must be "property" which can be valued for the purposes of the Act.'

(Reasons, p.7)

The AAT said that a person must have a proprietary interest in property for it to be the principal home.

Applying this interpretation, the AAT decided that, for the period when the applicants camped on their bush block and contemplated building on it, spending comparatively small amounts of time at their Haberfield house, the bush block was their principal home.

Similarly, the rented accommodation in Inverell became their principal home because they had a legal interest in it.

However their children's house in Inverell could not be classed as the applicants' principal home because it was not 'property' in which the applicants had 'some kind of interest' (Reasons p.8).

Accordingly, while living in their children's home in Inverell, the Haberfield house was the applicants' principal home, even though they were only living in it for limited periods.

The encumbrance

The applicants sought to have an unsecured loan of $16 000 allowed as an encumbrance against the value of units owned in Toowoomba. This loan was at 15% interest from a nephew (referred to as 'Malcolm Turnbull') and was proved by a loan agreement that was executed in December 1986.

The units were purchased by the applicants in 1979, using $16 000 originally borrowed from their children for another purpose (to build a house on the bush block). They then borrowed the money from their nephew to repay their children.

The loan from their nephew was not legally secured, there being no registered bill of mortgage. Nor was there any evidence of the original loan from their children (presumably, apart from the applicants' assertions that it existed).

The AAT endorsed the following interpretation of an 'encumbrance' contained in the Pensions Manual:

> 'The outstanding value of an unsecured loan may be deducted from the value of a particular asset if the pensioner can provide evidence that the loan was obtained specifically for the purchase of that particular asset.'

Noting that the loan agreement was made 7 years after the units were purchased, the AAT had little difficulty deciding that 'the unsecured loan of $16 000 ought not to be used to reduce the value of the property at Toowoomba': Reasons p.9.

Formal decision

The AAT affirmed the DSS decision to disallow the unsecured debt of $16 000 as an encumbrance against the Toowoomba home units.

In relation to the principal home, the AAT set aside the DSS decision and remitted it for reconsideration with directions that the Haberfield house was not the applicants' principal home during the period when they alternated between the bush block and rented accommodation in Inverell, but that it was their principal home at all other relevant times.

[D.M.]

Invalid pension: permanent incapacity

YESILOTLAK and SECRETARY TO DSS

(No. V88/315)

Decided: 6 October 1988 by I.R. Thompson.

Ali Ihsan Yesilotlak applied for an invalid pension on 5 June 1987 but his claim was rejected. After unsuccessfully seeking review by a SSAT he sought review by the AAT.

Which legislation

The AAT first had to decide whether to apply the current legislation which, since 1 July 1987, has included the