

Medical evidence suggested that he was able to take on manual or clerical work although two doctors who did support the applicant's claim were not available for the hearing. This was described by the Tribunal as 'very unsatisfactory' and 'unfair to the applicant.' The Tribunal also referred to the failure of the applicant's doctor to obtain an expert opinion on the applicant's 'depressed state'.

'...although Dr C has reported the applicant as suffering from depression, there is no evidence of an expert character about this condition. Because of this and because Dr C has never seen it necessary to refer the applicant to an expert for treatment of depression, we are not in a position to find that he is depressed. To us, he looks depressed but we cannot base a finding to this effect mainly upon our own impression.'

(Reasons, para.15)

The Tribunal preferred the evidence of the doctors present at the hearing over the written reports of the other doctors. The applicant was found not to be 85% incapacitated on medical grounds. Social factors did not raise his incapacity over that mark as the AAT considered that his level of education (he had a degree in business management and accountancy) and age (39 years) meant that with an improvement in his English he would not be at a disadvantage in seeking employment because of his medical condition. This latter consideration also led to the conclusion that his incapacity could not be described as permanent.

#### ARSLANOSKI and SECRETARY TO DSS

(No. W87/184)

Decided: 11 March 1988 by J.O. Ballard.

The Tribunal *affirmed* a DSS decision to refuse invalid pension to a 29-year-old man who suffered from back problems.

The medical evidence suggested that the applicant's medical condition was relatively minor. However, the applicant thought that he was ill even though there was not much physically wrong with him.

In affirming the decision, the AAT referred to section 170 of the *Social Security Act* which provided for the granting of sickness benefit (which the applicant was receiving) to be made conditional on the applicant undertaking

rehabilitation. The AAT recommended that the powers of that section should be invoked to start the applicant on such a program.

[**Comment:** The recommendation made at the end of this decision to invoke s.170 may represent a new direction for the AAT in social security appeals. Clearly, there was no decision under s.170 for the Tribunal to review. But it made a recommendation here which if acted on may deprive the applicant of his benefit. As such, it indicates a willingness by the AAT to venture outside the strict parameters of the decision under appeal. Such a willingness has not always been apparent as we have argued in relation to the use of the power in the old s.135TB(5), see (1985) 28 SSR 355. B.S.]



## De facto relationship

#### SABA and SECRETARY TO DSS

(No. V86/640)

Decided: 22 January 1988 by J.R. Dwyer

Karla Saba had returned to Czechoslovakia in May 1984. She was then in receipt of widow's pension as a deserted wife and this payment was continued after she went overseas.

In March 1985 the DSS received anonymous information that the applicant had been living with her husband in Australia and that they were together in Czechoslovakia. Her pension was suspended in July 1985. The applicant applied to the AAT for review of that decision.

#### Question of credibility

The Tribunal said that the issue came down to a question of who to believe, those who gave evidence suggesting that the applicant was not estranged from her husband, or the applicant herself through her written statements.

The Tribunal preferred the evidence of two witnesses who testified that the applicant had lived

with her husband at all times. This was supported by evidence with respect to the telephone at the applicant's residence being in the name of her and her husband and later transferred to new premises in joint names. The applicant was also in receipt of a small income and this payment was made into an account in the name of her and her husband.

Letters also existed that indicated that the applicant was living with her husband in Czechoslovakia. These letters were written to one of the witnesses indicating that her husband and herself had bought a car from her father-in-law and that they hoped to be in their own home by the end of the year. They also requested that their new address not be given to anyone, 'not even Departments'.

The whole matter seemed to be an elaborate plan to obtain a pension while overseas. The Tribunal concluded that the applicant was never qualified to receive widow's pension or supporting parent's benefit.

#### Formal decision

The Tribunal varied the decision to provide that the applicant's pension was to be cancelled from July 1985.

#### FREEMAN and SECRETARY TO DSS

(No. N87/782)

Decided: 15 February 1988 by A.P. Renouf

The AAT *affirmed* a DSS decision to cancel the widow's pension of the applicant after it was decided that she was living in a de facto relationship. There was evidence to support the existence of such a relationship. The applicant had two children to the man who was allegedly her de facto spouse. The applicant also cared for another daughter of that man and had done so since he had been awarded custody of the child by the Family Court which had approved of the applicant as a surrogate mother. The applicant and the man had jointly obtained a loan to purchase a house.

The Tribunal also had doubts about the credibility of the applicant and the alleged de facto spouse. In particular,

his denial of the existence of a strong relationship seemed improbable given his involvement with the family routine.

Other evidence indicated that the man had not lived with the applicant since the date of the cancellation of the pension. In deciding that there was a de facto relationship at the time of cancellation the Tribunal also recommended that in the event of the applicant reapplying for the pension, account should be taken of the changed circumstances of the relationship since the decision to cancel.

**KING and SECRETARY TO DSS**  
(No. N87/170)

**Decided:** 19 February 1988 by J.R. Gibson

The rate of the applicant's invalid pension had been reduced after the income of his former wife was included in the assessment of that rate. This was done following a DSS finding that the applicant was living with his former wife as her 'spouse on a bona fide domestic basis' and was therefore a 'married person' under s.6(1) of the *Social Security Act*.

**The facts**

The applicant and his former spouse had divorced in October 1981. This followed almost 30 years of marriage. The applicant had been shot by the husband of a woman with whom he had been having an affair and this precipitated the divorce.

After living apart for a time, the applicant and his former spouse decided to jointly purchase a residence in April 1982. In October 1986 the applicant applied for invalid pension.

**Was there a de facto relationship?**

The AAT found that a de facto relationship did not exist between the applicant and his former spouse. The decision to purchase the residence together was based on considerations of an economic nature and the advantage to the applicant of having someone in the house, given his health.

There had been no intention to resume their spousal relationship. There was no sexual intercourse taking place between them. Generally, they engaged in separate social activities. Although the bank loan documents in relation to their house purchase stated that they were married, those documents had not been prepared by them and the Tribunal thought that they probably did not realise that this was the case.

The Tribunal concluded:

'The various aspects of their relationship must be looked at in the light of their former marriage and its breakdown. Because of the former marriage, they have retained close ties with their children who live in the same area and for that reason

alone, will continue to have some association. Neither has any intention of re-marrying or forming any close relationship with a person of the other sex, but each feels that the present arrangement provides more satisfactory accommodation and personal security. But it is an arrangement which involves substantially separate accommodation, home life and social activities and does not involve any sexual relationship or lasting personal commitment. No doubt the relationship that exists would not have occurred if the parties had not formerly been married but it is strikingly different from the relationship which existed prior to 1980.'

**Formal decision**

The AAT set aside the decision under review and directed that the applicant's entitlement to invalid pension be calculated on the basis that he was not a 'married person.'

**KEAR and SECRETARY TO DSS**  
(No. S87/88)

**Decided:** 24 February 1988 by J.A. Kiosoglous

The Tribunal *affirmed* a DSS decision to cancel the applicant's widow's pension on the basis that she was living in a de facto relationship with her former husband.

The AAT considered all the facets of a marital relationship. It was clear that there was some commitment, both emotional and financial, between the applicant and her former husband. They had lived together for most of the time since their divorce.

Although the relationship was marked with tensions the AAT said:

'For a couple to be living together as man and wife it is not necessary for them to be completely happy together. It is clear that this is not an ideal relationship, however the Tribunal finds that the applicant and Mr Kear do still feel loyalty and some affection for each other...'

(Reasons, para.27)

Although the applicant indicated that the relationship would end if either of them moved out of the house that they shared this had not occurred. This suggested that 'neither the applicant nor Mr Kear has a strong desire to bring the current situation to an end' (Reasons, para.27). The Tribunal concluded that a de facto relationship existed.

**SMITHIES and SECRETARY TO DSS**  
(NO. S86/145 & S87/59)

**Decided:** 24 February 1988 by J.A. Kiosoglous

The applicant asked the AAT to review two decisions of the DSS. The

first decision was the raising of an overpayment of unemployment benefit in the amount of \$5,278.21 on the basis that at the time he was in receipt of the married rate while his wife was working. The second decision was to cancel his supporting parent's benefit on the basis that he was not separated from his wife.

**The facts**

The applicant was retrenched in 1980. At that time his wife was working. In December 1982 the applicant lodged a claim for unemployment benefit. His wife was then pregnant with their second child and not working. He received unemployment benefit at the married rate.

In December 1983 the applicant and his wife agreed to live separate lives as their marriage had deteriorated. The applicant moved into a separate bedroom in the house. At this point the applicant was told by his wife that he would have to find his own source of income. He agreed to care for the children.

The applicant informed the DSS that he had separated but he continued to receive unemployment benefit at the married rate. In July 1984 he again informed the DSS about his change in status after an accountant preparing his income tax return pointed out the error. His unemployment benefit was stopped immediately and he did not receive any income until supporting parent's benefit was granted in October 1984.

The applicant had continued to fill out the continuation of unemployment benefit forms between December and July. He had not indicated that his spouse had commenced working (he completed the section relating to his spouse) and so the DSS subsequently calculated an overpayment.

With respect to the cancellation of supporting parent's benefit the issue was whether or not the applicant and his wife were separated after July 1984.

**Were the applicant and his wife separated?**

The Tribunal examined the relationship after December 1983 to assess whether it could be described as a marriage.

The applicant cared for the children after that date, doing all the chores associated with their welfare. He did no cooking or other household tasks for his wife. They did not converse much at home, except in relation to the children. They did not eat together. There was no sexual relationship. They shared the household accounts. They also did not socialise together although they had not informed many people of their separation. They took no steps to obtain a divorce for religious reasons,

although in June 1987 they obtained a property settlement from the Family Court.

After considering the evidence and the principles to be applied in determining whether a marriage is in existence the AAT concluded that the applicant and his wife had separated in December 1983.

'Regardless of the fact that there may still have been some similarities between the previous marital relationship and the living arrangements after December 1983, the Tribunal is nevertheless satisfied that the relationship changed dramatically after that time. Although their relationship had been deteriorating, the separation was manifested by Mrs Smithies returning to work and the applicant moving out of the marital bedroom. There was no financial interdependence and very little or no domestic co-operation ... It is obvious they preferred living under the one roof until September 1986. However neither could afford to move and as there was ample room in the jointly owned home there was no immediate reason to do so...'

(Reasons, para.34)

#### Waiver of overpayment

The Tribunal found that the applicant should not have received unemployment benefit at the married rate, but neither should the rate of his benefit be calculated with respect to his wife's income. Further, as he and his wife had separated at the relevant time, he was eligible to receive supporting parent's benefit. Thus the amount of any overpayment would be the difference between that benefit and the amount he actually received.

The true overpayment was in the order of \$1,456. The Tribunal considered that recovery of this amount should be waived under s.186 of the *Social Security Act*. The overpayment resulted from an innocent mistake and on discovering the error the applicant notified the Department. Also, the applicant would suffer financial hardship if he were to pay back the amount.

#### Formal decision

The AAT set aside the decision to cancel the supporting parent's benefit of the applicant and directed that recovery of the overpayment of unemployment benefit be waived.

#### BOURKE and SECRETARY TO DSS (No. S87/1272)

**Decided:** 2 March 1988 by B.J. McMahon

The AAT *set aside* a DSS decision to cancel the widow's pension of the applicant because she was living in a de facto relationship.

In deciding whether or not the applicant was in such a relationship the Tribunal considered the many facets of a relationship: permanence, exclusiveness, sexual intercourse, mutual society and protection, the existence of a household, relationships within the household, relationship presentation to the outside world, financial support and the nurture and support of the children of the relationship (see *Farnell and Lauritz* 11 ALN N103).

The AAT commented:

'Assessment of the significance of these factors is not a mathematical exercise. One does not count them, one weighs them. The object is to

identify, as far as humanly possible, the presence or absence of the essential characteristic of a marital relationship...'

(Reasons, para.21)

In this case the applicant and her alleged de facto spouse lived essentially separate lives, although they lived under the same roof.

#### TILLEY and SECRETARY TO DSS (No. S87/172)

**Decided:** 8 March 1988 by J.A. Kiosoglous, B.C. Lock and D.B. Williams

The Tribunal *set aside* a DSS decision to cancel the applicant's widow's pension on the basis that she was residing with her former spouse in a de facto relationship.

The evidence was that the applicant agreed to reside with her former spouse as his housekeeper. The Tribunal commented that while the relationship may appear similar to that which they had while married, it was also consistent with that of housekeeper and employer. The applicant and her former spouse did not have the commitment towards each other of a married couple.

Accepting that it was 'sensible for people who share a house to have an amicable relationship' the Tribunal noted those aspects which in this case testified to the absence of a marriage: the absence of sexual relations, the absence of any permanent commitment, the absence of any provision in wills for each other and the absence of any financial commitment to the applicant by her former spouse. The former spouse was also still married, though separated, to his second wife and had a retarded daughter to care for with that wife. This also was a relevant factor in considering the issue of the applicant's relationship with her former spouse.

## Legislation

### CHILD SUPPORT SCHEME: CHANGES TO THE SOCIAL SECURITY ACT

The *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Bill 1988* is complementary to the child support legislation.

The Bill provides for an 'annual maintenance free area' which is the amount below which people in receipt of pensions or benefits will not have their rate of pension or benefit affected by any maintenance payment that they receive. In the case of an unmarried person the sum is \$780 plus \$260 for each dependent child, other than the first (see clause 4).

'Maintenance income' is defined as the amount of the payment or the value of a benefit received by the person from the parent of a dependent child, or spouse or former spouse for the

maintenance of the child, or from the person's spouse or former spouse for the maintenance of the person. It also includes payments or benefits given to children for maintenance (clause 4).

It is clear that the effect of the above definitions is to make misleading claims that the legislation is solely about child support. The maintenance free area is defined in such a manner that the first \$780 allowed is not necessarily a rate of \$15 per week for the first child. A person who receives \$15 per week for his/her own maintenance and \$15 per week for the first child will only be able to count the first \$15 in calculating his/her maintenance free area.

'In-kind maintenance' is also to be assessed in determining the rate of pension or benefit. For example, rent payments, a car or school fees would fall within this category (clause 4).

Capital payments and lump sum payments fall within the definition of 'capitalised maintenance income.' The value must exceed \$1500 (clause 4). Clause 5 provides a formula for apportioning such payments over a period of time so that the person is taken to receive them in fortnightly instalments.

'Special maintenance income' relates to 'in-kind housing maintenance income' (primarily the family home), in-kind maintenance income received from the person's spouse or former spouse within six months of separation (but excluding in-kind housing or capitalised maintenance income), or maintenance income provided in respect of the 'expenses arising from a physical, intellectual or psychiatric disability, or a learning difficulty, of a dependent child of the person.' The disability must be