'The Tribunal is not persuaded by the evidence of the applicants that the decisions under review are incorrect. The Tribunal is satisfied, also, that the evidence available to the respondent was such that the respondent was entitled to cancel the pensions in each case. The Tribunal is not persuaded by the evidence which has been placed before it in its review of the respondent's decision to set aside the decision appealed from.'

(Reasons, para. 14)

Formal decision

The AAT affirmed the decision under review.

[D.M.]

HILTON and SECRETARY, DSS (No. N89/451)

Decided: 29 October 1990 by R.N. Watterson, C.J.Stevens (M.T. Lewis dissenting).

By a majority (Watterson and Stevens) the AAT affirmed a decision of the SSAT that Hilton was eligible for a supporting mother's benefit 'at all relevant times' from 13 October 1981 until it was cancelled by the DSS as from 8 September 1988.

The issue was whether during that period Hilton was living with Ian Bradford as his *de facto* spouse.

The legislation

At the time, s.44 (1) of the *Social Security Act* provided that a person was qualified to receive supporting mother's benefit only if that person was a single person. A single person was defined as a person who was not married: s. 43(1).

According to s.3(1), a married person included a *de facto* spouse, which was defined as a person who is living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not legally married to that other person.

Findings

Hilton and Bradford had shared Bradford's home continuously from 1985 until 20 December 1989, when Hilton and her 2 children had moved to a separate residence. During that period Hilton had used the name of Bradford for various purposes, including that of registering the birth of her younger child.

Hilton had registered Bradford as the father of her 2 children, and had represented him as such to the children's school and even to her own parents. The AAT accepted her explanation that this was a facade erected in the interests of the children, and found that Bradford was not in fact the biological father.

Bradford had acted as a father figure to Hilton's children, looking after them in Hilton's absence both during and after the period of shared residence. The AAT accepted that this was consistent with the relationship being one of friendship and support.

Although sexual intercourse had taken place between Hilton and Bradford on at least one occasion, the AAT found that the relationship lacked the element of exclusivity. Hilton had had sexual relations with other men, and this was seen by her and by Bradford as being consistent with their relationship.

During the period that they had lived together, Hilton and Bradford had led largely separate social lives. Although some domestic tasks were shared, they each kept a separate household. They occupied separate rooms and did not eat meals together.

Their financial relations caused the AAT some difficulty. In November 1989, Bradford caused a transfer of his home to be registered, from himself as sole owner to himself and Hilton (named as Bradford) as joint tenants. While this would normally indicate a marriage-like relationship, the AAT found that Bradford was confused as to the nature of the legal arrangement that he was making, believing that 'he had simply made arrangements for Mrs Hilton's children to inherit his property'.

The majority laid considerable weight on Hilton's move to separate accommodation in December 1989 as supporting its view that the relationship was one of strong friendship and mutual support rather than marriage-like.

The dissenting decision

Mrs Lewis dissented from the majority decision, finding that at all relevant times Hilton was living in a *de facto* relationship with Bradford. In her reasons, she noted the many inconsistencies and conflicts in the evidence, and found that neither Hilton nor Bradford were credible witnesses. She referred to the remarks of the AAT in *Petty* (1982) 10 *SSR* 99:

'The proper administration of the social welfare system depends upon applicants making a full and true disclosure of their circumstances. The question whether two people who reside under the one roof are living as husband and wife on a *bona fide* domestic basis although not legally married is difficult enough for the Director-General to resolve without people telling lies or trying to mislead. Where applicants make an untruthful or misleading statement concerning their relationship, they must realise that the inference is likely to be drawn that they are endeavouring to conceal the true nature of their relationship.'

In support of her conclusion, Mrs. Lewis found that:

- whether he was the father of Hilton's children or not, he accepts and enjoys the role of father and is registered as such
- Hilton had used the name Bradford for various purposes and had presented to a number of different persons and instrumentalities either as his wife or his de facto wife
- they had provided mutual support and assistance over a number of years, in a way that was consistent with a marriage-like relationship, and
- there was considerable financial interdependence and sharing, such as the transfer of the title to Bradford's home, and the provision by him to Hilton of a sum of $26000 from his insurance settlement for the purchase of a car with no arrangements for repayment for some 3 years.

[P.O'C.]

Invalid pension: physical or mental impairment

SECRETARY TO DSS and VAN HENGST (No. 6285)

Decided: 12 October 1990 by H.E. Hallowes.

Van Hengst lodged a claim for invalid pension on 5 December 1988. This was rejected on the ground that a Commonwealth Medical Officer had found she

was capable of undertaking employment. When the SSAT set aside this rejection and granted an invalid pension, the DSS appealed to the AAT.

Van Hengst suffered from a collagen disease, for which there was no specific treatment or cure. Her condition was constitutional and expected to deteriorate over a number of years. Her disabilities included impaired agility and nimbleness of the fingers, dry discomfort and some stiffness of the skin, coldness and numbness when her extremities were exposed to cold. Van Hengst said she experienced difficulty sleeping and carrying out her domestic duties. In Holland she had carried out some clerical work but had not looked for paid work since arriving in Australia in 1969. She had been on sickness benefit since September 1988.

Findings

The Tribunal approved the case of *Kadir* (1989) 49 *SSR* 638, in which the AAT had said the essential qualification for invalid pension continued to be that the claimant is 'permanently incapacitated for work'. It found that, although Van Hengst's mood was depressed and she was entrenched in a restricted invalid-type lifestyle, her perception of herself did not constitute a psychological condition falling within the term 'mental impairment' under s.27(b) of the *Social Security Act*.

Van Hengst did, however, have a physical impairment and was permanently incapacitated for work as a result. The Tribunal found that Van Hengst would not be able to attract an employer prepared to employ her during a normal working week. Her attendance would be unpredictable and agility and dexterity were necessary attributes for employees in the only work for which she would be suitable. The degree of her incapacity was not less than 85%.

The Tribunal said that s.27(b) came into operation once a finding was made that the respondent was permanently incapacitated under s.27(a). Although part of the reason why Van Hengst would be unattractive to an employer was the length of time she had been out of the workforce, her lack of skills and her age, 50% of her incapacity for work arose from her physical impairment.

Formal decision

The AAT affirmed the decision of the SSAT.

[B.W.]

Invalid pension: incapacity 'in Australia'

HIBBERT and SECRETARY TO DSS
(No. 6216)
Decided: 11 September 1990 by D.W. Muller.

In October 1989, the DSS decided that Hibbert should be paid invalid pension at a rate fixed under the reciprocal agreement between Australia and the United Kingdom and not at the rate in the Australian *Social Security Act*.

This decision was based on a finding that Hibbert's incapacity for work had commenced at a time when he was not an Australian resident.

Hibbert asked the AAT to review the decision that he did not qualify for an invalid pension under the standard provisions of the *Social Security Act*.

The legislation

Section 30(1) provides that an invalid pension shall not be granted to a person unless the person became permanently incapacitated for work while an Australian resident. Hibbert claimed his incapacity commenced in Australia in 1974.

The facts

Hibbert arrived in Australia in October 1974 and obtained work as a boilermaker. In December 1974 he injured his back while lifting at work. He received worker's compensation payments and tried to work from time to time. The longest continuous period he was able to work since 1974 was about 3 months. He aggregated about 6 months work in the 2 years after the injury. He stayed on worker's compensation until 1979 when he received a lump sum payment. In 1977, the DSS decided he was permanently incapacitated for work but his wife's income meant his invalid pension would be about $1 a week so he declined it.

In 1979 he sold his house, car and furniture, and cleared his debts. He left no property in Australia. He told the Tribunal he had intended to go to England for a 12-month period and live with his mother. His mother proved difficult to live with so he bought a cheap house into which he and his wife shifted. He was about to return to Australia when his wife's brother died. This delayed his return. Then another of his wife's brothers died and this further delayed his return. He went on to English social security benefits in 1979 and was away from Australia for a total of 28 months.

Hibbert returned to Australia in November 1981, rented a villa and found work. He stayed in the job for 12 months until the firm closed down. He then went on to unemployment benefits and got into debt. His wife left him and returned to England. Hibbert returned to England in 1984 on a one-way ticket because, he said, that was all he could afford. Hibbert had spent 4 years and 9 months in Australia, then 2 years and 4 months in England, followed by 2 years and 10 months in Australia.

In England he went on the dole for 3 months, then got work until he was made redundant in about July 1986. He then went on to the United Kingdom equivalent of invalid pension for nearly 3 years. In June 1989 he and his wife returned to Australia and he claimed an Australian invalid pension.

The issue

The question before the Tribunal was when Hibbert's incapacity for work arose, because invalid pension is not granted to a person unless the person became permanently incapacitated for work while he or she was an Australian resident.

The decision

Medical evidence of an orthopaedic surgeon indicated that in 1976 (nearly 2 years after his original accident) Hibbert had a full range of movement in his lumbar spine. By 1986 he had generalised arthritis which was the reason for the grant of invalid pension in England.

The Tribunal did not accept that a person who was capable of working for 3 years was incapacitated for work. It found that Hibbert became permanently incapacitated for work in England in 1986. It also found that Hibbert's absence from Australia between 1979 and 1981 was not a temporary absence as Hibbert had sold his house and severed all ties with Australia. Hibbert conceded that the second absence from Australia was not a temporary absence.

Formal decision

The AAT affirmed the decision under review.

[B.W.]