total lack of education and his inability to speak or understand English, combine to make it questionable, in our view, whether he would be accepted back into the work force. Mr Huttner (who appeared for the respondent), put it strongly that '. . . you cannot become an invalid by virtue of the fact that you cannot speak the (English) language'. While that proposition, considered in isolation, is unquestionable, his lack of comprehension of the language, just as his lack of education, is, we think, a factor to be taken into account in assessing the effect of his physical or mental incapacity or his ability to obtain and perform work. We add, because it appeared to be challenged to some extent by the respondent, that we are satisfied that the applicant's lack of ability to speak or comprehend English is genuine and virtually total, despite the length of time he has been in Australia.

. . .

48. In all the circumstances, and taking due account of *Panke's* case, we find ourselves, on the evidence, unable to conclude that the applicant was at any relevant time, permanently incapacitated for work to the extent of 85 percent or more, and we would accordingly affirm the decision under review.

49. While coming to that conclusion, we think we should add that we have considerable doubt whether, in the situation of the 1980's, the applicant's chances of obtaining suitable employment will prove realistic. As the evidence before the Tribunal in *Re Bradley and the Director-General of Social Services* [4 *SSR*, 35] showed (see paragraph 34 of the Reasons for Decision), positions of gatekeeper and lift driver are not in practice available. And we think it is clear that many other types of 'light' employment are not likely to be available to the applicant because of his disability or his lack of education and English. We do not accept Mr Huttner's proposition that the applicant, with his history, and being on sickness benefit, should have been out looking for employment, even perhaps concealing the fact that he *was* on sickness benefit. We think that that asks far too much of such a person; and we certainly do not think that a person should be expected to mislead a prospective employer as to his medical fitness.

50. Not the least of the applicant's problems is that he has now been, for several years, treated as markedly disabled—by the grant of compensation, by his former employer, by his own doctors and by the grant of the invalid pension itself. He no doubt believes himself to be unable to work and has accepted the role of an invalid so that motivation to break back into the work force has been lost. The conflicting medical opinions that have now been expressed no doubt have served only to confuse him.

51. We would therefore recommend that the applicant's case be reconsidered in 12 months time. This would probably mean that the applicant would need to make a fresh application at that time, and submit up to date medical reports. If there is no improvement in his medical condition over that period, and experience has shown that no suitable light employment has been able to be found, we would think that the grant of an invald pension to him should then be favourably considered.

Invalid pension: separation under one roof

McQUILTY and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/116)

Decided: 13 January 1982 by W. Prentice, M. S. McLelland and I. Prowse.

Cecil McQuilty was granted an invalid pension on 11 April 1980 when he was 64. The DSS decided that his wife's earnings of $430 a fortnight would be taken into account in computing the level of McQuilty's pension. [The effect of this would have been to reduce his pension by about $43 a week.]

In making this decision, the DSS relied on s.29(2) of the *Social Services Act*:

> (2) For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall—
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines,
> be deemed to be half the total income of both.

McQuilty appealed against this decision to an SSAT, arguing that he had been living apart from his wife for many years, although they lived under the same roof. The SSAT recommended that the appeal be allowed but a delegate of the Director-General dismissed the appeal and affirmed the earlier decision to take the wife's earnings into account.

McQuilty then applied to the AAT for review of this decision.

The evidence

McQuilty, his wife and his daughter gave evidence to the AAT, and this evidence was not challenged by the DSS. They said that the McQuiltys had not lived as man and wife since 1970; they considered there was a complete breakdown of their marriage; they rarely saw each other; they did all their own household chores. They had remained in the one house (rented from the Housing Commission) because it provided cheap accommodation—it was 'vital economically that they not give up their own house'—and because they wanted to keep up appearances for their grandchildren.

Household expenses had been shared by the McQuiltys when he had a job; since his retirement his wife had paid most of these expenses on the understanding that he would resume his contribution when he received more income.

On 9 January 1981, the McQuiltys formalised their situation by entering into a written separation agreement.

The AAT's decision

The AAT decided that McQuilty and his wife had been living separate and apart since 1975. They had lived quite independent lives and it was clear that resumption of relations as husband and wife was impossible. The recent payment of rent by Mrs McQuilty did not compel the conclusion that they were living as husband and wife. As they had lived apart in pursuance of the written separation agreement since January 1981, the wife's income must be ignored from that date: s.29(2)(a).

Before that written agreement was made, that is between 11 April 1980 and 9 January 1981, was there 'any special reason' for disregarding the wife's income: s.29(2)(b)?

The AAT referred to *Reid*, 3 *SSR* 31, where the AAT had decided that a married pensioner should be treated as a single person (and his spouse's income ignored) because the marriage relationship had ended and the husand and wife were separated, although they were living undr the same roof and had made no formal separation agreement.

The AAT concluded that the conditions under which the McQuiltys share a house should be treated as a 'special reason' under s.29(2)(b) of the Act: 'By so finding "special reason" it considers it will be achieving rather than frustrating ends and objects of the Act': Reasons for Decision, para. 14.

The AAT determined 'that Mrs McQuilty's income should be disregarded in calculating the rate of the applicant's pension and directs that his pension should be recalculated and paid accordingly as from 11 April 1980': Reasons for Decision, para. 15.

Child endowment: jurisdiction

DOWLING and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/33)

Decided: 13 November 1981 by J. D. Davies J.

In June 1980 the Director-General decided that the child endowment payable for the children of Richard Dowling and Stephanie Claire (who had been divorced) should be apportioned—two-thirds to Dowling and one-third to Claire. (Section 99A gives the Director-General discretion to make such a decision.)

Dowling applied to the AAT for review of this decision and the Tribunal directed that Claire be joined as a party. Her counsel raised a preliminary objection that the allocation of child endowment was the subject of a matrimonial dispute which could only be dealt with by the Family Court, and that the AAT had no jurisdiction.

The AAT rejected this argument, saying that 'the Family Court of Australia has no