pleted in March 1980) that Italy was the country of her residence and that she intended to stay in Australia for only 6 months. The Tribunal said that, in its opinion, Italy was 'the settled or usual abode of the applicant'.

The extension of the concept of 'residence' to include 'domicile' did not help Tolomeo. (At the time of the decision under review, this extension was effected by s.20, which incorporated s.6 of the *Income Tax Assessment Act* 1936.) Under the common law, Tolomeo's domicile followed that of her husband; and the evidence was sufficient to satisfy the AAT that her husband had decided to settle permanently in Italy when he returned there in 1972. That is, he had abandoned his Australian domicile of choice and reverted to his Italian domocile of origin.

The reason for departing

Tolomeo claimed that she had left Australia in October 1980 for reasons which could not have been foreseen when she arrived here in March of that year. The AAT noted that she had not had the operation, which she had claimed was one of her reasons for returning to Italy; and said that the real reason was the deterioration in her husband's health. Looking at the history of her husband's health, the AAT observed that he had been seriously ill since 1972:

> In my opinion it is foreseeable, if not highly likely, that the condition of a man in this state of health, even if he were in one of his better periods, might deteriorate within a period of six months.
>
> In addition, the statement in Mrs Tolomeo's arrival card of 14 March 1980 that she intends to stay in Australia for 6 months detracts from any argument that a necessity to depart in October the same year arose suddenly from unforeseen circumstances.

(Reasons, p. 12).

Special benefit

The AAT considered the possibility of granting Tolomeo a special benefit under s.124 of the Act. It rejected the DSS argument that this benefit should not be granted to a person who could not meet the residence requirements in other parts of the Act: special benefit was 'an independent payment with its own tests for entitlement'. The AAT adopted the statement in *Kakouras* (1983) 17 *SSR* 172, to the effect that the Act did not forbid payment of the benefit overseas but that, as a matter of discretion, payment overseas should be confined to 'circumstances of extreme personal need'.

The AAT said that, if a claim for special benefit were lodged, then the DSS could exercise the discretion in s.124 in the light of all the circumstances, including Mr and Mrs Tolomeo's absence overseas, Mr Tolomeo's inability to travel, their Italian pensions and any provision of support by their children. But the AAT would not 'make a finding on special benefit before the Director-General has had an opportunity to consider it': Reasons, p. 13.

Formal decision

The AAT affirmed the decision under review.

Married persons—'separation under one roof'

DRIES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/186)

Decided: 26 September 1984 by E. Smith, M.S. McClelland and A.P. Renouf.

Mervyn Dries asked the AAT to review a DSS decision to cancel his sickness benefit. That decision had been based on s.114 of the *Social Security Act*.

Section 114(1) provides that a person's sickness benefit is to be reduced according to the person's income. The section goes on to provide:

> (3) For the purposes of sub-section (1), the income of a person shall include the income of that person's spouse, unless that person and his spouse are living apart.
>
> (a) in pursuance of a separation agreement in writing or of a decree, judgment or order of a Court; or
>
> (b) in such circumstances that the Director-General is satisfied that the separation is likely to be permanent.

The issues

In the present case, the DSS had taken into account the income of Dries' wife; but Dries and his wife told the AAT that, at the time when his sickness benefit was cancelled, they had been living separately and apart in their jointly-owned home, that their marriage relationship had ended, but that, for religious reasons, they had not attempted to dissolve the marriage.

When the DSS cancelled Dries' sickness benefit, his wife had moved out of their jointly-owned home and the DSS had then restored his sickness benefit. The DSS argued that, because of this restoration, Dries was no longer a person whose interests were affected by a decision (as required by s.27(1) of the *AAT Act*) and that, therefore, he did not have standing to ask the AAT to review the decision to cancel his benefit. But Dries argued that because his wife intended to return to the jointly-owned home, he needed to know whether that return would affect his sickness benefit.

Standing to seek review

The Tribunal concluded that Dries did have 'an interest in the outcome of the proceedings and that the case should proceed . . . it is clear that to do otherwise would only be postponing the issue to the time when the applicant's wife moved back to the house': Reasons, para. 7.

Separation under one roof

The AAT noted that in *Karrasch* (1983) 17 *SSR* 169, the Tribunal had said that a husband and wife living separately in the one house were not 'living apart' as that term was used in s.114(3).

But, the AAT said, several decisions had established that a couple could be 'living apart', although living in the same house, for the purposes of age and invalid pension, which was dealt with by s.29(2); these included *Reid* (1981) 3 *SSR* 31; *McQuilty* (1982) 6 *SSR* 61; and *A* (1982) 8 *SSR* 29. While there were some differences between the wording of s.29(2) and s.114(3), the AAT said that the expression 'living apart' should be given the same meaning in each of those provisions:

> We can discern no principle in the legislation that a more technical meaning is to be given to that expression and there appear to be good reasons for giving it the meaning that has been given to similar provisions elsewhere in the Act. The Act is a welfare Act; it is not a technical statute, such as the Income Tax Assessment Act, where rights and liabilities are spelled out technically and technicalities necessarily govern the intention. We have concluded, therefore, that we should treat the principles applied in the cases we have cited in the last preceding paragraph as relevant in ascertaining whether the applicant and his wife are "living apart". For that purpose, we are of the view that spouses *can* be living apart for the purposes of s.114(3) notwithstanding that they live under the same roof.

(Reasons, para. 11).

The AAT said that the evidence in this case established that Dries' marriage was at an end; and that the principal reason for their continuing to live in the one house was financial – if the house was sold, it would not provide sufficient funds to finance the purchase of two separate dwellings. Applying the decision in *A* (above), the Tribunal concluded Dries and his wife should be treated as 'living apart' in circumstances which were likely to be permanent and that, accordingly, the income of Dries' wife should not be taken into account when fixing the level of his benefit.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Dries was, at all relevant times, entitled to sickness benefit regardless of the income of his wife.

IVOVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/265)

Decided: 17 September 1984 by R. Balmford.

Pedrag Ivovic was granted an invalid pension in 1979. In 1982, the DSS decided that the rate of his pension should be calculated by taking account of half the income of his wife (in accordance with s.29(2) of the *Social Security Act*).

Ivovic asked the AAT to review that decision, claiming that he and his wife were separated, although living under the one roof; and that this was a sufficient 'special reason' for disregarding his wife's income (as provided by s.29(2)(b)).

Separation under one roof

The AAT noted that the earlier decisions of *A* (1982) 8 *SSR* 79 and *Reid* (1981) 3 *SSR* 31 had accepted that separation under the one roof was a sufficient 'special reason' to disregard a spouse's income.

In deciding whether a married couple were separate although sharing the same house, family law cases were a useful guide. In *Pavey* (1976) 10 ALR 259, the Family Court had said that separation involved 'the destruction of the marriage relationship' and had emphasized that it was unlikely that a marriage had broken down when a husband and wife continued to live together. To establish the breakdown of the marriage, the Court would expect clear evidence and an explanation why the parties continued living under the one roof.

The Tribunal said that, in the present case, it should consider –

(a) the reason why, if the parties were in fact separated, they continued to live under the same roof;
(b) what was the marital relationship before and during the relevant period with reference to

- where the parties lived
- sexual intercourse
- mutual society and protection
- recognition of the existence of the marriage by both spouses in public
- private relationships, and
- the nurture and support of the children

(c) whether either or both of the spouses had formed the intention to sever or not to resume the marital relationship and had acted on that intention, or acted as if the marital relationship had been severed.

Ivovic and his wife told the AAT that each of them wanted to dissolve the marriage, his wife because she did not accept any financial responsibility for her husband, Ivovic because he did not want to be a burden (or dependent) on his wife. However, they still felt affection for each other, shared many household tasks and had not pursued a divorce because of their young child.

The Tribunal suggested that the key to Ivovic's situation probably lay in his humiliation in being reduced to an invalid pensioner, owing thousands of dollars to the DSS (see *Ivovic* (1982) 3 *SSR* 25) and financially dependent on his wife. The AAT quoted an observation in the DSS files:

> At the heart of the dispute between Mr and Mrs Ivovic is their wish to have separate incomes. Mrs Ivovic does not want to be burdened by her husband and he does not want to be a burden to her. It is unfortunate that the effect of the Social Security Act is to place Mr Ivovic in a dependent position in relation to his wife and to embroil the department in a dispute which it has no power to resolve.

The Tribunal decided that, while Ivovic and his wife had decided to break the marriage relationship, 'neither has with determination acted on that intention or acted as if the relationship had been severed': Reasons, para. 17. Accordingly, they could not be regarded as separated.

Formal decision

The AAT affirmed the decision under review.

Cohabitation

KELLIE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/103)

Decided: 5 October 1984 by A.N. Hall, I.A. Wilkins and J.G. Billings.

By a majority, the AAT *affirmed* 2 DSS decisions to cancel an unemployment benefit held by Deborah Kellie and to refuse a new claim for benefit. The decisions had been made on the basis that Kellie and a man, O, were 'married persons' and that, therefore, O's income should be treated as her income (in accordance with s.114(3) of the *Social Security Act*).

The question before the AAT was whether Kellie was living with O as his wife, on a *bona fide* domestic basis, although not legally married to him.

The AAT was told that Kellie and O had begun to live together in 1981, when they were university students. They had maintained an exclusive sexual relationship since then, but they had few interests in common, did not pool their financial resources and were agreed that the relationship was unlikely to persist.

The majority of the AAT (**Hall** and **Wilkins**) noted that, in *Lynam* (1983) 20 *SSR* 225, the Federal Court had expressly rejected the argument that financial dependence was the critical factor when deciding whether a man and woman should be treated as 'married persons' for the purposes of the unemployment benefit income test in s.114(3):

> What must be looked at is the composite picture . . . The endless scope for difference in human attitudes and activities means that there will be an almost infinite variety of circumstances which may fall for consideration.

In the present case, the majority said, Kellie and O had continued to maintain an exclusive sexual relationship and a common household. Although they were disenchanted with the relationship, they had persisted with it and Kellie should be regarded as living with O as his wife on a *bona fide* domestic basis although not legally married to him.

On the other hand, **Billings** emphasised the lack of personal interdependence between Kellie and O and described it as 'an arrangement of convenience'. On balance, she said, Kellie could not be described as living with O as his wife on a *bona fide* domestic basis.

WOOD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W80/83)

Decided: 17 August 1984 by G. D. Clarkson.

The AAT *set aside* a DSS decision to refuse unemployment benefit to R. Wood. The decision had been made on the basis that a woman, M, was living with Wood as his wife 'on a *bona fide* domestic basis although not legally married to him' and that, in accordance with s.114(3) of the *Social Security Act*, her income should be treated as Wood's income.

After examining all the evidence of the relationship between Wood and M, the Tribunal said that it was 'extremely difficult to draw a clear line of definition between the contention on the one hand that the relationship is one of *de facto* marriage and on the other that it is similar to that of mother and child, as the SSAT thought, or to that of brother and sister as Mrs M has suggested': Reasons, p.14.

On the one hand, Wood and M owned the house in which they lived as joint tenants; and, in an affidavit lodged in 1982 under the *Family Law Act*, M had sworn that he was 'residing in a de facto relationship with [M]'.

On the other hand, the AAT found that the joint tenancy had been entered into as a means of raising a temporary loan (so that Wood would not be forced to sell his house); and that the assertion of a *de facto* relationship made in the affidavit was based on advice to Wood from the DSS and was made in order to resist a claim for maintenance from his former wife.

The AAT said that, because it was uncertain whether M was Wood's 'spouse' within the meaning of that term in s.114 of the *Social Security Act*, it followed that her income should not be treated as Wood's income. That approach was, the Tribunal said, in accordance with the observations of Woodward J in *McDonald* (1984) 18 *SSR* 188.

WATTUS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/773)

Decided: 25 July 1984 by W. A. G. Enright.

The AAT *set aside* a DSS decision to cancel a widow's pension held by Jean Wattus. That decision had been based on the belief that Wattus was living with a man, C, as his wife 'on a *bona fide* domestic basis' and was, by s.59(1) of the *Social Security Act*, excluded from the definition of 'widow'.

The Tribunal said that the relationship between Wattus and C was one of friendship: there was no sharing of income, assets