

penses. However, at no stage did they share a surname and they had regular independent social activities.

On the basis of this evidence, the AAT decided that, although Smith had been living with R on a *bona fide* domestic basis during the period in question (which was from July 1984 to March 1985), she had not lived with R 'as his wife'. The AAT said that several aspects of the relationship between Smith and R had to be examined, including the following:

(1) the fact that Smith and R had lived apart since March 1985 suggested that any relationship which they had had was not a permanent one;

- (2) during the period when they shared the house, there was no suggestion that their relationship was an exclusive one;
- (3) Smith and R had pooled only part of their resources (namely the cost of purchasing food);
- (4) Smith had gone out of her way to explain to other people that she was not married to R;
- (5) Smith and R had not regarded their relationship as being like one of man and wife (this, the AAT said, was 'the most important test': Reasons, p.13);
- (6) there had been no sexual relationship between Smith and R during the period in question; and
- (7) Smith and R had enjoyed largely separate lives.

The AAT summarised its assessment as follows:

Perhaps it is some emotional element that must exist in the relationship between a man and woman before she can be regarded in anyway as his wife. Whatever spark is required to ignite the tinder of cohabitation into the fire of a quasi marriage relationship, we are clear that it did not exist in the present circumstances. An arrangement of mutual convenience for the housing and the material welfare of the parties and their children is the highest level at which it could be put.

(Reasons, p.16)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Smith be granted the widow's pension.

Income test: damages settlement

PAYNE and SECRETARY TO DSS (No. W85/47)

Decided: 14 June 1985 by G. D. Clarkson. Graeme Payne was granted unemployment benefit in January 1984 and payment of that benefit continued for some time. However, the DSS decided that, because his wife received a payment of \$14 000 in the week ending 11 May 1984, unemployment benefit could not be paid to Payne for that week.

The payment to Payne's wife was a settlement of her damages claim for injuries suffered in a car accident. According to evidence given to the Tribunal, the damages related to disfigurement and pain and suffering but did not include any economic loss suffered by her. Payne asked the AAT to review the DSS decision.

The legislation

Section 114(1) of the *Social Security Act* provides for unemployment benefit to be reduced by taking account of the beneficiary's weekly income. According to s.114(3), the income of a married person includes the income of that person's spouse.

Section 106(1) defines 'income' as meaning—

any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . .

The s.106(1) definition goes on to exclude certain payments from the definition of income, including a payment of compensation for loss or damage to buildings, plant or personal effects (para. (cd)).

'Income' does not include capital receipts

The AAT said that the 'two terms, "moneys" and "valuable consideration", are equivocal and could refer . . . to what is commonly described as capital': Reasons p.5.

However, the AAT said, the meaning of those terms should be influenced by the other phrases in the s.106(1) definition, 'personal earnings' and 'profits'; so that the definition of 'income' should be taken as referring to income as distinct from capital receipts.

It might be argued, the AAT said, that the specific exclusion of compensation

payments for loss of property in para. (cd) suggested that all compensation for personal injury should be treated as income; but the Tribunal said that it was wrong to read too much into that specific exclusion, 'because Acts of Parliament are not always drafted as precisely as might be desirable': Reasons p.8. The AAT concluded that the definition of 'income' did not apply to capital receipts and that—

the general policy of the Act [is] that bare capital assets, in no way derived from or related to the loss of past or future earnings, do not affect the amount of periodic payments made under Part VII of the Act.

As the general damages received by Payne's wife had not covered loss of earning capacity, past or future, there could be no question that those damages amounted to 'income' within s.106(1).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that the sum of \$14 000 general damages received by Payne's wife was not income for the purposes of ss.106 and 114.

Income test: war restitution pension

KOLODZIEJ and SECRETARY TO DSS

(No. S84/44)

Decided: 6 June 1985 by J. A. Kiosoglous. Stanislaw Kolodziej had been granted an invalid pension in March 1980. At the time of this grant, the DSS reduced his pension on the ground that payments received by Kolodziej and his wife under the West German *Federal Restitution Act* were 'income' for the purposes of the social security income tests.

Kolodziej had spent 5 years as a prisoner of war in Germany and had been subjected to severe physical maltreatment over this period. In 1949, he married his wife, who had also been imprisoned and ill-treated by German authorities during the war. They had migrated to Australia in 1950 and, in 1964, had been recognized by the West German Government as victims of Nazi persecution. As a consequence they had

been granted compensation under the West German *Federal Restitution Act* and that compensation had been converted to periodic pension. In 1980, Kolodziej's restitution pension was \$4800 a year and his wife's pension was \$3600 a year.

Following the decision of the DSS to reduce his invalid pension by reference to these restitution pensions, Kolodziej sought review by the AAT.

The legislation

Section 6 of the *Social Security Act* now defines 'income' as—

personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for that person's own use or benefit by any means from any source whatsoever, within or outside Australia and includes a periodical payment or benefit by way of gift or allowance . . .

The West German *Federal Restitution Act* provides for the payment of compensation or a pension to a victim of Nazi

persecution who 'suffered damage to life, body, health, freedom, property, wealth, his employment or economic livelihood . . .'

'Income'

The AAT said that the definition of 'income' in s.6 of the *Social Security Act* was broad but it was not unlimited. That definition differed markedly from the notion of 'income' under the *Income Tax Assessment Act 1936*, as the AAT had pointed out in *Paula* (1985) 24 SSR 288 and *Schafer* (1983) 16 SSR 159.

Because the *Social Security Act* and the *Income Tax Assessment Act* used quite different concepts of 'income', statements made in Parliament when the *Income Tax Assessment Act* was being amended to exclude restitution pensions from 'assessable income' for income tax purposes, were not relevant to the meaning of 'income' in the *Social Security Act*. On this point, the