The legislation

Section 28(2) of the *Social Security Act* provides that the annual rate of pension payable to an age pensioner is to be reduced by reference to the pensioner's annual rate of income.

Section 6(1) defines 'income' as meaning -

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

Net income

The AAT referred to the decision of the Full Federal Court in *Haldane-Stevenson* (1985) 26 *SSR* 323, where the court had observed that the *Social Security Act* was concerned with net income, so that expenses incurred in producing income should be deducted from that income when applying the pension income test.

However, the AAT said, *Haldane-Stevenson* had suggested -

> 'two limitations which must be made when calculating net income from gross income. The first is that the proposed deductions are not to be permitted unless there is income "with which they are associated" . . .
>
> Secondly . . . the proposed deductions must arise in the same period during which the gross income sought to be reduced arose.'

(Reasons, p.8)

In the present case, the AAT said, these two limitations prevented Mr and Mrs Crosby from deducting the payments of trading debts from their receipt of interest payments on the sale of the business. The trading debts had been incurred when carrying on the business but there was now no income from that source:

> 'In my view there is no sufficient association between debts incurred in the carrying on of the business which has been sold and the interest received on capital owing in respect of the sale of the capital assets of that business.'

(Reasons, p.8)

Furthermore, the AAT said, the trading debts had arisen before the sale of the business 'and the interest is now payable in respect to later periods': Reasons, p.8.

The AAT acknowledged that Mr and Mrs Crosby had been placed in a very difficult position: almost all of the instalment payments of the outstanding purchase price and interest was being used to repay the trading debts so that they had practically no financial resources. Notwithstanding that they had consulted a solicitor, an accountant and a real estate agent, their advisors had not contemplated

> 'the effect on the lives of the applicant and his wife nor on their pensions of the arrangement they were allowed to make, which deprived them, both over 70 years of age, of immediate access to their remaining capital, and which substantially reduced their pension entitlement.'

(Reasons, p.9)

The Tribunal concluded by recommending that Mr and Mrs Crosby obtain 'competent professional advice' so as to come to an arrangement with their creditors to 'enable some part of the interest to be used to supplement their drastically reduced pensions . . .': Reasons, p.9.

Formal decision

The AAT affirmed the decision under review.

Income test: 'deprivation of income'

BRADNAM and SECRETARY TO DSS
(No.Q86/22)
Decided: 16 December 1985 by R. Balmford.

Mr and Mrs Bradnam were age pensioners who had private income of $9450 during the financial year 1982-83. This income was made up of rents paid by various tenants of a property which they owned as partners.

In May 1983 they sold this property for $165 000. They told their investment advisor, R, that they wanted to invest the proceeds of the sale so that they would not have to worry about managing the investments and so that any share of the proceeds which might go to their daughter or their grandson would be liable to income taxation.

R then set up a discretionary trust, to which the proceeds of the sale of the property were transferred. The trust deed provided that the trustee should hold any income produced from the funds for the benefit of any of Mr and Mrs Bradnam, their daughter and their grandson.

According to R, this trust was not set up so as to increase the age pension payable to Mr and Mrs Bradnam. However, because Mr and Mrs Bradnam gave instructions that only $1000 of the trust's total income of $8000 should be paid to each of them, their income was now reduced to a level where they qualified for age pensions at the maximum rate. The balance of the income of the trust was distributed to their daughter and their grandson, who were then liable to pay income tax on the money received by them.

The DSS then decided that the balance of the income of the trust was income of which Mr and Mrs Bradnam had deprived themselves and that, therefore, it should be treated as their income for the purposes of the age pension income test; and the DSS reduced their age pensions accordingly. Mr and Mrs Bradnam asked the AAT to review that decision.

The legislation

Section 28 of the *Social Security Act* provides that the rate at which a pension is payable is to be reduced by reference to the person's income.

At the time of the decision under review, s.47(1) provided that if the Secretary is of the opinion that a pensioner has 'deprived himself of income . . . in order to obtain a pension at a higher rate than that for which he would otherwise have been eligible', the pension's income shall include the amount of the 'deprived income'.

'Deprived'

The AAT referred to earlier decisions in *Nadenbousch* (1984) 21 *SSR* 242, *Robertson* (1983) 12 *SSR* 118, and *Roberts* (1983) 17 *SSR* 168 and said that, where a person had deprived himself of a capital sum, that person had also deprived himself of the income which the capital would have earned. In the present case, by handing over the capital sum from the sale of their property, Mr and Mrs Bradnam 'had deprived themselves of the income which they would otherwise

have received by the investment of that money': Reasons, para 19.

'In order to . . .'

The next question, the AAT said, was whether that deprivation had been effected 'in order to obtain a pension at a higher rate'.

The Tribunal said that neither Mr nor Mrs Bradnam had given evidence to the Tribunal - the only direct evidence was that of their investment advisor, R. He had told the AAT that Mr and Mrs Bradnam had set up the trust and transferred the money to it in order to ensure that their daughter and grandson paid income tax on any benefit which they derived from the income produced by those funds.

The AAT said that R.'s evidence was hearsay: it could rely on that evidence but, because Mr and Mrs Bradnam had not appeared before the Tribunal, the weight to be given to that

evidence might not be very substantial. It was, the AAT said, -

> 'To say the least, unusual for a small close family to arrange its affairs in such a way that the Taxation Department receives more money by way of income tax than it would receive in the absence of the arrangement.'

(Reasons, para.24)

The AAT noted that Mr and Mrs Bradnam's investment advisor, R, had been aware of the possible pension implications of setting up the trust and transferring the money to it. The AAT said that, in deciding whether Mr and Mrs Bradnam had deprived themselves of income for the purpose of obtaining pensions at higher rates, it was entitled to take into account the material which their advisor had before him. That point had been established in *Nadenbousch* (above). The AAT came to the following conclusion:

> 'There is no statement of [Mr and Mrs Bradnam's] intention on which I can rely to balance against the inevitable conclusion to which I am led by the facts before me. In all the circumstances I find that Mr and Mrs Bradnam deprived themselves of income in order to obtain a pension at a higher rate than that for which they would otherwise have been eligible.'

(Reasons, para.25)

Formal decision

The AAT affirmed the decision under review.

Mobility allowance: eligibility

LARKIN and SECRETARY TO DSS (No.V85/282)

Decided: 13 February 1986 by J.O. Ballard

Colleen Larkin was a young woman who suffered from a degree of mental retardation and had been granted an invalid pension in 1979. In December 1984 she began to attend a sheltered workshop in a country town some 30 kilometers from her home. There was no public transport between her home and the workshop and she travelled to and from the workshop in her own car. She applied to the DSS for a mobility allowance and, when the DSS rejected her application, she sought review by the AAT.

The legislation

Section 133RD(1)(a) of the *Social Security Act* provides that a person may qualify for a mobility allowance if she is -

> 'in the opinion of the Secretary, permanently unable, or unable for an extended period, by reason of [her] physical or mental disability, to use public transport without substantial assistance . . .'

'Unable . . . to use public transport'

The AAT found that Larkin had 'very great deficiencies in her mental processes' and that she was capable of using public transport only if she was given a week's instruction for each distinct journey.

The AAT said that it was not relevant that there was no public transport available between Larkin's home and the sheltered workshop - the principal reason for the DSS' rejection of her application. Such a narrow view was, the AAT said, 'unwarranted':

> '[T]he provision refers to the use of public transport generally and not to any limited use for a specific journey between home and work.'

(Reasons, para.18)

The Tribunal said that, in deciding whether a person was 'unable . . . to use public transport', the appropriate question was whether the person could not reasonably be expected to make use of public transport - essentially the same test as was applied to a person's inability to earn a livelihood for the purposes of special benefit, as in *Te Velde* (1981) 3 *SSR* 23.

In the present case, Larkin could not reasonably be expected to use public transport without at least a week's tuition for each specific route or new journey. That tuition had to be described as 'substantial assistance' in the sense that it was more than trivial or minimal.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Larkin was entitled to mobility allowance.

Married persons: 'special reason' to treat as single

TRAIL and SECRETARY TO DSS (No.S85/50)

Decided: 16 January 1985 by J.A. Kiosoglous.

Charles Trail, who was 77 years of age, and his wife, who was 79 years of age, had been granted age pensions in 1973 and 1972. Their pensions had been paid at the married rate and had been reduced by taking into account Mr Trail's superannuation income.

From 1980, Mrs Trail's health deteriorated and in May 1984 she was diagnosed as suffering from Alzheimer's disease. She was no longer mobile, unable to care for herself and was incontinent. She was then admitted to a nursing home.

The DSS then decided that single rate pensions should be paid to Mr and Mrs Trail, but that each pension should still be reduced by taking account of Mr Trail's superannuation income. Mr Trail asked the AAT to review that decision.

The legislation

Section 28(1A) of the *Social Security Act* fixes two rates of age pension - a higher rate for 'an unmarried person' and a lower rate for a married person whose spouse is also receiving a pension.

Section 28 (1AAA) authorizes the Secretary to pay the higher rate of pension to married pensioners where the Secretary is satisfied that their living expenses are higher because illness or infirmity has prevented (and will continue to prevent) them living together.

Section 28(2) establishes the pension income test, under which the rate of age pension is to be reduced by reference to the pensioner's income.

Prior to 21 September 1984, s.29(2) provided that the income of a husband or wife should be taken as half the total income of the husband and wife -

> '(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 a particular case, the Secretary otherwise determines . . .'

From 21 September 1984, that provision was replaced by s.6(3), which provides for 50% of the total income of a married couple to be attributed to each married person; and s.6(1), which excludes from the definition of 'married person' -

> '(a) a legally married person . . . who is living separately and apart from the spouse of the person on a permanent basis; or
>
> (b) a person who, for any special reason in any particular case, the Secretary determines in writing should not be treated as a married person . . .'

The discretion to disregard income

The AAT first rejected a DSS argument that s.28(1AAA) was an exhaustive statement on the question of separation by reason of illness or infirmity:

> 'The old s.29(2)(b) discretion is a residual "catch-all" discretion which may apply to any situation in which "special reason" is demonstrated in relation to applications under Part III of the Act. In cases where the *nature* of that illness or infirmity has the effect of rendering the marriage of the applicant and the ill or infirm spouse a "dead marriage", that is, where it cannot meaningfully be said that the *consortium*