returned to new Guinea) Donovan was convicted of a criminal offence and sentenced to imprisonment.

In his evidence to the Tribunal, Donovan said that he anticipated that he would be released from prison early in 1985, would obtain employment as a taxi driver and be allocated accommodation by the State Housing Commission, so that he would be able to bring his wife and daughter to Australia.

The legislation

Section 95(1) of the *Social Security Act* provided, at the time of the decision under review, that family allowance was payable to a person who had 'the custody, care and control of a child'.

According to s.96, family allowance could only be paid for a child outside Australia if the claimant was living in Australia and the Secretary was satisfied 'that the claimant intends to bring the child to live in Australia as soon as it is reasonably practicable to do so'.

Section 112(2) provided that additional unemployment benefit could be paid to a married person if that person had a dependent spouse resident in Australia.

Section 112(5) provided for the payment of additional unemployment benefit to a person who had the 'custody, care and control of a child'. Section 106A provided that a person outside Australia could not be treated as a child of a beneficiary unless the Secretary was satisfied that the beneficiary 'intended to bring the person to live in Australia as soon as it was reasonably practicable to do so'.

Additional benefit for wife

The AAT pointed out that, during the period in question, J had not been resident in Australia and, even if she had been dependent on Donovan, he was not qualified to receive additional unemployment benefit for her.

Additional benefit for child

The AAT accepted that Donovan intended to bring his daughter to Australia as soon as reasonably practicable. Accordingly, the only question was whether he could be said to have the 'custody, care and control' of his daughter so as to be entitled to family allowance and additional unemployment benefit for her.

The AAT referred to the decision in *Hung Manh Ta* (1984) 223 *SSR* 247, where a Vietnamese refugee living in Australia was held not to have the 'custody, care and control' of his children who were still in Vietnam living with their mother. The AAT said that the facts of *Hung Manh Ta* were very different from the facts of the present case:

> '27. A crucial distinction between *Ta's* case and this case is that in this case the circumstances which determine when D joins the applicant are circumstances within the applicant's control. These concern his general establishment in North Queensland and in particular in obtaining regular work and accommodation for the family . . . Those plans were faced with no external impediment save those which it was for the applicant to overcome . . .
>
> 28. In *Ta's* case Mr Hall said:
>
> "He is powerless to limit the period or the scope of his wife's custody, care and control of the children. He is powerless to control their movement out of Vietnam . . ."
>
> On these facts it cannot be said that the applicant is powerless to limit the period or scope of his wife's custody, care and control of the children [*sic*] nor that he is powerless to therefore remove them [*sic*] from Papua New Guinea. On the contrary, both of these things are within his power. As a result the situation is essentially different from that in *Ta's* case.'

Accordingly, the AAT concluded that Donovan was entitled to payment of family allowance and to a higher rate of unemployment benefit in respect of his daughter.

Formal decision

The AAT set aside the decisions under review and remitted the matter to the Secretary with directions that Donovan was entitled to family allowance for his daughter from the date of its cancellation and to additional unemployment benefit for his daughter.

Married persons: 'special reason' to treat as single

FAGUE and SECRETARY TO DSS (No N85/11)

Decided: 6 March 1986 by R. A. Hayes and G.P. Nicholls.

Mr and Mrs Fague had been granted age pensions in 1980, free of the income test because each of them was over 70 years of age. At that time, they were living apart because Mrs Fague was suffering from an 'almost total mental incapacity' and the DSS was paying their pensions at the single rate.

In October 1983, following the introduction of an income test for pensioners aged over 70, Mr and Mrs Fague's pensions were reduced because of their combined income. In June 1984, their pensions were reviewed and, because of the level of their combined income, the DSS cancelled their pensions. Mr Fague then asked the AAT to review that decision.

The legislation

Section 28(1A) of the *Social Security Act* fixes two rates of a 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) authorises the Secretary to pay the higher 'single' 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 pension's income.

Prior to 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 a decree, judgment or order of a court; or
>
> (b) unless, for any special reason, in a particular case, the Secretary otherwise determines . . .'

From 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 (unless the contrary intention appears) 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 . . .'

A 'special reason' to disregard income

In the present case, the income which had been taken into account when applying the income test to Mr and Mrs Fague's pensions had consisted, for the most part, of income received by Mr Fague from his investments. However the DSS had also taken into account some interest payments accruing on Mrs Fague's investments, although neither she nor Mr Fague had access to that income because she was incapable of dealing with, or authorising any other person to deal with, her property.

Nevertheless, the AAT said that the former s.29(2)(b) did not allow Mr or Mrs Fague to have their incomes treated separately. This was because there was a special provision in the *Social Security Act*, s.28(1AAA), for dealing with the financial problems of a husband and wife who were obliged to live apart because of illness or infirmity:

'[T]he presumption in interpreting the Act must be that a legislative provision dealing specifically with a particular problem should be interpreted as excluding a more general provision that deals generally with that topic along with others. *Generalia specialibus non derogant.* [General provisions do not derogate from special provisions.] (See *Maybury* v. *Plowman* (1930) 16 CLR 468, 473-4 per Barton ACJ).

. . .

[A] basic principle of statutory interpretation would, *prima facie*, demand that if the applicant and his wife cannot gain relief under a provision dealing specifically with separation due to illness, the more general discretion allowing relief in "special circumstances" should not be invoked.'

(Reasons, pp.10-1)

Turning to the new definition of 'married person' in s.6(1), the AAT observed:

'The problem here, as with the pre-21 September 1984 position, is that s.28(1AAA) continues to apply, and to deal specifically with the "greater living expenses" of a "married person" where the husband or wife is forced to live apart as a result of "illness or infirmity". The exclusion in the definition of a "married person" contained in s.6(1) is, in the Tribunal's view, limited by the clear contrary intention to *include* as "married persons" in s.28(1AAA), spouses living apart indefinitely as a result of illness or infirmity'.

(Reasons, p.15)

The discretion

The AAT said that, even if Mr and Mrs Fague were entitled to take advantage of the old s.29(2) or the new definition of 'married person' in s.6(1), this was not an appropriate case for the exercise of any discretion in their favour. The evidence in the present case did not show that Mr Fague was suffering any serious financial hardship: he was 'out of pocket something in the region of $10 to $15 a fortnight'; and Mrs Fague was 'experiencing no hardship, because she does have access to the income of her husband'. Although neither Mr or Mrs Fague currently had access to her income or assets, there were, the AAT said, procedures available in the protective jurisdiction of the Supreme Court by which this access could be gained. Moreover, the AAT said, Mr Fague stood to inherit his wife's assets should she pre-decease him:

'In this case, the applicant and his wife are living as a married couple, in the sense that they are facing the crisis in their lives occasioned by Mrs Fague's almost total mental incapacity in a manner which reflects a long, sustaining, and enduring mutual bond. The applicant is bestowing upon his infirm wife the manifestations of his qualities of loyalty and responsibility. The responsible, indeed the only decision is that she should be cared for in a nursing home. They are not living together, but their emotional and financial resources are being pooled for their joint benefit.'

(Reasons, pp.16-7)

Formal decision

The AAT affirmed the decision under review.

Procedure: telephone evidence

LINTOV and SECRETARY TO DSS (No N84/221)

Decided: 6 March 1986 by J.O. Ballard, D.J. Howell and J.P. Nicholls.

In the course of its review of a DSS decision to refuse an invalid pension to a 49-year-old man, the AAT considered whether it was appropriate for medical witnesses to give their evidence to the Tribunal by telephone.

The AAT conceded that evidence was frequently taken on the telephone in the Tribunal but indicated that it was reluctant to allow this practice to become the norm. The AAT suggested that a general practitioner might

'more readily give evidence as to an applicant's attendances and treatment than a specialist give opinion evidence as to causation. The first is largely reading treatment cards; the second is giving an opinion which may go far to determine the matter in issue on which counsel on the other side is likely to need to cross-examine . . . As we understand it, the reason, and the only reason, why [the specialist's] evidence was taken on the telephone was because the specialist was busy. We do not think it is desirable for s.33 of the *AAT Act* be used to take evidence on the telephone in those circumstances.'

(Reasons, para.10)

Procedure: legal professional privilege

GREENBANK and SECRETARY TO DSS (No N83/150)

Decided: 19 March 1986 by B.J. McMahon, M. McLelland and J.P. Nicholls.

In the course of its review of a DSS decision to reject a claim for invalid pension, the AAT concluded that the applicant (a 38-year-old man) was incapacitated for work.

The AAT then turned to the question whether Greenbank's incapacity for work was permanent. The DSS called on Greenbank to produce two rehabilitation reports prepared by senior hospital staff at the request of his solicitor. Greenbank declined to produce these reports, arguing that the call for their production was invalid and that they were protected by legal professional privilege.

Greenbank's solicitor told the Tribunal that he had requested the preparation of these reports for two purposes: first, to obtain evidence to use before the Tribunal; and, second, to provide information to the legal aid authority which had given Greenbank legal aid for these proceedings.

Legal professional privilege

The AAT said that the two reports in these proceedings.' (Reasons, p.15)