'[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)