condition, skin rashes, infections, enuresis and anaemia. It was also claimed that the applicant's daughter had slight mental retardation but this was rejected by the Tribunal who found that she was of average or slightly less than average intelligence. None of her conditions was considered to have resulted in substantial impairments and the care provided as a result did not, in general terms, go beyond that of normal parental care.

The legislation

Section 105J of the *Social Security Act* provides that a person who provides 'constant care and attention' to a dependent severely handicapped child in their home is eligible for handicapped child's allowance.

Section 105JA gives the Secretary power to grant an allowance to a person who provides 'only marginally less than the care and attention' needed by a severely handicapped child to a dependent handicapped child in their home (para.(a)), if the person 'is, by reason of the provision of that care and attention, subjected to severe financial hardship' (para.(b)).

Section 105H(1) defines a 'severely handicapped child' as a child with a physical or mental disability needing constant care and attention; and a 'handicapped child' is defined as a child with a physical or mental disability needing only marginally less care and attention.

Was there a 'need' for constant care and attention?

The AAT observed that the care and attention provided to the daughter was clearly needed, but

> ... it is equally clear that this care and attention is neither constant nor marginally less than constant. The administration of medication or vitamin tablets would take only a few minutes a day. The enuresis is controlled, although the child is checked at night occasionally. The additional nursing provided because of infections, whilst adding to the care and attention, does not alter this conclusion...
>
> However, additional care and attention is provided by the applicant. It consists of a whole range of tasks which are well within [the daughter's] capabilities, e.g. assisting her when she dresses, tying her laces, bathing her. It also comprises a large amount of protection and emotional support as [she] is often teased at school because of her appearance. To make matters worse, the ethnic community to which the applicant belongs stigmatizes physical disability. [The daughter] is thus sheltered within her own community by her mother. Indeeed, the applicant's grandmother is not even aware of her grand-daughter's problems. Whether the additional care and attention that is given to [her] by the applicant is in her best interests is a difficult question. If it is not, it cannot be 'needed'...

(Reasons, paras. 15-16)

The Tribunal referred to the decisions in *Sachs* (1984) 21 *SSR* 232 and *Sergi* (*this issue*). In those decisions the objective test of need was stressed.

The objective test

The Tribunal noted the difficulty of applying the objective test. The appropriate degree of objectivity is difficult to determine. However, 'care and attention can never be needed by a child when its provision is judged not to be in the best interests of the child's development' (Reasons, para. 18).

The Tribunal, while sympathising with the parent, concluded that this case involved a little girl whose disabilities, although not severe enough to substantially disrupt her daily life, distinguished her from her peers to the extent that her parent felt it necessary to provide care and attention beyond that which was necessary.

Formal decision

The AAT affirmed the decision under review.

Invalid pension: married person

BRADLEY and SECRETARY TO DSS
(No. N86/70)

Decided: 18 September 1986 by A.P. Renouf, J.H. McClintock and H.D. Browne.

In June 1984 Norma Bradley applied to the AAT for review of a DSS decision to reject her application for invalid pension on the basis that her husband's income deprived her of entitlement.

The facts

The applicant and her husband had been married for over thirty years. She had developed a mental condition about nine years ago. This required her to undergo hospitalisation. In 1981 the condition became worse and in 1983 she entered a hospital for an indefinite period. She moved to a nursing home in November 1985.

Medical evidence indicated that the applicant was unable to communicate with her husband or children 'in any sensible, rational or emotional way'. It was accepted by the AAT that her condition would require her to spend the rest of her life in institutional care. Her husband considered that the marriage was at an end although he did not want to divorce the applicant because of a moral obligation not to 'dump' her.

Two relevant periods

The relevant sections of the *Social Security Act* were amended on 21 September 1984. The AAT therefore had to consider the application in relation to two periods. The first period being from June 1984 to 20 September 1984 and the second from 21 September 1984 to the present.

The former section 29(2) which related to the first period provided:

> ...the income of a husband or wife shall -
> (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 any particular case, the Director-General otherwise determines, be deemed to be half the total income of both.

Was there a special reason?

The AAT referred to *Reid* (1981) 3 *SSR* 31 which had said that the 'special reason' required in s.29(2) to make a case exempt from the normal methods for the computation of income must be such as to 'take it outside the common run of cases'.

The husband of the applicant argued that he suffered financial hardship as a result of his wife's condition and therefore his case was out of the ordinary as required by Reid.

The AAT did not accept this submission. There was no evidence that the husband was so committed to the payment of the applicant's hospital expenses that he had virtually no income left (see *Williams* (1981) 4 *SSR* 39). His income and expenses were balanced. The applicant's hospitalisation did not require expenditure beyond that for items such as toiletries and clothing which he would have incurred in any event. He also had savings of over $14,000.

Thus, in relation to the first period the Tribunal agreed with the decision of the DSS. It was also noted that s.28(1AAA), which gives the Secretary a discretion to allow payment of a pension at the single rate for a married person where the living expenses of the married couple are increased by reason of illness making them unable to live together, had been properly disregarded in this case. The AAT was not convinced that the applicant's husband had incurred increased expenses as a result of his wife's hospitalisation.

The second period

From 21 September 1984 the new s.6(1) defined 'married person' as including a de facto spouse but not including:

> (a) a legally married person (not being a de facto spouse) 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.

It was argued for the applicant that she and her husband should not be regarded as married and that she was therefore entitled to the pension at the single rate as her husband's income would no longer be calculated for the purposes of the income test. The DSS argued that the marriage still existed and that unless s.28(1AAA) can apply the income test would apply and preclude payment.

The AAT referred to *Fague* (1986) 31 *SSR* 392 where it was said

> The exclusion in the definition of a 'married person' contained in s.6(1) is...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. This latter circumstance remains precisely the situation of the applicant and his wife. He considers himself in a real sense to be a married person, notwithstanding the fact that his wife has become incapacitated and has had to be institutionalised...

The difference between Fague and the present case was that the applicant's husband in the present case no longer considered himself to be married to the applicant.

This did not resolve the apparent conflict between s.6(1) and s.28(1AAA). On this point the AAT concluded that the definition of 'married person' governs s.28(1AAA). The definition section was to apply unless the contrary intention appeared in the legislation and there appeared to be no contrary intention in s.28(1AAA).

The Tribunal concluded that the applicant was 'a legally married person...who is living separately and apart from the spouse of the person on a permanent basis'. She thus fell within the exclusion in s.6(1). This finding was based on the evidence of the separation of the applicant and her husband and applied the High Court decision in *Main* v. *Main* (1949) 78 *CLR* 636.

The AAT also referred to Trail (1986) 31 SSR 377 which while taking a broader view of what constituted a 'special reason' under the old s.29(2)(b) came to a similar conclusion on the basis of the new provisions.

Formal decision

The AAT affirmed the decision under review for the period from 13 June 1984 to 20 September 1984 and set aside the decision in respect of the period from 21 September 1984 to the present and remitted the matter for reconsideration with the direction that the applicant not be considered 'a married person'.

Federal Court Decision

Family allowance: late claim

OZCAGLI v. SECRETARY TO DSS (Federal Court of Australia)

Decided: 16 September 1986 by Keely, J.

This was an appeal, under s.44(1) of the *AAT Act*, against the AAT's decision in *Ozcagli* (1986) 31 *SSR* 379 where the Tribunal had affirmed a decision by the DSS to refuse to allow backpayment of family allowance.

The facts

Ozcagli had arrived in Australia in 1970 with two children. Two others were born in Australia. She had limited understanding of English, and her husband, who could speak English, had difficulty reading documents in English.

Ozcagli said that she had received a form relating to H's student family allowance but the form was too difficult for any member of the family to read and had been lost when the family moved. Eventually, she had completed an application for H in February 1983. When M was born, an interpreter who was to assist Ozcagli in applying for family allowance had suffered an accident and the form had not been filled in. H had realised in 1983 that Ozcagli was not receiving family allowance for M and the family had visited the local DSS office and completed the form.

The legislation

Section 103(1) of the *Social Security Act* provided that family allowance ceased to be payable if -

> (f) the child attains the age of 16 years unless the Director-General is satisfied, before the expiration of 3 months after the child attains that age, that the child became a student child on attaining that age...

Section 102(1) provides for the back payment of family allowance where the claim is lodged within 6 months of the claimant becoming eligible or in 'special circumstances' such longer period as the Secretary allows.

Cessation of payment

It was argued for the applicant that the effect of s.103(1) was to 'suspend' payment until such time as the Secretary became satisfied that the child became a student child on attaining the age of 16 years. The effect of this view was that upon becoming satisfied the allowance could be paid retrospectively.

The Court did not accept this submission. It was held that the effect of s.103(1) was to disqualify the person from receiving payment. The provision of the 3 month time period within which the Secretary is to be satisfied supported this conclusion. This time period was also prefaced with the word 'unless' and not 'until'. This indicated that the payment would cease and not merely be suspended. Also, where the Act intended suspension of a payment to occur the words 'suspend' or 'suspension' were used. It was further commented that the ordinary meaning of the word cease meant bringing to an end. Finally, other situations which were described in s.103(1) as giving rise to a cessation of payment are referred to explicitly as not temporary.

Special circumstances

The Court held that the AAT had not erred in law as to the construction of s.102 with respect to the existence of 'special circumstances'. The AAT's decision was consistent with the decision of the Full Court in *Beadle* (1985) 26 *SSR* 321. The Court referred to the difficulties of attempting to rely on the negligence of the applicant's husband. (This was not relied upon in the AAT).

The Court raised the question of whether the Full Court in Beadle, in referring to the 'negligence' of a third party, intended to include the 'negligence' of the spouse of an applicant. Of course, the negligence of a third party did not necessarily give rise to special circumstances.

Formal order

The Federal Court dismissed the appeal and upon counsel for both parties stating that they were not seeking an order as to costs made no order as to costs.