

# Cohabitation: law reform

## STOILKOVIC and SECRETARY TO DSS

(No.V85/45)

**Decided:** 23 December 1985 by R.Balmford, G.Brewer and D.Sutherland.

Suncica Stoilkovic had applied to the DSS for sickness benefit; but the DSS had rejected that claim because it decided that she was living with a man, M, as his wife and the level of his income precluded payment of sickness benefit to Stoilkovic. She asked the AAT to review that decision.

### A de facto marriage

The central question before the Tribunal was whether Stoilkovic was a 'dependent female' within s.106(1) of the *Social Security Act* - that is, was she living with M 'as his wife on a *bona fide* domestic basis although not legally married to him'?

Stoilkovic and M had begun a close relationship in late 1981 and had lived in the same house (owned by M) from then to the present time. However, the nature of their relationship had changed (according to Stoilkovic and M) about 5 months after they had started to live together. Although Stoilkovic gave birth to a child (of which M was registered as the father) in August 1984, they claimed that they had lived essentially separate lives from early 1982.

Between March 1984 and June 1985, Stoilkovic and M had slept in separate bedrooms in M's house, M had provided Stoilkovic with financial support after the birth of her child, and there was no regular pattern of division of the household responsibilities, with Stoilkovic occasionally cooking M's meals and M occasionally providing Stoilkovic with assistance in return. There was a limited common social life and Stoilkovic had not represented herself as M's wife.

M told the AAT that he had not regarded his life with Stoilkovic as similar to a marriage - there was none of the personal feelings which marriage involved. Stoilkovic and M main-

tained a sexual relationship, although M claimed to have other sexual partners.

On the basis of this evidence, the AAT concluded, 'albeit with some difficulty, that the relationship between Stoilkovic and M falls within the range of relationships which could be regarded as the nature of a marriage': Reasons, para.23. In reaching this conclusion, the AAT relied upon the statement in *Lambe* (1981) 1 SSR 5 that the range of relationships acceptable within and recognisable as a marriage extended across a wide spectrum.

### Policy implications

The AAT said that the purpose of the cohabitation rule was to ensure that people living in a marriage-like relationship were dealt with on the same basis as people living in a real marriage. But, the AAT said, many people lived together in different circumstances and were entitled to receive pensions or benefits without any regard being paid to their household circumstances:

'Where 2 people of the same sex live together, whether or not there is any sexual element in the relationship, whether or not there is any emotional dependence, whether or not there is any financial dependence, whether or not the establishment can be described as a household, whether or not the relationship appears to be permanent; whatever the circumstances, the act is silent. Where 2 people of the opposite sex, but closely related, such as a sister and brother or parent and child, live together, it would not be possible for either of them to come within the definition . . . of "de facto spouse" . . .

27. The effect of the legislation is that people who choose to live in a staple heterosexual relationship, whether married or not, receive less by way of pension or benefit than people who choose to live in any other kind of establishment. This

result derives from 2 assumptions which are visible throughout the Act: first, that the normal mode of adult life is that of a married couple under one roof; and second, that 2 people living under one roof can live more cheaply than 2 people living separately and should therefore receive less by way of support from the taxpayer than should 2 people living separately. That second assumption is, no doubt, in general true: but, because of the first assumption, it is applied only to people living in a limited range of relationships, who thus suffer by comparison with those who live in different relationships.'

The AAT referred to 'the variety and fluidity of relationships within households' and observed:

'29. It seems to us that this whole question should, and no doubt does, concern those whose task is not only to administer, but also to develop, our system of social welfare. The injustice to the married and as-good-as-married is not the only difficulty which we see arising from the present form of the Act. The need for officers of the DSS, in implementation of the legislation, to enquire into the intimate details of people's lives is unfortunate: and, as is a matter of general knowledge, does harm to the Department's relationship with the very people it seeks to help.

30. There is nothing new in what we have said, and nothing of which the Department is not well aware. We make no constructive suggestion; no simple solution presents itself to us. We merely take this opportunity of expressing our concern, in the hope that, albeit in the long term, some consideration may be given, by those responsible by this much amended piece of legislation, to remedying the situation which we have described.'

### Formal decision

The AAT affirmed the decision under review.

## STUART and SECRETARY TO DSS

(No.V85/46)

**Decided:** 19 December 1985 by J.R.Dwyer, G.Brewer and D.Sutherland.

The AAT affirmed a DSS decision to recover an overpayment of unemployment benefit paid to Stuart.

The DSS decided that there had been an overpayment because Stuart had not disclosed to the DSS that he was living with a woman, J, in a *de facto* relationship and the woman had an income

(which, under s.114 of the *Social Security Act* had to be treated as Stuart's income).

The AAT found that there was a 'significant emotional and romantic commitment between Stuart and J'. They lived as a couple and their relationship was of long standing. Taking into account all facets of the interpersonal relationship between Stuart and J, they were living as man and wife. After expressing this conclusion, the AAT made the following com-

ments on the cohabitation rule:

'31. We feel we should say that the test imposed by the legislation is extremely difficult to apply. It is not easy to determine whether a man and a woman are living as man and wife. We think the time is fast approaching when changes of lifestyle will require either individually means-tested assessments of rate of benefit for all individuals, whether married or not, or a hard and fast rule that those who are