Secretary to the DSS certified, under s.15A(2)(b) of the *Social Security Act*, that the appeal raised an important principle of general application.

**The legislation**
This appeal hinged on the question whether the Italian social security pensions should be regarded as 'income' as that term was defined in s.6(1) of the *Social Security Act*. The terms of this definition are set out in *Zolotenki*, noted in this issue of the *Reporter*.

**The Italian pension scheme**
Before migrating to Australia, Nemaz had worked in Italy and had made contributions from his earnings to INPS, a national body whose directors were nominated by the Italian government from employer groups, trade unions and civil servants.

INPS maintained a fund, to which workers, employers and the government contributed, and from which pensions (including age pensions) were paid to persons who had established their entitlement through contributions. Pensions were paid in quarterly instalments, with an extra 'Christmas' payment each year. Under the rules of INPS, the level of pension paid to an eligible person related to that person's wages rather than to her or his contributions to the fund.

**The AAT's decision**
The Tribunal decided that the pension payments did amount to 'income' within s.6(1):

> 'In our opinion the periodicity of the payments, their lack of relationship to the contributions of the member and the general scheme of the Italian social welfare as applied to INPS members make it apparent that such pension payments are income within the meaning of s.6(1) of the Act as well as in the ordinary sense of the word "income".'

(Reasons, p.7.)

The AAT also held that Italian income tax, deducted from the Italian pension at source, should be included in the calculation of the applicant's 'income' because, under the terms of the Australian-Italian double tax treaty, that tax was refundable to the applicant:

> 'If the applicant had derived his income in Australia there would be no question but that pay-as-you-earn tax deductions from salary would be treated as earnings derived by a person for his own benefit insofar as they are credited against any tax assessment or refunded if no tax is payable. We see no different result when the tax is deducted in Italy and subsequently refunded.'

(Reasons, p.8.)

**Formal decision**
The AAT *affirmed* the decision under review.

[redacted]

**Re EVANS and SECRETARY TO DSS (No.S86/187)**
**Decided:** 28 May 1987 by J.A. Kiosoglous and D.B. Williams.

The AAT *affirmed* a DSS decision that a war disability pension, paid by the United Kingdom government to an Australian invalid pensioner was 'income' within s.6(1) of the *Social Security Act*.

Accordingly, the AAT concluded, the pension should be taken into account in assessing the rate of invalid pension payable to Evans. This was despite the fact that the pension was intended to compensate the applicant for interference with his normal living and was not intended as compensation for any loss of capacity for work. The AAT referred to the Federal Court decision in *Read* (see this issue of the *Reporter*), which established that -

> 'the definition of "income" is not to be restricted to receipts which would ordinarily be income but must be construed to include some capital receipts. Thus even if the UK war pension is properly classified as compensation for pain and suffering (that is a payment of a capital nature) rather than compensation for loss of income, it still may be income within the meaning of the Act.'

(Reasons, para.19.)

The pension payments could be described as 'moneys . . . received . . . from any source whatsoever, within or outside Australia'; and as 'a periodical payment or benefit by way of . . . allowance', the AAT said.

# Family allowance: temporary absence

**MAHFOUZ and SECRETARY TO DSS**
**(No. N86/531)**
**Decided:** 20 February 1987 by R.A. Hayes, J.H. McClintock and M.T. Lewis

Shahid Mahfouz applied to the AAT for review of a decision to cancel the payment of family allowance in respect of his three children in Lebanon. The applicant first came to Australia in 1968, married and had three children. In 1978 they visited Lebanon to be with the applicant's ill father and remained there until the applicant returned in 1985 and the rest of the family in August 1986.

Family allowance had been paid prior to 1978 and was suspended prior to their departure in 1978 as at that time it was not expected that they would be absent for more than twelve months. On his return the applicant claimed family allowance for his children in Lebanon. The DSS eventually conceded that he was entitled to family allowance from the date of his departure in 1978 to March 1980 and from the date of his application on his return in September 1985.

The reason why the DSS accepted eligibility until March 1980 was that the main purpose for the applicant and his family returning to Lebanon was to be with his ill father. The father died in September 1979. Allowing for a customary three month mourning period, March 1980 could be taken to be the date beyond which the applicant's absence from Australia could not be described as temporary for the purpose of being with his ill father.

The question for the AAT to determine was whether the applicant was entitled to arrears of family allowance for the period between 1980 and 1985.

**The legislation**
The legislation had been amended a number of times over the relevant period. The Tribunal decided that the appropriate provision to apply was that which existed at the time that the original decision to cancel payment would have been made.[The Tribunal referred to the 'conceptual decision' made in this case. Apparently this is in reference to the absence of clarity as to at what point cessation of payments actually took place after the applicant and his family had returned to Lebanon. It was only upon the new application being made upon his return that caused a 'decision' to be made that cancellation should have been made in March 1980.]

Thus the relevant provision to be applied was s.103(1)(d) and (e) of the *Social Security Act* which provided:

> '...An endowment payable to an endowee...ceases to be payable

if...the endowee ceases to have his usual place of residence in Australia, unless his absence from Australia is temporary only...[or] the child ceases to be in Australia, unless his absence from Australia is temporary only...'

**Were the applicant and his children temporarily absent from Australia?**

The question then became one of whether the applicant and his children were temporarily absent from Australia. The Tribunal referred to the decision of the Federal Court in *Hafza* (1985) 26 *SSR* 321. In that decision the Court had referred to the relevance of the intention of the applicant in determining whether absence from Australia could be regarded as temporary. The Court referred to a temporary absence becoming an indefinite absence even though it may not be a permanent absence. The example of a person who leaves Australia to visit a sick relative and then decides to stay on after the expiration of that purpose was also posited by the Court as an example of a situation where the 'absence will cease to be temporary notwithstanding an intention eventually to return to Australia'.

That example in *Hafza* was similar to the facts in the present case said the AAT. The fact that he and his family had stayed away for seven years, that as Australian citizens they could return to Australia at any time, that he had property in Lebanon but none in Australia and that his children all attended school in Lebanon all became relevant in determining whether his absence was temporary. On the whole the AAT was not convinced that but for a lack of money for air fares the family would have returned soon after the death of the applicant's father. [The applicant obtained part-time work after the death of his father to earn money to pay for return fares to Australia but the work was sporadic due to the war.] It appeared that the applicant's plans were somewhat indefinite for a period of years after the death of his father.

**Formal decision**

The AAT gave effect to the DSS concession at the start of the hearing that the original decision be set aside and a decision be substituted that family allowance be cancelled from March 1980 and that family allowance recommence from September 1985.

# De facto relationships

**Re STOPPER and PALOMBO and SECRETARY TO DSS**
**(Nos S86/243 & S86/245)**
**Decided:** 31 March 1987 by J.A. Kiosoglous, J.T.B. Linn and D.B. Williams.

The AAT *set aside* a DSS decision that the two applicants, Stopper and Palombo, were living in a de facto relationship and were ineligible for supporting parent's benefits.

Stopper and Palombo, each of whom was a supporting parent beneficiary, had been living together for 3 years. They told the AAT that their relationship had always been one of employer and housekeeper: Stopper, a 48-year-old woman, was responsible for house cleaning and, in return, Palombo, a 51-year-old man, provided free accommodation for her and her son.

Stopper and Palombo assumed individual responsibility for their own cooking and washing, although Palombo and his daughter had occasionally eaten food prepared by Stopper; they each contributed to household bills; they did not jointly own any property and had separate bank accounts; they occasionally shared outings; and they did not sleep together nor had they ever had a sexual relationship.

S had applied for separate public housing; and she told the AAT that, as soon as she was offered housing, she would move out of Palombo's house.

The question before the AAT was whether the two applicants were 'de facto spouses' as defined in s.6(1) of the *Social Security Act*: that is, whether they were -

'living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not legally married to that other person . . .'

The AAT decided that, although the applicants were living together on a *bona fide* domestic basis, they were not living together as spouses. Their relationship was 'sustained primarily by necessity'; and had 'not made a commitment to live together because of any personal relationship': Reasons, paras 20, 21.

**Re JONES and SECRETARY TO DSS**
**(No.N86/878)**
**Decided:** 8 May 1987 by A.P. Renouf, C.J. Stevens and M.T. Lewis.

The AAT *set aside* a DSS decision to reject a claim for sickness benefit lodged by Jones, a 39-year-old man, because of the income of a woman (his former wife) with whom he was living.

The AAT decided that Jones was not living in a marriage-like relationship with the woman, although they were sharing a house, had once been partners in a de facto marriage and were the parents of two young children.

The AAT accepted Jones' evidence that he and the woman had terminated their de facto relationship, now had no sexual relationship, had no common social life and had only minimal communication at home. The Tribunal also accepted Jones' claim that he had remained living under the same roof as his former de facto wife only because of his concern for his children's well-being (an attitude which she shared) and because he was determined to retain custody over the children.

The AAT noted that the DSS had adopted the approach that a former de facto couple who continued to share a roof and support their children should be regarded as still 'married' for the purposes of the *Social Security Act*:

'This is a reasonable hypothesis and in such a situation the evidence refuting it, if it is to be refuted, has to be weighty. We consider that the evidence in this case is sufficient to refute the hypothesis. The circumstances surrounding the relationship of [Jones and the woman], as described by each of them, are very unusual but in this day and age, they are not improbable.'
(Reasons, para.43)

**Re ROBERTS and SECRETARY TO DSS**
**(No.W86/295)**
**Decided:** 11 May 1987 by R.D. Nicholson, I.A. Wilkins and J.G. Billings.

The AAT *set aside* a DSS decision that Chantal Roberts was not qualified to receive supporting parent's benefit because she was living as the de facto spouse of a man, also known as Roberts.

The applicant had adopted the surname of Roberts, with whom she shared accommodation and who was the father of her child. However, several other people shared the same accommodation - it was a 'communal household' consisting of 5 adults and 2 children.

Each of the adults occupied a separate bedroom and contributed equally to the rent for the house, the cost of food and utilities, and shared the household chores. The father of the applicant's child provided her with no financial support; and there was now no sexual or romantic relationship between them.