on the land for 30 years, she was extremely attached to it.

In this application, the AAT focused on the question whether it would be reasonable to expect Tonkin to sell or realise part of the land - a question posed by the former s.6AD(1) [now s.7(1)(c)].

The AAT said that, in other decisions, the Tribunal had decided that it was not unreasonable for pensioners to remain in the social and geographic environment to which they were accustomed so long as that was 'not an indulgent lifestyle preference'. Tonkin did not fall into that category - she did 'not wish to establish an indulgent lifestyle, but rather to continue to work and live in a rural environment which she has done almost all of her life'.

The AAT referred to a Press Release from the Minister for Social Security, dated 26 May 1985:

> 'The Department will also accept that it would not be reasonable to expect a pensioner to sell a farm, or land larger than the normal building block, if they have lived on the property for at least 20 years or have been farmers for over 20 years.'

The AAT also decided that Tonkin could not be expected to use the land as security for borrowing because she had an inadequate income to service any loan; and that she would suffer severe financial hardship if the value of the property were taken into account for the purposes of the assets test.

[P.H.]

Invalid pension: claim for another benefit

FAVARA and SECRETARY TO DSS

(No. N88/137)

Decided: 26 August 1988 by B.J. McMahon

Favara was badly injured in a motor car accident in November 1983. The DSS conceded that he then became permanently incapacitated for work and, if he had applied for an invalid pension, would probably have been granted one. However, Favara did not apply then, believing that his compensation payments precluded him.

In April 1984, Mr and Mrs Favara applied for Family Income Supplement. They later said that they had asked about eligibility for other DSS payments and had been told they had none.

It was not until April 1987, on advice from the CES, that Favara lodged a claim for invalid pension, which was granted from April 1987. Favara appealed against the date of commencement of his pension, arguing that he should have received it from about November 1984.

The legislation

The AAT said that in order to receive payment of invalid pension from an earlier date, Favara needed to show that the DSS should have treated his application for FIS as an application for invalid pension.

It was agreed that the relevant legislation was that at the date of the decision under review, i.e. the decision to grant invalid pension made on 29 May 1987. The relevant legislation was then s.135TB(5) [in the same terms as the current s.159(5)].

This sub-section provides that, where a claim is lodged for a payment under the *Social Security Act* (or some other Act) and the Secretary considers it reasonable that it should be treated as a claim for some other payment under the *Social Security Act* that is similar in character to the payment applied for, it may be treated as a claim for the appropriate payment.

Section 135TB(5) embodied an amendment to the previous s.145, made in September 1985, which had added the requirement that the second allowance had to be 'similar in character' to the first actually claimed for.

'Similar in character'

Favara argued that an invalid pension was similar in character to a family income supplement because they were both 'designed to alleviate hardship for lack of income'. The AAT rejected such a broad approach, stating that all payments under the Act were designed for this purpose (with the possible exception of 'anomalies' like the blind pension). Such an approach would mean that the proviso had no meaning.

The AAT then went on to consider the nature of the two payments. It stated that there were three factors to look at: 'the use to which it is intended the payments should be put, the criteria of eligibility' and the administrative classifications of the Department.

It concluded that FIS and invalid pension were not similar in character for three reasons:

- First, invalid pension is designed to be a complete income replacement, whereas FIS is designed as a 'top up' measure paid in cases of 'unacceptably low family income'.
- Secondly, 'invalid pension is paid for the support of a claimant, wheras FIS is paid in respect of children'. The AAT noted that there was nothing in the Act to ensure that FIS payments were expended for the benefit of children, but it was clear that they should be the prime beneficiaries.
- Thirdly, 'throughout the Act there is a clear distinction between what may be called mainstream payments, which are usually referred to as pensions, and supplementary payments, which are usually referred to as allowances or benefits': Reasons, para 24.

The AAT concluded that, at the time of decision under review, the Secretary had no power to substitute the FIS application for an invalid pension application.

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Correction

One of our vigilant readers has pointed out that our note on *Shine* (1988) 44 *SSR* 562 could give the wrong impression about a witness in that case. The note records that 'Shine's counsel suggested that . . . evidence [given by an Aboriginal Liaison Officer] was unreliable because of a personal interest in G.' However, the note omitted to mention that the AAT said that the suggestion, made by G, that the Liaison Officer had such an interest, was 'skittish and false'; and that, although the AAT did not find the Liaison Officer's evidence of great assistance, it remarked on her truthfulness, intelligence, courage and dignity.

We are grateful to our reader for pointing out this omission on our part; we can only plead that, in summarising often complicated (and sometimes long-winded) AAT decisions, we do have to make choices: sometimes we slip up.