the applicant arriving in Australia.' There was 'positive evidence' (in the immigration medical report) that there was no such incapacity.

The AAT noted that a specialist had examined Dayal for the DSS and observed that his incapacity for work was due to his advanced age at the time of his arrival in Australia. The Tribunal said that, even if it accepted this opinion (which it did not), the opinion -

> 'would not be sufficient to disqualify the applicant under s.25. There must be a medical component in the applicant's incapacity . . . As an Australian applicant could not successfully claim entitlement to an invalid pension simply because he was old, so also it cannot be alleged against an applicant that he was incapacitated for work outside Australia only because he was old outside this country.'

(Reasons, para.23)

On this point, the AAT referred to the statement in *Sheely* (1982) 9 *SSR* 86, 'that the "permanent incapacity" must result from a medical disability'.

The AAT went on to conclude that, despite his age, Dayal had been capable of attracting an employer and undertaking full time employment when he arrived in Australia. His situation differed from the applicants in *Krupic* (1984) 23 *SSR* 279 (Krupic had significant medical disabilities when he arrived in Australia), *Blando* (1987) 39 *SSR* 494 and *Maniatis* (1986) 32 *SSR* 407 (Blando and Maniatis did not have a 'history of regular full-time appropriate work' up to the time of their immigration).

[P.H.]

Special benefit: foster parent

CHRISTIE and SECRETARY TO DSS
(No. S87/309)
Decided: 1 July 1988 by J.A. Kiosoglous.

Carmel Christie had been a member of the order of the Sisters of Mercy since 1950. She had spent most of her time in the order caring for young children, both in institutions and in a home environment.

In 1984, Christie arranged with the State Community Welfare Department (DCW) and the State Housing Trust (SAHT) to foster children in a house provided by the SAHT. She inquired at the DSS and was told that she would be eligible for supporting parent's benefit or special benefit.

In June 1985 she began fostering 2 children and applied to the DSS for supporting parent's benefit. The DSS rejected her application because she did not have legal custody of a child; and also refused to pay her special benefit. Christie continued to foster the children until August 1985. In October 1985 she took another child into her foster care.

Christie asked the AAT to review the refusal of special benefit.

The legislation

At the time of the decision under review, s.124(1) of the *Social Security Act* gave the Secretary a discretion to pay special benefit to a person if the Secretary was satisfied that the person was,

> 'by reason of age, physical or mental disability or domestic circumstances, or for any other reason, . . . unable to earn a sufficient livelihood'.

'Unable to earn'

Over the 3 years from June 1985, Christie acted as foster parent for several children. She relied on various sources for her support: family allowance and family income supplement from DSS; a grant from her order; part-time work as a house cleaner; and income support from DCW, paid only while she pursued her appeal rights against the DSS decision.

The AAT said Christie had conceded that she could earn a sufficient livelihood; but that, if she did this, she would be unable to continue as a foster parent. The AAT apparently regarded this as sufficient to show that she was unable to earn a sufficient livelihood 'by reason of her domestic circumstances or for any other reason': Reasons, para.22.

The discretion

However, the AAT said, the discretion in s.124(1) should not be exercised in Christie's favour. The AAT referred to *Te Velde* (1981) 3 *SSR* 23, where the Tribunal had said that a person's control over the circumstances which prevented the earning of a sufficient livelihood was relevant to the exercise of the discretion to grant special benefit.

The AAT also referred to *Conroy* (1983) 14 *SSR* 143, where the Tribunal had said that special benefit was not intended to provide public support for people who voluntarily committed themselves to full-time social welfare. The AAT said:

> '25. The Tribunal feels considerable sympathy for the applicant and the exceptionally good work that she has been doing. It would be tragic if her services in this field were lost. In fact the media is constantly making the community aware of the need for caring persons such as the applicant to cater for the homeless and needy children in our society. It is hoped that those in positions of influence would give consideration to the special needs for circumstances such as these to enable the applicant and people like her to continue the excellent work they do in providing a much needed facility for children. However in the light of the principles enunciated in the cases cited before this Tribunal it is not possible for the discretion to be exercised in the applicant's favour.'

Misleading advice

The AAT said it was not disputed that Christie had been given wrong advice by DSS officers; and it found that she had acted on that advice. Although this was not a case where the s.124(1) discretion should be exercised, the AAT 'hoped that the respondent will be able to recompense the applicant in some way for the first period... from June 1985 to August 1985': Reasons, para.26.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Cohabitation

HORVATH and SECRETARY TO DSS
(No. N87/926)
Decided: 17 June 1988 by C.J. Bannon.

Anna Horvath asked the AAT to review a DSS decision to cancel her widow's pension and recover an overpayment. The basis of these decisions was the belief of the DSS that Horvath had been living with a man, E, on a *bona fide* domestic basis for over 6 years since July 1980.

The facts

Horvath and E had shared accommodation since 1976 in different houses. They had always occupied separate bedrooms as did Horvath's children, who lived with them over different periods of time.

They maintained separate finances and each paid a share of rent, gas and electricity. Horvath paid more of these bills than E (presumably because of her children). They never pooled their moneys. They did not have a sexual relationship. Horvath did some cooking, cleaning and clothes washing for E, although he mostly looked after himself.

However, there was some evidence that suggested Horvath and E were living in a *de facto* relationship. In 1976 she used the name 'Anna E' when undertaking part-time employment. The AAT accepted Horvath's explanation that she had used this name to avoid disclosure of her earnings to the DSS. Therefore the AAT did not regard Horvath as having passed herself off as E's wife.

E had told his employer's insurers, when claiming worker's compensation, and the Taxation Office that he was married to 'Anna E'. The AAT decided that this could not be used against