one roof. The house was put on the market but not sold.

In early 1982 the husband left the house and in April 1982 the wife applied for and was granted sickness benefit. In the latter part of 1982 the husband returned to the family house and her benefit was terminated. It was agreed he would pay her $100 per week for housekeeping and taking care of his letters and some work documents.

The husband again left the home in early 1985 and she again applied for and received sickness benefit. In August 1985 she asked him to return because of her illness. He did so and paid her $20 to $30 per week for doing his washing. As a result of her November 1985 invalid pension claim the DSS accepted she was 85% permanently incapacitated for paid work but was considered as married.

The decision

The AAT examined s.3(1), 3(5), 3(8) and s.33(1) and (12) of the *Social Security Act*. It found Keenan had not established that she and her husband were separated under the one roof as there was no corroboration of her evidence. Even had she proved separation under the one roof under s.3(1), the inclusion of s.3(8) meant she would still be treated as a 'married person' after 26 weeks unless property proceedings were instituted.

The AAT used the factors listed in the *Annotated Social Security Act* (4th edn) to assess the nature of the relationship and to conclude that a 'marriage of sorts' existed.

Under s.3(5) of the *Social Security Act*, a wife is deemed to receive 50% of the aggregate of her income and that of her husband. The AAT had encouraged the applicant to call her husband as a witness. She had failed to do so and no evidence regarding his income was available. Since she had failed to establish a fact crucial to her case the AAT said it had no choice but to reject her claim and affirm the decision under review.

[B.W.]

Assets test: 'deemed income'

HUGHES and SECRETARY TO DSS

(No. 4917)

Decided: 10 February 1989

by R.A. Balmford.

The AAT *affirmed* a DSS decision to grant Sufiya Hughes a family allowance for her child from 15 August 1987 and not from the date of the child's birth, 19 April 1987.

Hughes had contacted a DSS office shortly after the birth of her child and had been told that she would have 6 months in which to lodge her claim for family allowance. Section 102(1)(a) of the *Social Security Act* then allowed a 6-month period for the lodging of claims for family allowance.

However, the *Social Security and Veterans' Entitlements Amendment Act* 1987 amended s.102(1)(a) from 1 July 1987. The amended section provided that family allowance would only be payable from the first day of the family allowance period during which a person lodged a claim for the allowance. The Bill for this Amendment Act had been introduced into Parliament at the time when Hughes was advised by the DSS office that she would have six months in which to lodge her claim.

At that time, s.135TA(1) prevented the grant or payment of any allowance, 'except upon the making of a claim for that... allowance', which, according to s.135TB(1), was required to 'be made in writing'.

Hughes eventually lodged her claim for family allowance on 26 August 1987 (that is, a little over 4 months after the birth of her child) and the DSS then decided, in accordance with the amended s.102(1)(a), that the allowance should be paid to her from 15 August 1987.

An 'accrued right'?

Hughes argued that the Amendment Act had not taken away her 'accrued right' to family allowance, which was protected by s.8(c) of the *Acts Interpretation Act* 1901. That section provides:

> '8. Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not -
>
> ...
>
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed.'

The AAT referred to a decision of the Privy Council, *Abbott v Minister for Lands* [1895] AC 425, where the following observation had been made:

> 'Their Lordships... think that the mere right (assuming it to be properly so-called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by the individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.'

The AAT said that it was satisfied that the intention of Parliament in passing the Amendment Act had been to change the law; and that any substantive entitlement to the payment of family allowance for a period prior to the family allowance period during which the claim was lodged had been removed by the Amendment Act.

[At that time, s.135TA(1) prevented the grant or payment of any allowance, 'except upon the making of a claim for that... allowance', which, according to s.135TB(1), was required to 'be made in writing'.]

[P.H.]

Invalid pension: lump sum preclusion period

TRIKILIS and SECRETARY TO DSS

(No. 4930)

Decided: 21 February 1989

by H.E. Hallowes.

Steve Trikilis claimed invalid pension on 28 September 1987. In so doing he advised he had settled a claim for compensation on 23 September 1987 for $35 000. The award was made pursuant to the *Accident Compensation Act* 1985 (Vic.).

The DSS accepted his claim on medical grounds but decided his compensation award precluded him from receiving pension from 23 September 1987 until 14 March 1989.