It followed that, during the period from 22 April to 27 October 1988, Byrt had not been eligible for unemployment or special benefits — the term 'benefit' in s.136(1) referred to a benefit as defined in s.115 of the Act, namely, unemployment, sickness or special benefit.

**Formal decision**

The AAT set aside the decision under review and decided that Byrt was entitled to unemployment benefit until 21 April 1988.

**[P.H.]**

# *Unemployment benefit: failure to register with CES*

**SECRETARY TO DSS and DUNNE (No. 5063)**

**Decided:** 4 May 1989 by G. L. McDonald.

The Secretary applied for review of a decision by the Social Security Appeals Tribunal, directing payment of unemployment benefit to Dunne from 29 April to 9 June 1988.

Dunne had been receiving unemployment benefit between May 1987 and March 1988. She worked between March and 22 April 1988.

Dunne then went to the CES and was advised, or at least understood, that she required an 'Employer Separation Certificate' before she could register with the CES. Her employer was slow in supplying this and she eventually registered with the CES on 2 June, and lodged her unemployment benefit claim on 10 June 1988.

The DSS decided that Dunne was eligible for unemployment benefit from and including the 7th day from her re-registration with the CES, according to s.125 of the *Social Security Act*.

The SSAT decided, on review of Dunne's case, that she should be eligible from 7 days after she had left her employment, relying on s.116(2) of the Act.

**The legislation**

Section 125(1) of the *Social Security Act* provides that an unemployment benefit is payable to a person from the 7th day 'after the day on which he became unemployed or after the day on which he made a claim for unemployment benefit, whichever was the later'.

Section 125(2) provides that, if a person lodges an unemployment benefit claim within 14 days of being registered with the CES (or within such further time as the Secretary considers reasonable), the day on which the person became registered can be treated as the relevant date for the purposes of s.125(1).

Section 116(1)(d) of the Act provides that registration with the CES is one of the preconditions to eligibility for unemployment benefit. However, s.116(2) gives the Secretary a discretion to waive this requirement where the Secretary is satisfied that a failure to register with the CES should be disregarded, 'having regard to circumstances beyond the person's control'.

**Discretion to waive registration not available**

The DSS argued that, before the s.116(2) discretion could be invoked, a failure to register with the CES must be the *only* reason why a claimant is ineligible for unemployment benefit; she must have complied with the Act in all other respects. Here, Dunne had not registered a claim for unemployment benefit with the DSS until 10 June and therefore had not complied with s.158(1) and s.159(1).

The AAT accepted the DSS argument, and decided that Dunne was not eligible to receive unemployment benefit until 9 June, 7 days after her registration with the CES.

**Formal decision**

The AAT set aside the SSAT decision and remitted the matter to the Secretary, with a direction that Dunne was not qualified to be paid unemployment benefit until 9 June 1989.

**[J.M.]**

# *Family allowance: children overseas*

**QUAN HUE HUYNH and SECRETARY TO DSS (No. 4971)**

**Decided:** 16 March 1989 by Purvis J, J.R. McClintock and G.R. Taylor.

Quan Hue Huynh lived with her husband and their 7 children in Vietnam up until 1978. In that year, 4 of the children, including the eldest child, left Vietnam and were placed in a refugee camp in China, where they remained for the next 8 years.

Huynh and her husband left Vietnam with the remaining children and arrived in Australia in 1982. In January 1983 Huynh learned that her other 4 children were in China. She established contact with the eldest child, Q, sent him money for the support of the children, and instructed him on the steps he was to take for their care.

In April 1984, Huynh claimed family allowance for the 3 youngest children, then living with Q in the refugee camp in China. The DSS rejected these claims but eventually granted family allowance from November 1985, when the Chinese Government issued exit visas for the 3 children to enable them to travel to Australia.

**Custody, care and control**

The question at issue in the present case was whether Huynh was eligible for family allowance for the 3 children living in China for the period between April 1984 and November 1985.

The AAT said that Huynh's eligibility for family allowance depended on whether she had the 'custody, care and control' of the 3 children and intended to bring them to live in Australia as soon as it was reasonably practicable to do so. These requirements, the AAT said, were spelt out in the former s.96 of the *Social Security Act*.

The eldest child, Q, told the AAT that until early 1983 he had assumed responsibility for the care of the 3 youngest children living with him in the Chinese refugee camp. However, once his parents had re-established contact with him, they had assumed

responsibility for the children by sending money, medical supplies and clothing, as well as giving regular instructions on the care of the children.

Huynh told the AAT that she had expected Q and the other children to obey her instructions while they were separated and that Q had been responsible for taking care of the children with him until the family was reunited.

After referring to several earlier decisions, including *Cong Loy Huynh* (1988) 46 *SSR* 594, *Van Luc Ho* (1987) 40 *SSR* 510, *Hung Manh Ta* (1984) 22 *SSR* 247, and *Van Cong Huynh* (1988) 44 *SSR* 569, the AAT said that entitlement to family allowance depended on the factual circumstances of the case: the question was whether Huynh had the responsibility for the welfare of the children and undertook their care and control. The AAT observed:

> '[O]nce the applicant and her husband had become aware that Q and the 3 children with him had survived and were living in China, they resumed the parental functions and responsibilities which had been abrogated perforce when those 4 children sought to escape by boat. Once Q became aware that his parents were alive and accessible, he assumed the role of delegate to his parents. Thereafter the responsibilities and financial commitments were borne by his parents and he became responsible for carrying out their wishes in relation to the discharge of their functions and responsibilities.'

(Reasons, pp. 7-8).

### Intention to bring children to Australia

The AAT also concluded that Huynh had intended to bring the children to Australia as soon as it was reasonably practicable to do so; and the fact that, until the Chinese Government granted exit visas for the children, it was not legally possible to bring them to Australia was no bar to Huynh qualifying for family allowance.

### Formal decision

The AAT set aside the decision under review and referred the matter back to the Secretary for a decision in accordance with the AAT's reasons.

**[P.H.]**

## VAN VY VU and SECRETARY TO DSS (No. 4972)

**Decided:** 16 March 1989 by Purvis J, J.H. McClintock, and G.R. Taylor.

Van Vy Vu had come to Australia as a refugee from Vietnam in 1980, leaving his first and second wives and 4 children, who were in the care of his second wife, in Vietnam.

In 1982, Van Vy Vu claimed family allowance for his 4 children. Over the next 4 years he made a series of further claims for the children. All of these claims, with the exception of one made in April 1984 for the 2 youngest children, were rejected by the DSS. The April 1984 claim was granted but then cancelled by the DSS in May 1985.

After his last claim, made in August 1986, was rejected, Van Vy Vu appealed to the SSAT. The papers relating to this appeal, which were prepared by the DSS, described the appeal as relating to cancellation of family allowance as well as the recent rejection of family allowance.

The SSAT recommended that Van Vy Vu's appeal be upheld but the DSS rejected that recommendation, stating that the decision to cancel the family allowance had been correct.

Van Vy Vu asked the AAT to review the various decisions relating to his eligibility for family allowance.

### Jurisdiction

This appeal was brought to the AAT under s.17 of the *Social Security Act*, which authorised the AAT to review a decision made by a delegate of the Secretary following review by the SSAT.

The AAT said that the terms of the documents prepared for the SSAT appeal, the reasons given by the SSAT for its recommendation and the reasons of the delegate of the Secretary established that both the 1985 cancellation and the 1986 rejection decisions had been considered by the SSAT and were therefore available to be reviewed by the AAT in the present matter.

However, none of the other decisions had been reviewed by the SSAT. Accordingly, the AAT did not have jurisdiction to review those decisions, although the Secretary could consider *ex gratia* payments of family allowance in relation to those other claims, the AAT said.

### Eligibility for family allowance

The AAT defined the issues, upon which Van Vy Vu's eligibility for family allowance depended as, first, whether he had the 'custody, care and control' of his children and, secondly, whether he intended to bring his children to Australia as soon as it was reasonably practical to do so.

These issues were raised by ss. 96, 103, 106A and 6(6) of the *Social Security Act* in their various forms during the period in question.

### Custody, care and control

Van Vy Vu told the AAT that he regularly sent money and goods to his family in Vietnam for their support; and that he had regularly communicated with his family.

The DSS did not dispute that, during the period in question, Van Vy Vu had the 'custody, care and control' of his children as that term had been interpreted by the Federal Court in *Van Luc Ho* (1987) 40 *SSR* 510 and *Van Cong Huynh* (1988) 44 *SSR* 569. That is, the issue of 'custody, care and control' was a practical question of fact, depending on whether a person had responsibility for the welfare of a child and undertook the child's care and control. Van Vy Vu had established that he had that responsibility and undertook the care and control of his children in Vietnam.

### Intention to bring children to Australia

The DSS maintained that Van Vy Vu could not qualify for family allowance for his children in Vietnam because the children had not been given exit visas to come to Australia. Therefore, it was argued, he did not intend to bring them to Australia as soon as it was reasonably practical to do so.

The AAT referred to the decision in *Van Cong Huynh* (above), where Burchett J had said that the fact that it was not possible for a child to be brought to Australia was no bar to granting family allowance. On the contrary, that fact could assist in satisfying the requirement that the applicant intended to bring the child to Australia as soon as reasonably practical —

> 'because if it were reasonably practical to bring the child to Australia at that time, an applicant who was not doing so might not be able to show the requisite intention . . .'

The AAT accepted that it had been Van Vy Vu's intention at all relevant times to bring his children to Australia as soon as possible, and noted that he had made several attempts to obtain exit visas for them. The AAT said that the necessary intention on the part of Van Vy Vu had been established. The Tribunal expressed its general conclusion as follows:

'[P]hysical separation of the applicant from his family has not, other than by reason of this fact alone, interrupted the close ties existent between the applicant and his children, and the responsibilities assumed by him on marriage and parenthood. It is the opinion of the Tribunal that the applicant has, with considerable personal sacrifice, continued to communicate with, take care of, and provide support for, his family in Vietnam, and has done all that is within his power to bring them to Australia.'

(Reasons, p.19).

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration with a direction that Van Vy Vu be paid family allowance for two of his children from April 1984 and for a third child from August 1986.

**[P.H.]**

# Cohabitation

**SECRETARY TO DSS and SORENSEN**
**(No Q88/499)**

**Decided:** 28 April 1989
by S.A. Forgie.

The DSS appealed against a Social Security Appeals Tribunal decision that Sorensen was not living in a *de facto* relationship thus setting aside a DSS decision to cancel Sorensen's widow's pension and raise an overpayment from 19 March 1987 to 14 April 1988.

The AAT had to decide whether Sorensen fell outside the definition of 'widow' in the Act, that is whether she was living with a man as his wife on a *bona fide* domestic basis (s.43). It heard evidence from Sorensen, the man who was alleged to be her *de facto* spouse (C), a neighbour of theirs and a DSS field officer.

**The evidence**

The neighbour, called by the DSS, stated that she had seen C and Sorensen go out together a few times, and had also seen C on his own at the local RSL club. She had seen them 'kiss and cuddle' once, on Christmas Day. Sorensen had a daughter whom the neighbour had not heard speak of C, nor had she seen him discipline her. She also testified that she could see the bedrooms and lounge from her house and had seen C and Sorensen go into one of the bedrooms together and come out again soon after. She had also observed Sorensen and C go away with a sailing boat on a number of weekends. She was not aware whether they had any other joint social life.

A DSS field officer, who had interviewed Sorensen, described the difficulty in tracing Sorensen as she had moved from the house she shared with her daughter without informing the DSS. The field officer said that Sorensen had answered her questions willingly and had admitted that she was living in a *de facto* relationship.

At the AAT hearing, Sorensen agreed that she shared a house with C, but denied that they were living in a *de facto* relationship. She said she had taken up sailing because she was doing nothing else in her spare time. Sorensen said that C did not support either her or her daughter and had not assisted her when her DSS payments ceased.

She said that she and C had a casual sexual relationship which had started after she moved in with C. Sorensen explained that they each contributed $40 a week to a food kitty, and she paid the 'phone bill while C paid the other utility bills. If she did the house cleaning, she would clean the whole house, as would C and a similar arrangement applied to the washing.

Sorensen agreed that she had not told the DSS of her change of address but explained that she understood that she would lose her pension if she shared accommodation with a man who was not her relative, regardless of the relationship between them. She described the interview with the field officer as stressful and felt she had to sign a statement to say she was living in a *de facto* relationship to get out of the room.

C's evidence supported Sorensen's. He said that they had never represented themselves as husband and wife, that the only shared social life they had was sailing and that he did not discipline Sorensen's daughter. He said that although they shared the house, 'he does not look after her and she does not look after him': Reasons, para.16.

**The AAT's assessment**

The Tribunal referred to a series of Federal Court and AAT cases that have considered what it means to live in a de facto relationship for the purposes of the Act, including *Lambe* (1981) 4 *SSR* 43, *Lynam* (1983) 20 *SSR* 225 and *Stoilkovic* (1985) 29 *SSR* 362. It weighed the evidence in accordance with the factors summarized in *Stoilkovic*.

The AAT said all witnesses were honest. It did not find the evidence of the neighbour particularly helpful to the DSS case. It accepted Sorensen's evidence as to why she had not told the DSS of her change of address and, without finding that there had in fact been any duress by the field officers, accepted that Sorensen felt she had to sign the statement in order to be able to leave the room.

The AAT said:

'It has examined the relationship as a whole and finds that while there is sexual intercourse and the living arrangements have some degree of permanence, both those aspects are simply matters of convenience to the two parties in the house. It is not satisfied that there has been established any mutual care and protection [or] any element of exclusiveness which might normally be found in a de facto relationship.'

(Reasons, para.31)

The Tribunal concluded that it was not satisfied on the balance of probabilities that Cooper and Sorensen were living in a *de facto* relationship.

**Formal decision**

The AAT affirmed the decision of the Social Security Appeals Tribunal.

**[J.M.]**

# Income test: deductions and disclosure of income

**VXB and SECRETARY TO DSS**
**(No. 4968)**

**Decided:** 16 March 1989
by B.M. Forrest.

The applicant was paid unemployment benefit between December 1985 and September 1987. The DSS later decided that the entire amount of benefit paid to her, $14 662, should not have been paid and should be recovered by deductions from her current age pension. The DSS said that the overpayment arose because of a failure to disclose the existence of her husband's term bank deposit of $70 000. The applicant sought review of this decision.