

firmed the decision under review, after which she applied to the AAT.

The AAT's decision

Unders. 73 of the *Social Security Act*, FAS is payable to a person who is not receiving and whose spouse is not receiving, *inter alia*, a payment under Part XIII of the Act, and who meets a number of other eligibility criteria.

In rejecting her claim, the DSS relied solely on s. 73, arguing that it was clear that FAS was not payable to a person receiving sickness benefit and relied in support on the decision of the AAT in *Jessop* (1989) 49 SSR 639.

The Tribunal here saw no reason to depart from the reasoning in *Jessop*, stating that the provisions of s. 73 were self-explanatory and unambiguous.

The ex gratia payment

Mrs Hart-Towers had also asked the AAT to consider whether, as recommended by a DSS delegate, she should be granted an *ex gratia* payment. When the submission noted above had gone to Central Office for consideration, it had been rejected.

Notwithstanding an apparent absence of jurisdiction in the AAT to consider the granting of payments under the *Audit Act* [for the jurisdiction of the AAT in social security cases, see *Social Security Act*, s. 205; and for the SSAT, see ss. 177 and 178], the AAT also referred to the reasoning in *Jessop* as supporting its view that the decision 'not to sponsor a recommendation for an "Act of Grace" payment, whilst unfortunate, is nevertheless correct'.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Family allowance supplement: income test

SECRETARY TO DSS and SOSIN-LISOWSKA
(No. 6104)

Decided: 9 August 1990 by B.J. McMahon, T.R. Russell and C.J. Stevens.

The DSS asked the AAT to review a decision of the SSAT that Mrs Sosin-Lisowska was entitled to be paid Family Allowance Supplement (FAS) pursuant to a claim lodged on 31 July 1989.

The facts

Sosin-Lisowska and her husband had separated in January 1985 and remained separated until they reconciled on 20 July 1989. There was no dispute that they were separated during that period and Mrs Sosin-Lisowska had received supporting parent's benefit (sole parent pension) during that period.

However, on the date when she lodged her claim for FAS (31 July 1989) she was a 'married person' within the meaning of the Act. The issue in this case was whether, her husband's taxable income in the tax year 1987-88 should be taken into account in deciding Sosin-Lisowska's FAS entitlement for the 1989 calendar year.

The legislation

Section 74B of the *Social Security Act* sets out the structure of the income test for FAS. In establishing the 'relevant taxable income' (defined in s. 71(1) which also defines 'base year of income'), account has to be taken of the income of a married person and her husband in the financial year which ended on the 30 June preceding the calendar year in which application for the allowance is made.

Accordingly, in determining Sosin-Lisowska's entitlement, it was necessary to look at the relevant taxable income for the base year of income. This meant that, as she was now a married person, her income would be added to that of her husband for the fiscal year ended 30 June 1988 in order to determine eligibility for the 1989 calendar year. This was so, even though each of them was not a 'married person' throughout the entire financial year in question: Reasons, para. 5.

The AAT's decision

The AAT noted that the relevant test is whether 'at a particular time' a person who applies for FAS is a married person, not whether the person was married during the base year of income.

On this approach, Sosin-Lisowska was not eligible for FAS at the time she claimed, taking into account both her own and her husband's income during the relevant period.

The SSAT in the decision under review had taken the view that Sosin-Lisowska's husband's income should not be taken into account because, during the base year of income, she was a single person. The AAT noted that this view was not supported by the Second Reading Speech to which the SSAT had referred in its reasons for decision. Nor was it consistent with other decisions of the AAT such as *Meadows* (1989) 52 SSR 693 and *Chaplin* (1990) 55 SSR 733.

However, the Tribunal did acknowledge that 'the drafting of this definition can be improved' and expressed its hope (as the AAT had in *Chaplin*) that 'attention will be given to this when the matter is next considered' as 'clear inequities have been demonstrated in the application of this section'.

Formal decision

The AAT set aside the decision under review and remitted the matter with a direction that Sosin-Lisowska's entitlement to Family Allowance Supplement be calculated by adding her taxable income for the relevant year to that of her present spouse.

[R.G.]

Widow's pension: de facto relationship

NICOL and SECRETARY TO DSS
(No. 6143)

Decided: 24 August 1990 by J.A. Kiosoglou.

The DSS decided to cancel Nicol's widow's pension in November 1988 on the basis that she was living with Fotiou as his de facto spouse as defined in s.3(1) of the *Social Security Act*. She was therefore not a widow as defined in s.43(1).

The facts

The applicant said she divorced her husband Nicol in January 1987 because of his violence towards her. At the time of the hearing she had known Fotiou for 5 or 6 years. Nicol and Fotiou had gone into business together with a take-away food outlet in February 1987.

They lived with their respective children in a house which they rented together. They shared costs and Nicol used the name Fotiou. The business was in joint names and they had a joint bank account for the business. Nicol had a separate bank account in her own name into which her pension was paid. Nicol claimed each had their own bedroom and furniture. Nicol went out socially on her own and had a male friend she visited twice a week and whom she hoped to marry. Fotiou was aware of that relationship.

The business was sold in October 1987 and Nicol then took her money out of the name of Fotiou and put it in her own name. They moved out of the rented house and she lived in West Croydon while he lived in Melbourne. Nicol later rented a house in the name of Bayliss;