Literal interpretation rejected

The AAT agreed that, on the literal interpretation of the Act advanced by the DSS, s.74B(3) would be applied to the 1989/90 estimated combined income. This would mean that Clear's claim was properly rejected because their 1989/90 income fell $620 short of being 25% less than the combined income in 1987/88, the base year.

This was not an outcome that the AAT found acceptable, especially because the AAT said Clear would have qualified for FAS if her claim had been lodged prior to 30 June 1989.

Reference was made to the relevant second reading speech and to the DSS submission to the AAT that the number of FAS recipients had increased by more than 25% since the change from a four weekly to an annual income test. The AAT stated:

> 'It seems to me that if it is intended that the amendments to the legislation are designed to assist a wider number of recipients, the result in the case of the applicant is unreasonable if the words are given their literal meaning. . . . I am not convinced that the legislation is designed to produce the result that in 1989 the applicant in her circumstances is not entitled to benefit.'

(Reasons, p.8)

Formal decision

The AAT set aside the decision under review and remitted it with a direction that Clear was qualified to receive FAS from 29 August until 31 December 1989.

[D.M.]

[**Editorial comment:** The AAT seemed to overlook that, as Clear's partner was apparently on unemployment benefit up until 30 June 1989, a FAS claim lodged before that date would have been rejected because of s.73(1)(a)(i) of the *Social Security Act*.]

Special Benefit: New Zealand immigrant

WILLIAMS and SECRETARY TO DSS
(No. 6287)

Decided: 12 October 1990 by P. Gerber.

John Williams arrived in Australia from New Zealand on 13 October 1989, having recently lost his employment when his employer went out of business. He had been advised by his brother-in-law, living in Wollongong, that there was work available at the latter's place of work. On arrival, Williams was advised that there were no longer any such vacancies. The $500 with which he had arrived was spent within a week on transport, rent and clothes for interviews.

Not eligible for unemployment benefit

Williams applied for unemployment benefit on 24 October 1989. His claim was rejected – correctly, the AAT found – under sub-para 2(a) of Article 9 of the reciprocal agreement between Australia and New Zealand (see Schedule 3 of the *Social Security Act*). That provision imposes a requirement that a New Zealand resident, in order to qualify for unemployment benefit, must have been continuously present 'for not less than 6 months since the date of his or her most recent arrival in Australia'.

Special benefit

Having been rejected for unemployment benefit, Williams applied for special benefit under s.129 of the *Social Security Act*. The claim was rejected in reliance on a policy guideline set out in para. 24-802 of the Benefits Manual which stated that:

> 'A New Zealand citizen moving to Australia should have ensured that he or she had enough funds or have made adequate provision for his or her own support within the first six months in Australia.'

The policy basis for this instruction was that New Zealanders should not be able to receive through special benefit what they could not gain, because of the Reciprocal Agreement, through unemployment benefit.

The DSS also found that, although Williams was suffering severe financial hardship, his hardship was not due to unforeseen circumstances. He had arrived in Australia without sufficient funds nor an offer of employment. His claim therefore did not satisfy s.129(1)(c) of the Act.

Status of the guideline

The AAT endorsed the view of the SSAT that the Benefits Manual had no statutory basis; and, where it was in direct conflict with the express language of the Act, the former must give way. A claim could be rejected only where it fell outside the provisions of s.129, not where it fell outside the categories in the Benefits Manual.

Formal decision

The Tribunal affirmed the decision under review, being a decision of the SSAT which had set aside the rejection of Williams' claim for special benefit.

[P.O'C.]

Carer's pension: 'a home'

KINSEY and SECRETARY TO DSS
(No. 6310)

Decided: 19 October 1990 by B.M. Forrest.

This matter was remitted to the AAT by the Federal Court to determine whether Kinsey's daughter's flat was a home of Kinsey and her daughter for the purposes of s.39(1) of the *Social Security Act*. (For the Federal Court decision, see *Kinsey* (1990) 56 *SSR* 763.)

Background

Kinsey's daughter, who suffered from a severe mental illness, had lived with her husband and child in Kinsey's house, where Kinsey provided daily care for her. In May 1988, Kinsey's daughter, the daughter's husband and her child moved into a unit on an adjacent block of land, which was on a separate title from Kinsey's house. Kinsey continued to provide care for her daughter and her daughters' child as well as for her own husband (who was also disabled) dividing her time between her own house and her daughter's unit.

The DSS then decided that Kinsey could no longer qualify for carer's pension because she was not providing care to her daughter 'in a home of the person and of the other person' as required by s.39(1). On appeal, the Federal Court ruled that the AAT was correct in deciding that Kinsey's house and her daughter's flat could not constitute the one home. But the Federal Court remitted the matter to the AAT to decide whether the flat, by itself, was a home of Kinsey and her daughter.

The meaning of 'home'

The Tribunal noted that the Act did not use expressions such as 'the home', 'same home', 'principal home' or 'permanent home'. It used the term 'a home'. There was nothing in the Act or in the concept of 'home' that precluded a person from having more than one home. The matter was a question of fact, and the AAT considered the amount of time spent by Kinsey in the flat and whether the flat was a separate household as relevant but not determinative. 'What has to be considered', said the AAT, 'is whether of itself it is also a home of the applicant.'

The DSS argued that the flat was more like a place of work for Kinsey. It was argued that a home cannot be a place where one lives intermittently. The motive of Kinsey, suggested the

DSS, was to go to the flat as a carer and not to live there. This worked against the flat being described as a home of Kinsey.

The AAT did not accept these submissions. The Tribunal commented:

> 'The flat was used by the applicant not as a matter of convenience but of necessity in fulfilling her role as a carer, once the decision was made that it was in the best interests of the family in general and Megan in particular that care be provided for her in the flat as well as the house. That task is both constant and demanding. The separate accommodation gave some degree of independence to both Megan and the applicant. It enabled the applicant to maintain care yet from time to time obtain some respite. The applicant expected and anticipated she would spend a good proportion of her time in the flat. It became a home of the applicant.'

(Reasons, p.7)

The Tribunal also supported its conclusions having regard to the purpose of the legislation. It said:

> 'The purpose of the Act is to assist those people who provide care at home. Doubtless, it is both to the advantage of the family and the general community that this be so. The quality of life of a recipient of care is enhanced if administered in a home environment. To enable this to be done often involves re-arranging living quarters by, for example, an addition to an existing house or the building of a flat in the grounds.'

(Reasons, pp.7-8)

The history of carer's pension was also referred to by the AAT. The history indicated that the intention of the legislation was to provide support for those who provide care in a home environment. The Tribunal commented that its conclusion that the flat was a home of Kinsey was in keeping with the legislative purpose.

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with the direction that the flat by itself constituted a home of Kinsey and her daughter.

[B.S.]

Cohabitation

RAYNER AND SMITH and SECRETARY TO DSS
(No. Q89/113; Q89/132)
Decided: 20 September 1990 by K.J. Lynch, W.A. de Maria and T.R. Gibson.

Jillian Rayner and Michael Smith sought review of decisions by the DSS to raise overpayments of $10 740.50 in respect of Smith and $10 450.30 in respect of Rayner for the period May 1986 to September 1987, during which they had each received a supporting parent's benefit. The DSS raised each overpayment because it formed the view that during this period Rayner and Smith were living together on a *bona fide* domestic basis although not legally married.

The evidence

Smith had a son, D. Rayner and Smith commenced living together in 1983 and their child, K, was born in April 1985.

Jillian Rayner applied for supporting parent's benefit in May 1985 but it is not clear from the AAT's reasons whether she was living with Smith at that time or whether the benefit was paid.

The AAT did not clearly state whether Rayner and Smith lived apart from then until May 1986 but one could infer this from the AAT's reasons. At one stage Rayner lived in Tasmania and Smith apparently visited her to attempt to persuade her to return to Brisbane.

In May 1986 Rayner and Smith commenced to occupy a house in Camp Hill as tenants. The electricity was connected in the name of Smith and the telephone was listed under J.A. and M.V. Rayner.

Smith, Rayner and another person, G, who claimed to have lived in the Camp Hill house, gave evidence that, shortly after moving in with Rayner, Smith moved out with his son D while K remained with Rayner. They also said that D continued to attend a school near the Camp Hill house and was picked up from the house every evening by Smith.

The AAT first found that it was not prepared to accept G's evidence. It then decided that it must exercise caution in accepting Smith's and Rayner's uncorroborated evidence because of their admissions to previously not being wholly truthful.

Throughout its reasons, the AAT referred to a number of instances in which Rayner or Smith had not been truthful in the past or gave evidence to the AAT which it found hard to believe.

By contrast, the AAT accepted the evidence of a neighbour who said she did not see anyone else at the Camp Hill house, other than occasionally, except the applicants and the 2 children.

Other evidence considered by the AAT to be significant included that Smith and Rayner were both involved in the purchase of a car in July 1986 after Rayner's car was substantially damaged whilst being driven by Smith. Also, Smith gave the Camp Hill address to an employer he worked for after the time he said he had left that address.

The AAT commented on the evidence of sexual relationship:

> 'There is no evidence either way before the Tribunal whether there was a sexual relationship between the parties at the relevant times. nor does there have to be, as we are interested in the mosaic of the relationship, not just one facet. It was not specifically asserted that they did have a sexual relationship and the denials were in broad terms. Ms Rayner said she did not sleep with Smith and Smith said he did not live with Ms Rayner. The evidence establishes that there was ample opportunity for a sexual relationship to have existed between them particularly in the mornings after D had gone to school when, on the evidence, Smith frequently stayed at the house for a couple of hours.'

(Reasons, para. 10)

Determining whether a *de facto* relationship existed

Reference was made to the criteria of assistance in determining the existence of a *de facto* relationship listed in *Tang* (1981) 2 *SSR* 15. The AAT noted that:

> 'One does not tick off a list of criteria and find a marriage *de facto* when the points pass a certain percentage but one looks for these criteria in the context of the total relationship.'

(Reasons, para. 9)

The AAT outlined its approach to deciding this case:

> 'The question for the Tribunal to decide, firstly, is whether the information before the respondent was sufficient for it to cancel the pension.'

(Reasons, para. 12)

The AAT quoted from *Cassarotto v Australian Postal Commission* 10 AAR 191 at 205, where it was said that, where a claim for compensation was made –

> 'In a practical sense, if not in a strict legal sense, it will be the responsibility of an applicant for review to ensure that there is laid before the Tribunal all material which it will be necessary for the Tribunal to have before it to enable it to come to a decision.'

(Reasons, para. 14)

Its conclusions were put by the AAT as follows: