grant of FAS (including rent assistance of $30) at the rate of $81.88 a fortnight.

On 29 December 1988, the *Social Security Act* was amended, affecting the way FAS was to be calculated. As of that date, the rate was determined to be $47.00 a fortnight and as of 26 January 1989 the rent component was removed as the Lines bought a home and the rate was set at $7.90 a fortnight.

The legislation

As of 29 December, s.74B(1) of the *Social Security Act* laid out a new formula for calculating the rate of FAS, dependent on 'the amount by which the relevant taxable income of the person in the base year of income exceeds the income threshold in relation to the person'.

Section 72(1) defines various terms:

'base year of income', in relation to a person at a particular time, means the year of income of the person that ended in the preceding calendar year.

'relevant taxable income' for a year means:

. . .

(b) in relation to a married person at a particular time — the sum of:

(i) the amount that is at that time the taxable income of the person for the year of income; and

(ii) the amount that is at that time the taxable income of the person's spouse for the year of income.

'year of income' has the same meaning as in the Income Tax Assessment Act 1936.

Income threshold is also defined and is dependent on the number of dependent children: for the Lines the relevant figure was $16 224.

The decisions under review

Lines, after various internal reviews, appealed against her reduced rate of FAS to the SSAT, objecting in particular the fact that the DSS had taken her husband's income into account for the whole of the 1987/88 financial year. The SSAT determined that:

'(a) the income to be included for calculation of the rate of FAS payable to Mrs Lines for the 1989 claendar year should include:

(i) Mrs Lines' taxable income from supporting parent's benefit for the 1987/88 financial year, and

(ii) Mr Lines' taxable income from 20 December [the date of their marriage up to and including 30 June 1988.

(b) Mrs Lines was advised of the Department's decision to reduce payments of FAS to her . . . in a letter of 20 January 1989. Mrs Lines first appealed to the SSAT for a review of that decison on 2 August 1989 (outside the 3-month limit). The earliest date therefore that the decision of this Tribunal can have effect is 2 August 1989.' [See s. 183 of the Act.]

The DSS appealed against that part of the decison contained in para.(a); and Lines against the date of effect of the SSAT decision, in para.(b).

The AAT's consideration

The AAT decided that there was no scope to exclude the income of Mr Lines which had been earned before the Lines were married:

'The words of the statute are clear and unambiguous. The words "year of income" clearly mean the whole year of income. To interpret the definiton as meaning only that part of the income derived after marriage could lead to many anomalies. If the Lines had married on, for example, 28 June 1988 and if Mr Lines' taxable income was taken to have been only that amount in respect of two days then clearly the financial resources available to the Vines family would not be accurately reflected in such figures. It is also possible to envisage anomalies which have the opposite effect. In any event the words of the statute are clear and must be followed.'

(Reasons, para.8)

Formal decision

The AAT set aside the decisions of the SSAT and reinstated the delegate's decision.

[J.M.]

Special benefit: 'unemployable'

SECRETARY to DSS and CHAN (No. 5998)
Decided: 22 June 1990 by R.A. Balmford.

The Secretary applied for review of an SSAT decision, setting aside a DSS decision to cancel Yin Chan's special benefit when he left Australia on 23 November 1989.

Chan had notified the DSS of his proposed absence and his intention to visit Malaysia for family reasons. He was to be away for a period of up to 6 months (he returned to Australia on 3 May 1990).

Chan had arrived in Australia in 1982. He was paid unemployment benefit from his arrival until August 1985, when he was granted special benefit, after a recommendation from his local CES office that he be transferred from unemployment benefit on the basis that he was 'unemployable'.

Since August 1985, he had been receiving special benefit, including for a period of absence in Malaysia in 1987. However, when he notified the DSS of his plans in October 1989, the benefit was cancelled, on the ground that DSS policy was not to pay during absences overseas except in cases of 'extreme personal hardship'. The policy (as amended during his absence) also limited any such payment to 3 months.

The DSS argued before the AAT that the policy should be applied. Further, it was submitted that because Chan was to be supported by his daughter while in Malaysia, the discretion in s.129 should not be exercised.

The legislation

Section 116 of the *Social Security Act* governs payment of unemployment benefit. Under s.116(1)(b), a person must be an Australian resident and be in Australia throughout the relevant period and on the day on which she or he lodges a claim.

Section 129(1) provides the Secretary with a broad discretion to pay special benefit to a person who is 'unable to earn a sufficient livelihood' and who meets a number of other criteria, including that the claimant must not be a person to whom an unemployment benefit is payable (s.129(1)(b)).

Person to whom unemployment benefit not payable?

The DSS had conceded Chan's basic eligibility for special benefit at the hearing but maintained that the benefit should be cancelled in the exercise of the discretion, relying in particular on DSS Policy concerning Chan's absence from Australia.

However, the AAT, referring to a decision of the Federal Court of Australia in *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186, decided that it must consider for itself the question of Chan's eligibility for special benefit. Having satisfied itself that Chan was an Australian resident and that he was not a person to whom sickness benefit, or any pension was payable, the AAT went on to consider whether he was 'not a person to whom an unemployment benefit . . . is payable', under s.129(1)(b).

After referring extensively to the decisions in *Guven* (1983) 17 *SSR* 173 and *Dowling* (1987) 37 *SSR* 466, the AAT decided that the expression 'a person to whom an unemployment benefit . . . is payable' means 'a person who is qualified to receive an unemployment benefit . . . ' The AAT then considered whether Chan was so qualified when the special benefit was granted in August 1985.

The AAT pointed out that the decision that Chan was 'unemployable', that is, that he did not have the capacity to attract an employer, was a matter which, while relevant to the qualifications for invalid pension, was not relevant to unemployment benefit:

'24. I see no basis upon which the decision to grant special benefit to Chan with effect from 5 August 1985 could be justified, given that he was at that time qualified to receive unemployment benefit. That decision, however, is not before me.'

Moreover, the AAT noted that the DSS representative 'was unable to suggest any basis upon which Mr Chan . . . could be found to be not eligible for unemployment benefit'. The representative had submitted that it was desirable as a matter of policy that someone in Chan's position not be required to lodge fortnightly income statements; but the AAT commented:

'However commendable that attitude may be, it does not appear to me to have any foundation in the Act and if it is to be applied, the Act will require amendment.'

(Reasons, para. 26).

The AAT then considered Chan's eligibility for special benefit for the period of his absence, noting that he had passed the 'gates of eligibility' for the exercise of the discretion since, under s.116(1)(b) of the Act, he was not during that period qualified to receive unemployment benefit.

The discretion

The AAT decided that it was not appropriate to exercise the discretion in his case because consistency in decision-making indicated that the DSS policy should be followed, and because Chan had been supported by his relatives while in Malaysia.

The decision

In addition to setting aside the SSAT decision, and substituting for it a decision that the cancellation of special benefit was correct, the AAT commented on the implications of this decision, specifically, the suggestion that for a considerable period, Chan had been receiving a benefit for which he was not qualified. The AAT noted that no question of an overpayment arose for the period from August 1985 while Chan was in Australia, assuming he had received the same amount as he would have had he been in receipt of unemployment benefit. And, for the period of overseas absence from September 1987 to March 1988, no question of overpayment arose because Chan would not have been qualified to receive unemployment benefit while out of Australia; and the DSS had exercised the s.129(1) discretion in his favour.

[R.G.]

Special benefit: assurance of support

PIKULA and SECRETARY TO DSS (No. 5950)
Decided: 31 May 1990 by J.A. Kiosoglous, B.C. Lock and D.B. Williams.

Marianna Pikula appealed against an SSAT decision to cancel her special benefit.

Pikula migrated to Australia from Poland in 1984 when she was 69 years old. Her son had signed an assurance of support guaranteeing her maintenance for the first 10 years of her time here and had honoured that obligation to the date of the AAT hearing.

Pikula became an Australian citizen on 23 June 1989. She had been granted special benefit on 2 November 1987 at the full rate as it was considered she was not receiving a sufficient livelihood. This was cancelled in June 1988, on the ground that her son was earning sufficient income to support her. Special benefit was regranted at one-third of the full rate; she again appealed and the SSAT decided her son and daughter-in-law were able to support her and cancelled her special benefit. This appeal concerned that final decision.

The evidence

Pikula gave evidence that she lived with her son and daughter-in-law in a separate room that was adequately furnished. Although she normally ate with her son and daughter-in-law, she was unable to eat meat and at times she therefore prepared food for herself. If she was in need of clothing or other incidentals, her son paid for them. Her son and daughter-in-law gave evidence that they were in debt with both a large mortgage and other personal loan commitments. Pikula explained that she wanted a special benefit in order to cease being a drain on her son and daughter-in law. She was upset when they quarrelled about money and felt that if she was independent this source of irritation would be removed.

The legislation

Section 129(1) of the *Social Security Act* gives the Secretary a discretion to grant a special benefit to a person not receiving a pension or eligible for unemployment benefit—

'(c) with respect to whom the Secretary is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).'

The assessment

Pikula submitted that, in the exercise of the discretion in relation to special benefit (it being conceded that the conditions precendent to that discretion were established), regard should be had only to her financial position, not that of her son, the guarantor. She noted that the obligation to care for parents is different to the obligation to care for children, and that special benefit should be paid at the one-third rate, given that she was receiving food and shelter.

The Tribunal considered a series of previous decisions on special benefit in similar circumstances including *Takacs* (1982) 9 *SSR* 88, *Blackburn* (1981) 6 *SSR* 53, *Abi-Arraj* (1982) 8 *SSR* 82, *Guven* (1983) 17 *SSR* 173, *Macapagal* (1984) 21 *SSR* 236, *Sakaci* (1984) 20 *SSR* 221 and *Bahunek* (1985) 24 *SSR* 287.

The Tribunal said that it preferred the approach in *Sakaci* (special benefit should be paid where a maintenance guarantee/assurance of support had been signed and where the applicants had moved out of the guarantor's home) and *Takacs* (no special benefit payable where applicant was living with guarantor and being supported in straitened but adequate circumstance) to that of *Macapagal* (applicant living with guarantor receiving board and lodging, special benefit should be paid at one-third rate) and *Blackburn* (special benefit paid at maximum rate to applicant living with his daughters).

The AAT concluded that 'the applicant is receiving an adequate livelihood in the home of her son and daughter-in-law': Reasons, para.22.

The AAT went on to consider the inconsistencies in past decisions. It was particularly concerned with the 'one-third rate' decisions of *Macapagal* and *Blackburn*. It noted that the effect of this was to grant a special benefit at the rate of some $81 a fortnight. This was substantially more than pensioners, provided with full board and lodging in hostels regulated by the *Aged or Disabled Persons Homes Act* 1954, were allowed to retain from their age pension plus benefit for needs other than board and lodging. The amount under this legislation for a single person came to some $46 per fortnight.

Formal decision

The Tribunal found that a sufficient livelihood was provided to the applicant and affirmed the decision under review.

[J.M.]