was permanently incapacitated for work.

[*Note*: Not all members of the AAT agree that s.5(4) of the *Transition Act* ousts s.8 of the *Acts Interpretation Act*. Other members have decided that an applicant retains rights under the 1947 Act if the claim was lodged before 1 July 1991 but no decision was made by that date. See, for example, *Mifsud*, decided 9 January 1992, and noted on p.919 of this issue.]

[C.H.]

Invalid pension: special needs

SECRETARY TO DSS and BLAZEVIC, ECIMOVIC AND DUSPARA
(No. 7638)

Decided: 24 December 1991 by I.R. Thompson, A. Argent and D.M. Sutherland.

On 27 August 1986 Blazevic, Ecimovic and Duspara (the claimants) completed claims for invalid pension which were rejected by the DSS on 2 June 1988. The claimants requested review by the SSAT which set aside the decisions under review and directed that the claimants were entitled to be paid the invalid pension. The DSS appealed against this decision.

The facts

As the claimants all live in Yugoslavia, they were not present at the AAT hearing and were represented by the Vice-Consul for Yugoslavia in Melbourne. He arranged for the authorities in Yugoslavia to provide to the AAT relevant information requested by the DSS. One such authority was the administrative head of a psychiatric centre in Yugoslavia, 'JAKES' Modrica. The claimants lived in Yugoslavia at the time they made their claims.

Blazevic, 44 years old, came to Australia in 1964 and lived here until 1972. Whilst in Australia he spent lengthy periods in psychiatric institutions.

Ecimovic, 57 years old, came to Australia in 1958. He was admitted to a psychiatric hospital in 1963 and remained there until he returned to Yugoslavia in 1968.

Duspara, 51 years old, came to Australia in 1960. He was diagnosed as suffering from chronic schizophrenia and hospitalised until his return to Yugoslavia in 1970.

Each claimant has required extensive psychiatric care since returning to Yugoslavia. It was agreed that each claimant is permanently incapacitated for work and that they have not resided in Australia since May 1973.

The circumstances of Ecimovic and Duspara were similar. They had both been inpatients of 'JAKES' Modrica for a number of years. 'JAKES' Modrica advised by letter in March 1988 that it was intended to discharge both men to live with relatives once they received the pension. In a later communication 'JAKES' Modrica advised that all 3 men were chronically ill; it was unlikely that Ecimovic and Duspara would be able to live independently and that they would be placed in a home for the aged if they could pay the cost. Based on the information provided by the Yugoslav authorities, the AAT calculated the average social assistance provided in Yugoslavia to persons without an income in 1990 as 9000 dinars per month.

Blazevic had been an inpatient of 'JAKES' Modrica until February 1987 when he was discharged and went to live with his mother. Blazevic's mother was in receipt of a social security benefit but Blazevic had no entitlement because he had not worked in Yugoslavia. Based on the information supplied to it, the AAT calculated that the minimum income received by Blazevic's mother was between $100 and $110 Australian per month. It was submitted by the Vice-Consul that Blazevic's mother received no separate amount for him, and that he begged in the streets for food.

The law

The first issue for the AAT to address was which law applied to these claims. The *Social Security Act* 1947 applied at the time when the claims were lodged and s.24A provided for the grant of invalid pension to persons outside Australia. The AAT noted that on 1 July 1991 the *Social Security Act* 1991 replaced the 1947 Act. However, the provisions of ss.773(1) were similar to those of s.24A. To qualify for a grant of invalid pension overseas a person must be:

- above the age of 16 years;
- not receiving the age pension;
- permanently incapacitated for work or permanently blind;
- not have resided in Australia since 7 May 1973;
- become permanently incapacitated for work or permanently blind whilst in Australia; and
- be in special need of financial assistance.

It was agreed between the parties that the claimants satisfied the first 5 criteria. The issue that the AAT had to decide was whether the 3 claimants were in special need of financial assistance.

The AAT first dealt with the issue of when the claimants must establish that they were in special need of financial assistance. Their claims dated 27 August 1986 were received by the DSS on 2 January 1987. Pursuant to s.135TA(1A) of the 1947 Act at that time, a claim could not be granted unless the person was qualified to receive the pension, benefit or allowance at the time the claim was made. Sub-section 135TB(2) provided that if a person became qualified to receive the pension, benefit or allowance within 3 months of making a claim, then the claim was deemed to have been lodged on the date that the person became so qualified. (It was pointed out by the AAT that s.789 of the 1991 Act is more restrictive but did not apply in these proceedings.) Therefore the AAT had to decide whether the claimants were in special need of financial assistance on the day they made their claim or at any time in the following 3 months.

Special need of financial assistance

After referring to *Harris* (1985) 25 *SSR* 299, the AAT stated that the claimants' circumstances would need to distinguish them from the ordinary and needed to be assessed by reference to the circumstances of the people in the country where they lived, that is Yugoslavia.

The AAT was not favourably impressed by the proposal that Ecimovic and Duspara were to be placed in a home for the aged. In the opinion of the AAT this would not be in the best interests of the claimants. Whilst living in 'JAKES' Modrica their material and medical needs were met by that institution. There was no evidence that the claimants were any worse off than the other inpatients in the institution. For this reason, the AAT decided that the claimants were not in special need of financial assistance.

The situation of Blazevic was different as he had left 'JAKES' Modrica during the 3 months following his

claim. After hearing the evidence of the amount of social security paid to Blazevic's mother and that this was a minimum paid to all households in Yugoslavia receiving social security, the AAT concluded that there was no evidence before it that Blazevic's household received less than other households in Yugoslavia in a similar position. There was insufficient evidence to establish that Blazevic's situation 'is any different from the situations of other persons in Yugoslavia who are dependent on heads of households which have no income other than social security payments': Reasons, para. 23. Therefore Blazevic also was not in special need of financial assistance.

Formal decision

The AAT decided to set aside the decisions under review and substitute decisions that neither an invalid pension (under the 1947 Act) nor a special needs pension (under the 1991 Act) is payable to the claimants.

[C.H.]

De facto relationship: failure to call witness

RODGER and SECRETARY TO DSS
(No. 7468)

Decided: 13 November 1991 by R. Balmford, D. Elsum and W.G. McLean.

Rodger claimed supporting mother's benefit on 26 August 1977 and continued to receive it until it was cancelled at her request on 8 October 1986. During the period that she was receiving the benefit, the *Social Security Act* 1947 was amended in various ways, but the effect remained that a woman 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him' was not entitled to the benefit. For convenience, the AAT referred to the concept as that of a '*de facto* spouse'.

The submission of the DSS was that from 5 July 1979 to 2 October 1986 Rodger was the *de facto* spouse of Brian Shirreff and was accordingly not entitled to the benefit paid to her throughout the period. The DSS decided that Rodger had been overpaid $43 905.70 during this period. The SSAT affirmed the DSS decision.

The decision under review was made under the provisions of the *Social Security Act* 1947, which was repealed from 1 July 1991. Having regard to Clause 15 of Schedule 1A of the *Social Security Act* 1991, the AAT was satisfied that the matter was to be dealt with under the 1991 Act, save that the substantive question was to be determined wholly in accordance with the provisions of the 1947 Act, since the case involved a closed period expiring before 1 July 1991.

In support of its case the DSS alleged the following facts (none of which were disputed by Rodger):

- in June 1979 a house in Deer Park was purchased in the joint names of Brian Leonard S and Faye Lynette S and was mortgaged.
- On the Certificate of Title to the property Faye S was described as a married woman.
- Brian S was the father of Rodger's younger child, T, born 31 December 1980.
- While employed at 'Snowdeli' Rodger used the name Faye S.
- Rodger wore wedding and engagement rings.
- Rodger's 2 children attended Deer Park State School and use the name S.
- Rodger had since January 1989 lived rent free in the Deer Park home with her 2 children and S's elder child L, aged 20, but without S. She had the use of S's car which is registered in her name.

The AAT's assessment of the evidence

However, the AAT found that there was no evidence that Rodger had lived with S under the same roof in the relevant period, and there was considerable evidence that they had not. Therefore an essential component of a *de facto* relationship, as defined in the legislation, was missing. The AAT accepted the evidence of Rodger and 3 witnesses called by her that she was living with her parents at Maidstone throughout the relevant period.

S had relationships with other women during the period, at least one of whom lived for a time with him at the Deer Park property.

The AAT accepted Rodger's explanations for the facts on which DSS relied. There had at one time been a close and loving relationship between Rodger and S. At the time that they met in 1976 he was married with one child, L. S led Rodger to believe that they would be married. In anticipation of the marriage she agreed to purchase the home at Deer Park jointly with him, and allowed herself to be described on the Title as Faye S, married woman 'to save the legal costs of changing the name later'. She made no financial contribution to the purchase or the mortgage payments. In 1987 S paid out the mortgage and registered the property in his name as sole proprietor.

Also in anticipation of the marriage, she sent her children to the Deer Park School under the name of S. When working at 'Snowdeli' she used the name S as one of the women working there had a child at school with Rodger's child. Otherwise she generally used the name Rodger.

The engagement ring was hers from a previous engagement, and the wedding ring her mother's.

Since 1989 she had lived at the Deer Park home with the 3 children rent-free, because S had offered her the accommodation to dissuade her from moving to Perth and taking T with her. She had the use of his car, but was not the only female friend of S's to have used it.

The rule in *James v Dunkel*

The DSS relied on a written statement by Rodger's father that she had not lived with her parents at Maidstone for 6 or 7 years. The advocate for DSS did not call Rodger's father, and 'made much of the fact that Miss Rodger did not call her parents or Mr S. He referred to the principle in *Jones v Dunkel* (1959) 101 CLR 29: that, where a witness whom one would expect to see called is not called, it is possible to infer that the evidence of that witness would not have assisted the party concerned.

Rodger said that she had tried to get S to give evidence but he found it difficult to get time off work. Her parents had said that they would get medical certificates if asked to give evidence. She had received some advice from a legal service at an early stage of preparation of her case, but the AAT did not know if she had been advised of the significance of *Jones v Dunkel*.

The AAT said:

> 'However, in a situation such as this where the evidence which was called is appropriate and convincing, we do not consider that Jones v Dunkel is necessarily applicable against an applicant not legally represented . . .