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The decision under review was made under the provisions of the *Social Security Act* 1947, which was repealed from 1 July 1991.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 . . .

> We note that the respondent called no evidence at all. The principle in Jones v Dunkel is certainly applicable to a well-advised party with the resources of the Commonwealth.'

(Reasons paras 28-9)

Formal decision

The AAT set aside the SSAT decision.

[P.O'C.]

Wife's pension payable overseas

SECRETARY TO DSS and STEFANOU

(No. 7568)

Decided: 10 December 1991 by R.C. Jennings QC.

The Department sought review of, and a stay order to prevent the implementation of, an SSAT decision to set aside a DSS decision of 12 July 1991 to reduce the rate of wife's pension paid to Stefanou who resided in Greece. Both matters were dealt with in this appeal.

Facts

Stefanou first arrived in Australia in 1965. She was granted a wife's pension on 14 February 1980 as her husband was an invalid pensioner. She left Australia in November 1986.

Following the introduction of the *Social Security Act* 1991, the Department applied s.1221 of that Act, which, according to the DSS, allowed it to reduce her rate of pension according to a formula which took account of the length of Stefanou's working life in Australia. The DSS decided that she was entitled to 254/300ths of a full pension.

The SSAT set aside this decision and substituted a decision that s.1221 did not apply to Stefanou, that she was entitled to have her rate assessed under the 'normal' income test, and that arrears were payable.

Legislation

Section 1216 provides that, generally, a person is disqualified from receiving a wife's pension overseas after 12 months absence. However, s.1216B provides various exceptions for 'entitled persons' including a woman who was an Australian resident for at least 10 years: s.1216B(2)(a).

Section 1221 sets the rate for a portable pension. Section 1221(2) provides that, subject to subsections (3), (4), (5) or (6), the section applies to a person who commenced to receive a wife's pension after 1 July 1986.

Section 1221(2A) states that, in spite of subsections (3) or (4), the section applies to a person who is receiving a wife's pension and is an 'entitled person' under s.1216B(2)(a).

Section 1221(3) provides that the section does not apply if the person was an Australian resident on 8 May 1985, they commence to receive a pension before 1 January 1996 and their absence from Australia commences before 1 January 1996.

Section 1221(4) provides that the section does not apply to a person if the person was an Australian resident on 8 May 1985 and the person is in a country with which Australia does not have a reciprocal agreement.

The rate calculator, included in Module A, then provides instruction for calculation of the appropriate rate of a portable pension.

The argument

The DSS argued that s.1221(2A) meant that s.1221 applied to all wife pensioners outside Australia with more than 10 years residence. Section 1221(2A) should not be restricted in its operation to wife pensioners who commenced to receive their pension after 1 July 1986. According to the Department, s.1221(2A) should not be read as if it were subject to s.1221(2): had Parliament intended it to be so, it would have said so, having expressly provided that s.1221(2) was subject to s.1221(3), (4), (5) and (6). It argued that subsection (2A) was intended to stand alone, and, given that it was subsequent to subsection (2) and more specific than it, it should 'be given its full effect'.

Which subsection prevails?

The Tribunal rejected the Department's arguments. It found that s.1221(2A) should be limited to wife pensioners who had commenced to receive their pension after 1 July 1986 and should not be read as if it stood alone. The Tribunal preferred the arguments of Stefanou's representative which 'mirrored' those of the SSAT:

> 'Sub-section 1221(2A) is not intended to add to the categories of persons to whom section 1221 applies, rather it merely reduces the effect of the exceptions under sub-section (3) and (4) . . . [P]roportional portability was introduced in 1986 and was only ever to apply to pensioners who commenced to receive their payment after 1 July 1986. To introduce a law now, 5 years after than time, and take away the respondent's exemption from proportional portability is considered outside the scope of the amendment'

(Reasons, pp.11-12).

The Tribunal also said it was not necessary to have regard to explanatory memoranda and second reading speeches, which the Department said the Tribunal should rely on. In the Tribunal's view, there was no ambiguity or obscurity in the legislation nor did its interpretation lead to an absurd or unreasonable result. Further, the Tribunal said, none of this material altered its view of the legislation.

Formal decision

The Tribunal affirmed the decision under review and rejected the application for a stay order. In making the latter order, it commented that a foreshadowed amendment to the portability provisions could not be relevant to the substance of the decision in dispute.

[J.M.]

Note: In decisions handed down on the same day, 10 December 1991, the AAT (constituted by R.C. Jennings QC) affirmed SSAT decisions to the same effect on the following cases:

SECRETARY TO DSS and BARSONY (No. 7632)

SECRETARY TO DSS and BELDING (No. 7625)

SECRETARY TO DSS and BRAND (No. 7624)

SECRETARY TO DSS and CACHIA (No 7628)

SECRETARY TO DSS and CETINIC (No. 7626)

SECRETARY TO DSS and HAGE (No. 7623)

SECRETARY TO DSS and KERNIOTIS (No. 7621)

SECRETARY TO DSS and LATIFOGLOU (No. 7627)

SECRETARY TO DSS and MATHER (No 7629)

SECRETARY TO DSS and SECANSKI (No. 7622)

SECRETARY TO DSS and STOLPER (No. 7567)

SECRETARY TO DSS and TAKACH (No. 7630)

SECRETARY TO DSS and VESPERO (No. 7631)