SSR 937, the AAT held that the steps taken to recover the debt necessarily involved the making of a decision, by way of implication, not to waive the debt.

Moreover, the question of waiver had been specifically put to the SSAT by Ibbotson in a letter (though not considered, in view of its decision that she was not F's *de facto* spouse). Therefore the AAT held that it had jurisdiction to consider the question of waiver as there was a primary decision under s.251 of the Act.

The AAT next considered whether the relevant legislation concerning waiver was s.251 of the *Social Security Act* 1947 or s.1235 of the *Social Security Act* 1991.

Applying *Mariot* (1992) 66 *SSR* 937, the AAT decided that, because the questions of waiver and write-off are not decisions about accrued entitlements but rather involve a current determination about current circumstances, the 1991 Act should be applied to the question of waiver, while the question of Ibbotson's entitlement to benefit should be decided in accordance with the law at the time that the entitlement accrued.

The AAT then referred to the Notice under s.1237(3) (the Minister's direction) dated 8 July 1991 and, in particular, paras (a) and (g). Paragraph (a) provides that a debt may be waived where the debt was caused solely by administrative error, was received by the person in good faith and recovery would cause financial hardship to the person; while para. (g) provides that a debt may be waived where special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional (see *Beadle v D-G of Social Security* (1985) 7 ALD 67); 26 *SSR* 321).

The AAT considered Ibbotson's difficult financial circumstances; the fact that she was maintaining her 9-year-old daughter; the fact that she was to an extent housebound in order to look after her invalid father; the fact that the overpayment (if any) resulted from false statements made; and her lack of means to repay the debt. The AAT determined that any amount in excess of $6000 should be written off for a period of 6 years and a decision whether to waive that amount should be made after that time. Meanwhile, recovery of the debt should be made by instalments not exceeding $20 a fortnight.

Formal decision

The decision under review was set aside and a decision substituted that during the relevant period Ibbotson was living with F as his wife on a *bona fide* domestic basis though not legally married to him; that she was entitled to unemployment benefit at the rate specified in s.112(1)(d) subject to the application of the income test provided in s.114; and the matter was remitted to the Department to determine whether there had been an overpayment in light of the decision. In the event that there was an overpayment, the tribunal limited recovery in accordance with the directions outlined above.

[R.G.]

Sole parent's pension: living separately

STAUNTON-SMITH and SECRETARY TO DSS

(No. 6144A)

Decided: 16 March 1992 by B.H. Burns.

In October 1991, the Federal Court heard an appeal from Lynn Staunton-Smith against the AAT's decision that her sole parent's pension should be cancelled from July 1989 because she was a 'married person'. (See *Staunton-Smith* (1992) 62 *SSR* 924.)

In March 1989, Staunton-Smith had recommenced living with her husband, from whom she had separated in 1981. She had moved back to her husband's house because she was ill and unable to look after her son, who had Down's syndrome.

The Federal Court decided that the AAT had treated Staunton-Smith's case as if it had to decide whether she was living in a *de facto* relationship, rather than whether she was living separately and apart from her husband.

The Court found that the AAT's reasons for decision were inadequate as the AAT had not indicated the weight it had attached to the fact that Staunton-Smith and her husband had no sexual or social relationship, that they did not regard themselves as married nor hold themselves out as married, that her husband had provided care to her son before she had moved back into his house and that Staunton-Smith's financial dependence on her husband only commenced when her sole parent's pension was cancelled.

The Federal Court had remitted the matter to the AAT for reconsideration in accordance with the Court's reasons. This appeal represented that reconsideration.

The legislation

A person was eligible for a sole parent's pension under the *Social Security Act* 1947 if the person was a 'single person'. A person was a 'single person' if the person was a legally married person living separately and apart from her or his spouse.

The evidence

The AAT received evidence from Staunton-Smith, her husband and her eldest son and her son's wife. The AAT said that it found Staunton-Smith an impressive witness.

The AAT found that the couple separated in April 1981, shortly before Staunton-Smith began to receive a sole parent's pension. Staunton-Smith and her husband lived apart until about May 1989 but her husband provided care for Staunton-Smith's children from a previous relationship, in particular a son P, who had Down's Syndrome, when Staunton-Smith was ill. (She suffered from Addison's disease.)

In May 1989, Staunton-Smith was ill and had nowhere to live so she moved in with her husband.

> 'Both the applicant and Mr Staunton-Smith understood this arrangement to be short-term until she could find more suitable surroundings for herself and P, and conditional on Mrs Staunton-Smith paying half the rent and power bill, and her own expenses'

(Reasons, para. 14).

The 'couple' led separate lives with Staunton-Smith and her son P sharing one bedroom and her husband having the other. Staunton-Smith paid for and cooked her and her son's meals, and her husband looked after his own cooking, washing and cleaning.

Her husband drove her to the supermarket once a fortnight and they had their own friends. When her sole parent's pension was cancelled, Staunton-Smith was unable to pay the rent and had to borrow money from her husband to buy clothes for P. Both these amounts were considered by each to be a debt.

The only joint social life they had was occasional visits to Staunton-Smith's other son and they did not hold

themselves out to any of their family and friends as married. Her husband would provide occasional care for P when it was needed. The AAT found that:

> 'Since separation in 1981 there has been effectively no relationship apart from that of boarder and landlord, whilst the applicant resided at Mortimer Street. This was brought about by Mrs Staunton-Smith's ill-health, her commitment to keep her son Phillip with her, and Mr Paul Staunton-Smith's humanitarian concern for Phillip not being institutionalised. Apart from the above considerations, the applicant and Mr Staunton-Smith provided no companionship or emotional support for each other. In fact, Mr Paul Staunton-Smith would have preferred that Mrs Staunton-Smith and Phillip not be on the premises in question.'

(Reasons, para. 19).

The AAT concluded that Mr and Mrs Staunton-Smith were living separately and apart on a permanent basis and that she was a single person for the purposes of sole parent's pension.

Formal decision

The AAT set aside the decision under review and substituted for it a decision that, from 18 July 1989 until the date of payment of invalid pension, Staunton-Smith was qualified for payment of sole parent's pension.

[J.M.]

Invalid pension: incapacity for work

Re CIRKOVSKI and SECRETARY TO DSS

(No. 7724)

Decided: 30 January 1992 by D F O'Connor J.

The DSS cancelled Radovan Cirkovski's invalid pension on 31 August 1987. Following review by the SSAT (before it had determinative power), Cirkovski applied to the AAT for review of the DSS decision. That application was lodged on 6 June 1988.

Which Act?

The *Social Security Act* 1947 was repealed with effect from 1 July 1991, when the *Social Security Act* 1991 came into operation.

Schedule 1A to the 1991 Act contained provisions dealing with the transition from the 1947 Act to the 1991 Act.

Clause 15(1) provides that an application made to the AAT before 1 July 1991 has effect as if it were an application under the 1991 Act.

Clause 15(3) provides that where a decision is made by the AAT on such an application and its date of effect is before 1 July 1991, the decision has effect, for the period up to 30 June 1991, as if it were a decision under the 1947 Act.

The effect of this clause, the AAT said, was to keep alive applications for review despite the repeal of the 1947 Act. Its effect was procedural only; and it did not direct the AAT to apply the substantive law contained in the 1947 Act to the review. On this point, the AAT preferred the approach adopted in *Simek* (1991) 65 *SSR* 920 to the approach taken in *Buquet* (1991) 65 *SSR* 910 and *Mifsud* (1992) 65 *SSR* 919.

The AAT said that it was part of a 3-tier administrative review system, involving the DSS, the SSAT and the AAT. At each step, the decision was made afresh; and the AAT's responsibility was to 'stand in the shoes' of the original decision-maker.

The general proposition was that the AAT applied the law as at the date of its decision: *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934. This was subject to s.8 of the *Acts Interpretation Act* 1901, which provided that the repeal of an Act was not, unless the contrary attention appeared, to affect any right, privilege, obligation or liability acquired or accrued under the repealed Act.

A claimant for a pension or benefit, the AAT said, had an accrued right to that pension or benefit, albeit contingent until the claim was determined, as decided in *Reilly* (1987) 39 *SSR* 495. A person, such as Cirkovski, who was in receipt of a pension which was cancelled also had an accrued right which was to be determined under the 1947 Act, unless a contrary intention could be shown.

The AAT said that a contrary intention might be found, where the AAT was reviewing a decision to reject a claim for pension, in cl.5(4) of Schedule 1A to the *Social Security Act* 1991. The Tribunal had come to this conclusion in *Simek*, a decision with which the AAT agreed in this case.

But, where the AAT was reviewing a decision to cancel a pension or benefit, the relevant clause in Schedule 1A was cl 4. A decision to cancel, the AAT said, was an 'instrument' within cl.4 of Schedule 1A, and cl.4 did not express a legislative intention contrary to s.8 of the *Acts Interpretation Act*. The substantive law to be applied in the review, after 1 July 1991, of a decision to cancel, made before 1 July 1991, was to be found in the 1947 Act.

Abolition of invalid pension

The AAT noted that the *Social Security (Disability and Sickness Support) Amendment Act* 1991 commenced operation on 12 November 1991. It repealed the provisions of the *Social Security Act* 1991 relating to invalid pension and introduced a new form of payment, disability support pension. The Amendment Act was silent on its retrospective application. It followed that Cirkovski's inchoate accrued right to invalid pension was protected by s.8 of the *Acts Interpretation Act* against the effects of the Amendment Act.

Not incapacitated for work

Turning to the evidence, the AAT found the Cirkovski was capable of performing light duties which did not require bending or lifting of heavy objects. He was not, the AAT decided, 85% incapacitated for work within ss.27 and 28 of the *Social Security Act* 1947.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

VANDERTUUK and SECRETARY TO DSS

(No. 7847)

Decided: 20 March 1992 by W.J.F. Purcell.

Vandertuuk applied to the AAT for review of a decision of the SSAT which affirmed a DSS decision to reject Vandertuuk's claim for invalid pension.

Vandertuuk was born in Scotland and came to Australia at age 11. She left school at age 13 after year 6. She worked as a roadhouse attendant for a few months, then in several old folks' homes for short periods of time. For 2 years she was a nurses' aide at a Repatriation Hospital, and later worked as a waitress.