reports with the AAT confirming that SRA was a suitable candidate for reassignment surgery.

**The legislation**

This case fell to be decided under the *Social Security Act 1947*. Section 37 of that Act provided that the wife of an invalid or age pensioner who was an Australian resident and in Australia at the date of claim, was eligible for a wife's pension. 'Wife' was defined in s.3(1) of the Act as a female married person, and married person included a *de facto* spouse, that is, a person living with another person of the opposite sex on a *bona fide* domestic basis.

**The argument**

There was no dispute that B was a man, and the DSS conceded that, if SRA was found to be a woman for the purposes of s.37 of the Act, her relationship to B would be that of *de facto* spouse. However, the DSS argued that SRA was male, emphasising her birth certificate and the fact that she had not undergone sex reassignment surgery. The respondent relied in particular on the decision of *Re HH* (1991) 60 *SSR* 838; 13 AAR 314, where the Tribunal had decided that only those transexuals who had undergone sex reassignment surgery could be classified by their reassigned sex.

The AAT quoted the description of a person's 'psychological sex' in *Re HH*, which that Tribunal had held was relevant to determining a person's sex, but only if it equated with their anatomical sex.

The AAT in *SRA* stated that the *Re HH* Tribunal had not adequately defined 'psychological sex', which it had treated as meaning the same as 'assumed sex role'. The AAT in SRA decided these were two different things: 'psychological sex . . . related to the person's inner belief concerning their sex', whilst 'assumed sex role . . . concerns the adoption by a person of social and cultural aspects pertaining to a particular sex'. The AAT continued:

> 'We agree with the Tribunal in *Re HH* that the factor most relevant to determining the sex of transexuals is psychological sex. We consider, however, that the test as postulated in *Re HH* was applied incorrectly.
>
> Having had a further opportunity to examine the issue, we are of the view that the emphasis by the Tribunal in *Re HH* on sex reassignment surgery was correct as an indicator of psychological sex but not conclusive of its existence. Surgery *per se* has no effect upon a transexual's psychological sex, that is their inner belief as to their own indentity. Post-operative transexuals may receive a psychological boost in that their outward anatomical appearance now conforms more closely to their inner belief about their sex, but it is not a determining factor in every case.
>
> [In *Re HH*] the Tribunal seemed to give greater emphasis to the assumed sex role than to psychological sex. This, we believe, led the Tribunal erroneously to consider anatomical factors as overriding other factors. Thus the Tribunal concluded that unless a transexual had undergone surgery so that his or her physical appearance was more in accordance with their belief as to their sex, they should remain classified as their sex at birth. Our view that the Tribunal in *Re HH* misapplied the test it had formulated is strengthened by the comments of Dr Greenway made in relation to the respondent in this case. He said:
>
> "The fact that she has not had surgery to me is irrelevant. The aim of the surgery is to make somebody feel more comfortable with their body, not to 'turn them into a woman'. The surgery does not supply the patient with a uterus, nor with ovaries. It is purely and simply an attempt to allow the person's body to approximate how they feel within themselves. Thus, in my opinion, [SRA] is no lesser [sic] woman for not having had surgery, nor would she be any more a woman for having had the surgery.'"

(Reasons, paras 23-5)

The AAT suggested that the Tribunal in *Re HH* may have been overly influenced by a NSW criminal case, *R v Harris and McGuiness* (1988) 17 NSWLR 158, which held that a post-operative male to female transexual was not a 'male person', but a pre-operative male to femal transexual was a 'male person' for the purposes of the NSW *Crimes Act*.

The AAT noted that the *Social Security Act* was beneficial legislation and should be interpreted accordingly. It stated that, although questions of fraud and ease of administration were important matters, the incidence of transexualism was very small. The AAT also emphasised that, if SRA was paid a wife's pension rather than a single rate of unemployment benefit, there would in fact be a saving to the DSS. Indeed, according to the AAT, the fact that SRA would receive less if paid a wife's pension was an important indicator of psychological sex.

The AAT concluded that psychological sex was the most important factor in determining a person's sex for the purposes of the *Social Security Act*, and it would be 'unduly onerous' to insist that a person had to undergo expensive surgery, before she was eligible to receive benefits. The AAT concluded that SRA had 'the psychological sex and social and cultural indentity of a woman' and was therefore qualified to receive wife's pension as B's de facto wife.

**Formal decision**

The AAT affirmed the decision under review.

**[J.M.]**

# Sole parent pension: reasonable action to obtain maintenance

**TEMMEN and SECRETARY TO DSS**

**(No. 8187)**

**Decided:** 21 August 1992 by P.W. Johnston.

Evelyn Temmen had been receiving sole parent pension at the rate of $362.60 since June 1990. On 6 August 1991 the DSS cancelled her pension because she had not taken reasonable action to obtain maintenance from her former husband.

The SSAT set that decision aside and substituted a decision that sole parent pension should continue. When the DSS implemented that decision, it set her rate at $257.20 (and on recalculation, $255.50). So, despite her apparent success at the SSAT, Mrs Temmen appealed to the AAT against the calculation of the rate of her pension on the remittal of the matter to the DSS.

When Mrs Temmen and her husband separated, Mrs Temmen had sole custody of their 2 children. The Temmens entered into an agreement under s.86 of the *Family Law Act* to finalise maintenance and property matters. This agreement provided that Mr Temmen would transfer his interest in the home to Mrs Temmen, that the house was to be placed on the market and Mrs Temmen was to receive all the net proceeds, that until the sale Mr Temmen would meet the mortgage payments of $536 per month, and after the sale he would pay $500 per month maintenance for the two children.

Subsequently, the parties agreed that they would not put the house on the

market until property prices improved, so the sale was deferred until the youngest child completed her primary schooling. Mr Temmen continued to pay $536 a month.

**The legislation**

Section 252 of the *Social Security Act 1991* provides that a person is not qualified for sole parent pension if s/he is entitled to maintenance, the Secretary considers it reasonable for the person to take maintenance action, and the person does not take such action as the Secretary considers reasonable.

Section 10 of the Act contains various definitions relevant to the meaning of 'maintenance', including —

'maintenance agreement': 'a written agreement . . . that provides for the maintenance of a person';

'cash maintenance': 'maintenance income of the person that consists of the amount of a payment received by the person or the dependent child of a person';

'maintenance income' means—

'child maintenance': 'the amount of a payment or the value of a benefit that is received by the person for the maintenance of a dependent child of the person and is received from' the child's parent, or the partner or former partner of the child's parent; or

'partner maintenance', defined in a parallel way; and

'non-cash housing maintenance': 'maintenance income . . . received in relation to the provision of a residence that is . . . the person's principal home'

**Departmental policy**

The DSS had adopted a policy of determining that a person's actions were 'reasonable' if s/he was receiving 90% or more of what s/he was entitled to as maintenance under the *Child Support (Assessment) Act 1989*. (See Chapter 5.450-5.451 of the 'Guide to the Administration of the Act'.)

**Original decision and SSAT decision**

The DSS had assessed that Mrs Temmen would be entitled to a sum of $803.66 per month through the Child Support Agency and, as the amount she was receiving was less than 90% of this, her pension was cancelled.

The SSAT decided, in assessing whether Mrs Temmen had taken reasonable action to obtain maintenance, that account had to be taken of Mr Temmen's transfer of his share in the matrimonial home to Mrs Temmen. In the SSAT's view, this was maintenance for the purposes of s.252.

The SSAT also had before it (as did the AAT) Mrs Temmen's evidence that she did not pursue higher maintenance from her former husband because he had little contact with the family and worked for a multi-national oil company; in her view, he 'would have no qualms' about transferring overseas if she sought more money. Taking all this into account, the SSAT concluded that she had taken reasonable action to obtain maintenance and the amount received was adequate.

**The Department's recalculation of the rate**

The DSS calculated Mrs Temmen's rate of sole parent pension after the SSAT decision, treating the value of Mr Temmen's transfer of his share of the home as worth $42 500. This amount was apportioned between Mrs Temmen and the 2 children.

Then, for each of these parties a 'capitalisation period' was determined in accord with s.1116 of the Act. (This allows a capitalised maintenance amount to be turned into an annual amount by apportioning it, in relation to a spouse, over the number of years until she would turn 65 and, in relation to the children, until they would turn 18). The amounts for each of the children and Mrs Temmen and the mortgage payments made by Mr Temmen were added together to give a total maintenance income.

**The issues in dispute**

Mrs Temmen argued that the transfer of her former husband's interest in the matrimonial home was a property settlement and should not be treated as maintenance under the *Social Security Act*.

The DSS conceded that she had taken reasonable steps to obtain maintenance. However, this was on the basis that the transfer of the interest in the house was considered to be maintenance. This then meant she had received some 75% of the amount she would get under the Child Support Scheme, and taking account of all matters, this was reasonable.

**The meaning of maintenance**

The AAT decided that the agreement under s.86 of the *Family Law Act* fitted the definition of maintenance agreement in s.10 of the *Social Security Act*, in that the payments of the mortgage were either payments for the maintenance of Mrs Temmen, and/or her children. They also fitted the definition of 'cash maintenance' and therefore 'maintenance income'. It did not think it was material that the agreement had been varied, and that the variation was not in writing.

The AAT also decided that, subject to s.87A of the *Family Law Act*, the transfer of the property was also 'maintenance':

> 'The purpose of the Agreement under the *Family Law Act*, both in its original intent to realise a capital sum for Mrs Temmen upon sale and as varied by the oral agreement not to sell the house for some time, is clearly to provide support for Mrs Temmen to continue to maintain the family as a household.'

(Reasons, para. 25).

**The effect of the Family Law Act**

The AAT decided that, because the Agreement was a maintenance agreement involving the transfer of property, it fell within s.87A of the *Family Law Act*. This provides:

> '(1) Where
>
> (a) a maintenance agreement ... has the effect of requiring;
>
> . . .
>
> (ii) the transfer or settlement of property and
>
> (b) the purpose . . . of the transfer or settlement is to make provision for the maintenance of a party to a marriage or . . . children of a marriage;
>
> the agreement shall:
>
> (c) state that the agreement is an agreement to which this section applies; and
>
> (d) specify
>
> (i) the person or persons for whose maintenance provision is made by the . . . transfer or settlement; and
>
> (ii) . . . the value of the portion of the property attributable to the provision of maintenance for that person or each of those persons, as the case may be.
>
> (2) Where a maintenance agreement of a kind referred to in paragraph (1)(a):
>
> (a) does not state that the agreement is an agreement to which this section applies; or
>
> (b) states that the agreement is an agreement to which this section applies, but does not comply with paragraph (1)(d);
>
> any . . . transfer or settlement of a kind referred to in paragraph (1)(a), . . . shall be taken not to make provision for the maintenance of a party to the relevant marriage or of a child of the marriage.'

The AAT found that, as the agreement did not state that s.87A applied to it nor for whose maintenance the transfer was made, it could not be said to make provision for either Mrs Temmen or for the children.

So, despite the fact that the transfer clearly fell within the definition of

*Social Security Act*, the transfer could not be treated as maintenance because of the effect of the *Family Law Act*. The Tribunal then recalculated the amount of Mrs Temmen's sole parent pension, on a tentative basis, finding that she should receive the amount she was receiving before the DSS cancelled her SPP.

The AAT noted that the DSS had not provided a detailed submission on the interrelationship between the *Family Law Act*, the *Social Security Act* and the Child Support legislation, and the AAT had assumed such an interrelationship.

**'Reasonable action'**

In relation to the question of 'reasonable action to obtain maintenance', the AAT accepted Mrs Temmen's evidence that her husband might leave the country if she sought more maintenance from him, and found that there was a real risk that Mrs Temmen would be worse off if she sought more money. This would also imperil the children's relationship with their father. In these circumstances, the AAT said, Mrs Temmen had taken reasonable action.

The AAT emphasised that, in determining whether action to obtain maintenance was reasonable, the DSS should not be confined to considering whether the amount obtained was reasonable — that is, the result of the action:

> 'Rather, it must also take into account the steps and procedures undertaken by the applicant with a view to securing maintenance.'

(Reasons, para. 33).

The Tribunal accepted that the 90% rule, contained in the Guide—

> 'may, at least in normal circumstances, be accepted as a rational interpretation of s.252 . . . But it is not a legal prescription and must yield, as the respondent itself recognised in the present case — by contemplating maintenance at the level of 75% — where there are special factors inhibiting recovery at the full assessed rate'

(Reasons, para 34).

**Formal decision**

The AAT affirmed the decision of the SSAT so far as it related to a determination that the DSS should not have cancelled Mrs Temmen's sole parent's pension.

The AAT set aside that part of the DSS decision, consequent on the SSAT's decision, to set the rate of pension at $257.20 (revised to $255.50) and remitted the matter to the Secretary with a direction that her entitlement should be calculated on the basis that the $536 per month paid by Mr Temmen should be assessed as cash maintenance.

[J.M.]

# Widow B pension: portability provisions

**SECRETARY TO DSS AND HODZIC**

**(No. 8162)**

**Decided**: 10 August 1992 by D.F. O'Connor J (President)

The DSS sought review of a decision of the SSAT setting aside the delegate's decision of 12 July 1991 to reduce Hodzic's Widow B pension in accordance with the portability provisions of the *Social Security Act* 1991.

**The facts**

Hodzic had been granted widow B pension from 26 September 1972. She had lived overseas at various periods while receiving payments, and had at the date of hearing been overseas continuously since 11 February 1990.

On 24 June 1991 the DSS wrote to Hodzic informing her that the rate of her pension would be reduced from 4 July 1991. The reduced rate of pesnion was to be paid in proportion to the number of years of her 'Australian working life residence'. On 12 July 1991 the DSS made a decision to reduce the rate of widow B pension from $301.60 per fortnight to $126.70. She appealed that decision to the SSAT which determined that the pension should not be reduced under the portability provisions.

**The legislation**

Section 1221 *Social Security Act* 1991 contains the portability rate calculator. At the time the SSAT made its decision s.1221(2A), as amended by the *Social Security Legislation Amendment Act (No. 2)* 1991, provided that the section applied to a person receiving a widow B pension, who satisfied the definition of 'entitled person' in s.1216B(2), who left Australia after commencing to receive the pension, and who continued to be absent from Australia for more than 12 months. Hodzic's circumstances fell within the subsection.

The AAT in *Re Secretary, DSS and Stefanou* (1992) 65 *SSR* 923 had read s.1221(2A) as applying only to people who commenced to receive a pension after 1 July 1986. The SSAT had relied upon *Stefanou* in deciding that Hodzic was not caught by the section.

On 30 June 1992, after the DSS had applied for review of the SSAT's decision, the *Social Security Legislation Amendment Act* 1992 received the Royal Assent. Subsection 1221(2) provided that the portability provisions of s.1221 apply to a person in circumstances similar to those in the old s.1221(2A), and added the words 'whether or not the person commenced to receive the . . . widow B pension before or after 1 July 1986'.

**Was there an accrued right?**

Since Hodzic had 10 years' Australian residence, she was not disqualified by s.1216 from continuing to receive payment overseas. Hodzic conceded that from 30 June 1992 her rate was affected by the portability provisions. The dispute related to whether her rate should be reduced for the period 1 July 1991 to 30 June 1992, the period prior to the 1992 amendments.

Hodzic argued that she had an accrued right to be paid the full rate of pension and that the amending Act did not express a clear intention to affect those rights. She relied upon s.8 *Acts Interpretation Act* 1901 *(AIA)* which provides in substance that the repeal of an Act shall not affect any right accrued under the repealed Act 'unless the contrary intention appears'. Hodzic's argument included the submission that the SSAT had correctly applied *Stefanou*, and that the repealed s.1221 had not affected her right to a full rate of pension.

The AAT accepted that Hodzic did have an accrued right to continue receiving pension, a right which the AAT described as conditional and not contingent. However the amending Act expressed a clear intention to operate retrospectively and thereby ousted the presumption in s.8 *AIA*. The intention was expressed in s.2(4) of the amending Act which states:

> Part 2 of Schedule 1 and Part 2 of Schedule 2 are taken to have commenced on 1 July 1991.

The relevant amendments appear in Part 2 of Schedule 1 under the heading 'Amendments commencing on 1 July 1991'. Relying upon *R* v *Kidman*