reconsider in accordance with directions that Edwards was not entitled to SPP following his claim of 4 December 1992 as he did not have an SPP child on a pension payday.

[P.O'C]

Sole parent pension: 'member of a couple'

GAIN and SECRETARY TO DSS (No. 9288)

Decided: 4 February 1994 by M.T. Lewis, J.D. Campbell and I.R. Way.

Gain asked the AAT to review a decision not to grant him sole parent pension and family allowance. His claim was rejected on the grounds that he was not a single person and did not have any dependent children.

Was the applicant a member of a couple?

The principal question to be decided by the AAT was whether Gain was a member of a couple. If he was then he could not qualify for sole parent pension. Gain was legally married to another person at all relevant times. Under s.4(2) of the *Social Security Act 1991* a married person is a member of a couple 'and is not in the Secretary's opinion living separately and apart from the other person on a permanent basis'. Section 4(3) sets out relevant criteria which must be weighed in determining whether a married person is separated from his or her spouse.

Section 4(5) is also relevant in the case of a person who applies for sole parent pension and who is married. Where the person has shared the same residence with their spouse for a period of 8 weeks and they are separated or claim to be separated then the Secretary cannot form the opinion that they are living separately and apart on a permanent basis unless the weight of evidence supports the formation of that opinion.

In this case the AAT was hampered by a lack of evidence on the part of Gain's wife. She would not attend the hearing and it was necessary to rely on written statements made by her at various points in time. She had resisted the notion that her marriage was at an end in some of those statements and had continued to either live in the matrimonial home or frequently visit the home. It seemed that her resistance to a separation and divorce was motivated out of concern for the welfare of her children.

Gain called evidence to indicate that he had taken on the care of his children without his wife's assistance and that she, in effect, no longer lived at the home. There was evidence of separate sleeping arrangements when his wife did stay in the home, although according to Gain, there had been occasional sexual relations initiated by his wife. There was also evidence of separate income and expenditure and a separate social existence. There was also much evidence of hostility between Gain and his wife. Against this was the apparent desire of the wife to continue with the marriage in some form.

The DSS argued that the evidence was not clear on the point of the couple being separated. It was submitted that there must be some doubt as to whether the couple were still together. In effect the DSS asked the AAT to find that this was simply a poor marriage, instead of not being a marriage at all.

The AAT concluded that they were not so uncertain as to prevent them from deciding the case on the balance of probabilities:

> 'Central to our deliberations has been the consideration of the consortium vitae. In considering the issue of whether the *consortium vitae* may be broken by the unilateral action of one party, we refer to the decision of Emery J in the Family Court of Australia *In the Marriage of Xuereb* (1976) FLC 90-029. In that matter it was found that from the date that the husband informed his wife that the marriage was, as far as he was concerned, at an end, there was an end to the consortium vitae, and he then found that the marriage had broken down irretrievably . . . Although these decisions are from another jurisdiction they are useful nonetheless in the Tribunal's consideration of whether, when the applicant [Gain] considered the marriage had ended, even if that was not shared with or by his wife at the time, this can and should be a factor in finding that the applicant and his wife are living separately and apart on a permanent basis. In the particular circumstances of this case we find that the marriage had ended by the commencement of the period under review. In coming to this view, we gave consideration to whether this was merely a bad marriage, but nonetheless a marriage.'

Reasons, paras 33-34)

Even though Gain's wife entered the home at least once a week, this did not suggest to the AAT that there was a marriage-like relationship between Gain and is wife. While there was no evidence that she had a permanent residence he could not stop her from entering the home as she was a joint owner. Overall, the weight of the evidence supported the conclusion that Gain and his wife were living separately and apart on a permanent basis.

Formal decision

The AAT set aside the decision under review and substituted a decision that Gain is not a member of a couple and that he is living separately and apart from his wife on a permanent basis and that Gain's children were dependent children of Gain.

[B.S.]

Application for extension of time

DEPARTMENT OF EMPLOYMENT, EDUCATION AND TRAINING and SECRETARY, DSS

SECRETARY, DSS and HUGHES (No.9279)

Decided: 31 January 1994 by S.A.Forgie.

This was an application for an extension of time lodged by the Secretary of the Department of Employment, Education and Training (DEET) ('the Employment Secretary'). It relates to a decision made by the SSAT, dated 24 May 1993, setting aside a decision of a delegate of the Employment Secretary. The SSAT decided that the respondent, Hughes, had not reduced his employment prospects and that a non-payment period of 12 weeks should not have been imposed.

The SSAT was reviewing an original decision made by DEET that Hughes' newstart allowance should be cancelled on the basis that he had reduced his employment prospects by moving from Taringa to Lismore. Although the effect of the decision was that by virtue of s.634(1) of the *Social Security Act 1991*, newstart allowance was not payable for 12 weeks, in fact he was not paid for a period of 5 weeks and 3 days. At the end of this period, he had moved back to the original area and re-registered with the local CES.

The SSAT decision was stated to have been made on 13 May 1993, but the reasons for the decision were dated