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

24 May 1993. A copy sent to the DSS was received on 26 May 1993. The decision and reasons were sent to Hughes, and the DSS External Appeals Section in Brisbane also sent a copy to DEET's Brisbane North office. A covering minute noted that the appeal period expired on 23 June 1993 and asked the Authorised Review Officer at Brisbane North to advise External Appeals as to whether DEET wished to appeal. This procedure was in accordance with the protocol between the two departments relating to arrangements between them in these cases.

However, there is no evidence that DEET received the department's minute enclosing the SSAT decision until 1 July 1993. After various communications between officers of DEET commencing on 1 July 1993, on either 2 or 3 August 1993 (both date stamps of the AAT appear on the application), DEET lodged an application for review. It also lodged on 2 August 1993 an application for extension of time which was based upon a failure by the DSS to advise of the SSAT decision. It was also noted by the AAT that in this period following the SSAT decision, Hughes had received an arrears payment for the period during which he had not been paid his newstart allowance. He had spent all of that money to the date of the application. Finally, following DEET's application, the DSS lodged a further application for review and an application for a stay of the operation of the SSAT decision on 27 August 1993. Those applications named the DSS as the applicant. The DSS otherwise relied on the application for an extension of time lodged by DEET on 2 August 1993.

Who is the applicant?

After pointing out that the powers under the *Social Security Act* are vested in the Secretary rather than the Secretary's department, the AAT noted that it is more usual for applications to be made in the name of the Secretary. However, as this was not argued, the AAT did not make a final decision on this point.

Turning to the reliance by the DSS on the DEET application, the AAT noted that the only way in which this application could be relied on would be if the officers of DEET were acting on behalf of the Secretary to the DSS or the Department of Social Security. However, there is nothing in the *Social Security Act* to suggest that the Employment Secretary or his officers may exercise any powers of the Secretary other than those specifically delegated to them, and there is no evidence that the Secretary to DSS has delegated his powers to lodge an application for review or an application for an extension of time in the AAT. Nor, in the absence of evidence of an express delegation, was the AAT able to infer from the delegation of powers to make the decisions under ss.627(1) and 597(1) to officers of DEET, that those officers had been delegated powers to seek review of decisions subsequently made by the SSAT when reviewing those decisions. And, the protocol between the two departments does not add to this, and the AAT noted that all the indications in the protocol would seem to be to be contrary. This is because it clearly states that the DSS 'will prepare all documentation, including section 37 statements, and arrange all investigations and representation. DEET's role is to provide decisions but, it would seem, not to take any action itself': Reasons, para. 21.

Having expressed doubts as to whether DSS could rely on the application for an extension of time lodged by DEET, the AAT then turned to consider whether DEET itself may lodge an application. The AAT considered s.27 of the *AAT Act* which provides that an application may be made to the Tribunal 'by or on behalf of any person or persons (including the Commonwealth) . . . whose interests are affected by the decision'.

While s.1285 of the Act expressly provides that the Secretary is a person whose interests are affected by the SSAT's decision within the meaning of s.27(1) of the *AAT Act*, no mention is made of the Employment Secretary.

Are DEET's interests affected?

The AAT considered a decision of Davies J in *Re Control Investment Pty Ltd and Ors and ABT (No. 1)* (1983) 3 ALD 74 on the question of who is a person affected (in the context of joinder of parties) and, after considering the application of those principles to this case, stated that it was not clear whether DEET does have interests which are affected by the SSAT's decision. However, the AAT did not consider it necessary to decide the point finally, having come to the conclusion that DEET failed on the merits of its application.

Extension of time

The AAT quoted extensively from a judgment of Wilcox J in *Hunter Valley Developments Ltd v Minister for Home Affairs and Environment* (1984) 58 ALR 305, in which he set out a number of principles to be taken into account in relation to applications for extensions of time. Having agreed with the Department that an application by it should be treated no differently from an application by any other person, the AAT noted that two matters were of particular concern. The first related to the delay between the time when DEET first became aware of the SSAT decision and its application being lodged. The AAT had found that DEET was aware of the SSAT decision on 30 June 1993 or 1 July 1993, only some 7 or 8 days after the expiration of the appeal period, yet it took another month to lodge the application. Nor was the AAT satisfied with the reason given, that DEET had never lodged an application in respect of a Queensland matter before, as DEET had procedures it was supposed to have followed set out in the Protocol. Moreover, the application was prepared in DEET's central office in Canberra.

The second matter related to the fact that the SSAT decision had already been implemented and Hughes had been paid a sum of approximately $900. In reliance on that decision, he had spent the money and was not in a position to repay it on demand should he have been unsuccessful on any review. The AAT also noted that without an outline of the facts DEET hopes to prove at a substantive hearing, it was unable to assess the merits of any substantive application for review lodged by it. Bearing all these factors in mind, the AAT did not consider this an appropriate case in which to exercise the discretion to grant the application for an extension of time.

Formal decision

The AAT refused the application for an extension of time

[R.G.]

Procedure: stay of decision

SECRETARY TO DSS and FIORITO

(No. 9234)

Decided: 13 January 1994 by A.M. Blow.

Fiorito was in receipt of a wife pension. The DSS had decided to cancel that payment and Fiorito then successfully appealed to the SSAT against that can-