detriment'. 'That together with the specification that the requirement must be reasonable, leads me to the view that the requirement must be an obligation and not simply a desire or a wish': Reasons, para. 25.

The AAT went on to find that nothing in the correspondence informed Brown that he had to attend at the CES office. Nor was the fact that he had made an appointment to do so any indication that he had been notified that he was required to do so. Although he had been told on a number of occasions that he had to keep appointments, this was not considered by the AAT as turning this current situation into a requirement to attend.

For these reasons it was unnecessary to consider whether or not his failure to attend was reasonable within the meaning of s.627(3). There had not been a failure to comply with a requirement of the Secretary under s.627(1).

Decision

The AAT set aside the decision under review and substituted a decision that Brown was entitled to be paid newstart allowance for the relevant period.

[R.G.]

Marriage-like relationship: estranged couple

McMEEKEN and SECRETARY TO DSS

(No. 9112)

Decided: 11 November 1993 by S.D. Hotop.

Athelie McMeeken sought review of an SSAT decision affirming a decision of an authorised review officer (ARO) in the DSS to cancel her sole parent pension (SPP) from 19 December 1991. She also sought review of the SSAT's decision to affirm the recovery of $8653.40 paid by way of SPP between 29 March 1990 and 19 December 1991 that the SSAT affirmed she had been overpaid.

Background

The McMeekens married on 5 June 1969. They had four children. In November 1989 Mrs McMeeken told her husband that the marriage was over and they ceased to occupy the same bedroom. Mr McMeeken moved into another bedroom in the same house with their son, Peter. Mrs McMeeken claimed SPP on 19 March 1990. She stated on her claim form that Mr McMeeken did not live with her and later advised the DSS that his address was that of his parents. She was granted SPP from 29 March 1990. She stated on various review forms that no other adult male lived at her address and told field officers in August 1990 and March 1991 that no one other than her children lived at her address.

In February 1991, one of Mrs McMeeken's daughters applied for unemployment benefit. She stated that she lived with both her parents but 'they are separated and have separate bedrooms'. Mr McMeeken's father was then interviewed and stated that Mr McMeeken had not lived with him since 1968. After interviewing Mrs McMeeken twice, the DSS decided her SPP should be cancelled as she was not separated from Mr McMeeken and that an overpayment should be raised.

The decision to cancel

Section 249(1) of the *Social Security Act* 1991 provides that a person is qualified for a SPP if '(a) (i) the person is not a member of a couple; or (ii) is a member of a couple who is living separately and apart from his or her partner'. Section 4 provides that a person is a 'member of a couple' if:

> '(2)(a) the person is legally married to another person and is not, in the Secretary's opinion...living separately and apart from the other person on a permanent basis...'

In deciding on the nature of the relationship between 2 people, the Secretary is to have regard to 'the financial aspects of the relationship', 'the nature of the household', 'the social aspects of the relationship', 'any sexual relationship between the people' and 'the nature of the people's commitment to each other' (see s.4(3) where these matters are further detailed). Section 4(5) contains the so-called reverse onus of proof provisions:

> 'If:
> (a) a person claims, or is receiving sole parent pension; and
> (b) a particular residence has been, for a period of at least 8 weeks, the principal home of both the claimant or recipient and a person of the opposite sex; and
> (c) the claimant or recipient and the other person are legally married to one another; and
> (d) the claimant or recipient and the other person:
> (i) are living separately and apart on a permanent basis; or
> (ii) claim to be living separately and apart on a permanent basis;
> the Secretary must not form the opinion that the claimant or recipient is living separately and apart from the other person on a permanent basis unless, having regard to all the matters referred to in subsection (3), the weight of evidence supports the formation of the opinion that the claimant or recipient is living separately and apart from the other person on a permanent basis.'

The evidence

Mrs McMeeken told the AAT that her relationship with her husband had deteriorated from the time of the birth of their son in 1981. She originally moved out of the marital bedroom, but later Mr McMeeken moved out to share a room with Peter. She said that prior to this time she had done the cooking and cleaning for the family, though Mr McMeeken had always done his own washing. After November 1989 she did no cooking or cleaning for him, although at all relevant times he was living in the same house. After Novemer 1989, Mr McMeeken gave her $60 a week for her own expenses and paid their eldest daughter $200 for household shopping which Mrs McMeeken regarded as maintenance for the children. Mrs McMeeken told the Tribunal that she and her husband had jointly owned the house they had lived in and had a joint bank account; she did not, however, have access to this. She also told them that she had not wanted to leave the matrimonial home because of a fear of losing custody of their son and any entitlement to the matrimonial home. Mrs McMeeken said that late in 1992 she had been granted a property settlement by the Family Court of Western Australia, and was now the sole owmer. Mr McMeeken had moved out. She said that she did not want to seek a divorce as she thought there was a possibility she might reconcile with her husband once the children had grown up, though there was no chance of such a reconciliation now.

Mrs McMeeken told the AAT that she had given Mr McMeeken's contact address as that of his parents on the departmental form because at that time she understood he was to be moving there. In answering subsequent departmental questions about other adults living in the house, she had presumed that they did not refer to Mr McMeeken; when she was asked whether she shared 'accommodation' with any other adult, she had thought this question referred to her bedroom, which Mr McMeeken did not share. Mrs McMeeken told the Tribunal that Mr McMeeken did use other rooms in the house.

Mr McMeeken, in his evidence to the AAT confirmed the basic information presented by his wife. He said he had originally intended to move out, but on legal advice he stayed. He said that Mrs McMeeken told him in 1989 that the marriage was over. Mr McMeeken confirmed that prior to this time, Mrs McMeeken had done the household shopping and cooking, while cleaning and washing was shared between family members. He said that he was not a good cook and his daughter had cooked for him after the separation and he had begun to pay her for the household shopping. As well as giving Mrs McMeeken some $60 a week for her personal use, he had paid all the household bills as Mrs McMeeken had no separate income. Mr McMeeken said that after November 1989 he tried to confine himself to the rear of the house and that he and his wife had not been out together since that time, while they had gone out together 'occasionally' prior to this time. Mr McMeeken siad that he had chosen to stay in the house because he felt it was as much his as Mrs McMeeken's and he felt he had responsibilities for his children. He said that he and his wife had had arguments prior to 1989 and their sexual relationship ceased long before that time. He had tried to convince his wife to reconcile but this had not worked.

Findings

The AAT found that, at the date of cancellation of Mrs McMeeken's SPP, she and Mr McMeeken jointly owned the house and given that Mrs McMeeken had no separate source of income, he paid her $60 a week for personal expenses. It found that they accepted joint responsibility for their children. They had separate bedrooms but used jointly, though not at the same time, the rest of the house. Each party accepted responsibility for her or his own cooking, washing and cleaning. Mr McMeeken did general maintenance around the house. Owing to the lack of clear evidence, the Tribunal was unable to decide whether other people viewed them as separated. It noted that Mrs McMeeken did view herself as separated, though used the name Mrs McMeeken. The Tribunal found that Mr and Mrs McMeeken had not had shared a sexual relationship since at least 1989. It found that Mrs McMeeken had not provided companionship or emotional support to her husband since the separation, though Mr McMeeken had tried to do so since that time; his attempts were rejected.

Weighing the evidence

The AAT noted that in this as in many other cases, there were factors which suggested that Mr and Mrs McMeeken were living separately and apart at the relevant time, and those which suggested they were not.

Circumstances which suggest that they were living separately and apart include:

- the use of separate bedrooms;
- the acceptance of each party of responsibility for her or his own cooking, washing and cleaning;
- the lack of general communication or any social relationship between them;
- the lack of any sexual relationship between them;
- the lack of any companionship and emotional support between them;
- their own subjective belief that their marriage had broken down.

On the other hand, circumstances which suggest that they were not living separately and apart include:

- their joint ownership of, and residence with their children in, the matrimonial home;
- the provision by Mr McMeeken of total financial support for the applicant and their children;
- their acceptance of joint responsibility for providing care and support for their children;
- their sharing of the common living areas in the matrimonial home;
- their continuing to reside together in the matrimonial home chiefly for the purpose of sharing in the upbringing of their youngest child, Peter: Reasons, para. 38.

The AAT rejected a mathematical approach to its lists of circumstances, but instead said that it had to 'weigh them appropriately in order to ascertain the true nature and character of the relationship between the parties': Reasons, para. 39. It concluded that in order to assess 'the true nature and character of the relationship' to decide whether they lived separately and apart for the purpose of the *Social Security Act* 1991, greatest weight should be given to 'their continuing to reside in the matrimonial home with their children, their sharing of the common living areas in the matrimonial home, and their sharing in the upbringing of their youngest child, Peter': Reasons, para. 39. These indicated that there was not a complete breakdown of the marital relationship, and that there was not the physical separation that had been required in *Staunton-Smith* (1992) 67 *SSR* 954 and the family law case of *Main v Main* (1949) 78 CLR 636. Mrs McMeeken's SPP was thus correctly cancelled.

The decision to raise and recover the overpayment

Section 1224(1) provides:

> 'If:
>
> (a) an amount has been paid to a recipient by way of pension, benefit or allowance under this Act or the 1947 Act; and
>
> (b) the amount was paid because the recipient or another person:
>
> (i) made a false statement or a false representation; or
>
> (ii) failed or omitted to comply with a provision of this Act or the 1947 Act;
>
> the amount so paid is a debt due to the Commonwealth.'

There was no dispute that an amount of $8653.40 had been paid to Mrs McMeeken as SPP between 29 March 1990 and 19 December 1991 under the 1947 Act and the 1991 Act. The AAT also concluded that Mrs McMeeken made false statements on her various review forms by stating that no other adults lived at her address and that she did not share accommodation with anyone other than her children. Although the Tribunal did not find that these statements were deliberately untrue, it noted that such a finding was irrelevant to the question of whether there had been an overpayment under s.1224(1). However, these false statements were a substantial contributing cause to the overpayment. It therefore concluded that the amount of $8653.40 was a debt due to the Commonwealth.

The AAT also decided that this debt, which was being recovered by the Department at the rate of $20 a week from Mrs McMeeken's current social security entitlements, should not be waived. Given that the ministerial guidelines on waiver had been declared invalid by the Federal Court in *Riddell* (1993) 73 *SSR* 1067, the AAT had regard to the *Hales* factors (1983) 13 *SSR* 136 and concluded that as there was 'no claim by the applicant . . . that . . . [she] is presently in such straitened financial circumstances, or likely to be so in the future, that recovery of the debt from her is causing, or will be likely to cause, her financial hardship', debt recovery should proceed: Reasons, para 51.

Formal decision

The AAT affirmed the decision under review.

[J.M.]