

ing period for benefits. Weislaw Kuzma provided an assurance of a support for Mrs Staniszewski. On her arrival Mrs Staniszewski had \$15,000.

Centrelink determined on 17 June 2002 that Staniszewski's disability support pension should be paid at the partnered rate. The decision was affirmed by the SSAT on 13 March 2003.

The issue

The issue was whether there was a special reason to not treat Staniszewski as being a member of a couple.

The evidence

Staniszewski submitted that the \$636 Centrelink was paying the family per fortnight was insufficient to support him, his wife, and their son. Of the money his wife had on arrival, \$9600 had been spent on college fees for their daughter in the United States. Staniszewski was not forthcoming about when that money was sent, or about how or when the remaining funds were expended, though it appears some was spent on house renovation. Staniszewski provided a document dated one day before the AAT hearing purporting to attest that he and his wife had been living separately under one roof since December 2002. Staniszewski said that Kuzma had been earning approximately \$900 a week when he signed the assurance of support, but had since had an accident and was now receiving sickness benefit, and was no longer in a position to provide support. No independent evidence of this statement was provided.

The law

Section 24 of the *Social Security Act 1991* ('the Act') provides:

Person may be treated as not being a member of a couple (subsection 4(2))

24.(1) Where:

- (a) a person is legally married to another person; and
- (b) the person is not living separately and apart from the other person on a permanent or indefinite basis; and
- (c) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple;

the Secretary may determine, in writing, that the person is not to be treated as a member of a couple for the purposes of this Act.

Discussion

The AAT determined that Staniszewski was lawfully married and residing with his wife, and that in June 2002, when the decision was taken to pay him at the married rate, Mrs Staniszewski had \$15,000 in her possession.

The Department submitted that Departmental guidelines prevent the application of s.24 when an assurance of support is in force. Accepting the need to pay college fees of \$9600, the Staniszewskis nonetheless had \$5400 to use to support themselves over a period of time. Until 7 November 2003 Centrelink had also paid Staniszewski \$240 family tax benefit per fortnight.

The AAT considered the case of *Sarmini and Secretary Department of Family and Community Services* (2003) AATA 90, accepting the quoted proposition therein:

The Tribunal must, in addition to considering the legislative requirements, consider the policy guidelines and it is clear to me that section 24 of the Act both from the legislation and the intention behind the legislation, both in terms of the Migration Regulations and in terms of the Act in combination with the policy considerations would make it undesirable and inappropriate to have the discretion contained within section 24 to be exercised.

The AAT rejected Staniszewski's application on the basis that: he was receiving \$240 per fortnight family tax benefit until 7 November 2003; a valid and enforceable assurance of support was in force and it had not been demonstrated that the assurer could not provide an adequate level of support; and the Staniszewskis had spent a considerable amount of money after his claim for the single rate of disability support pension and her claim for special benefit were rejected.

Formal decision

The AAT affirmed the decision to pay Staniszewski's disability support pension at the married rate.

[H.M.]

Marriage-like relationship: special reasons and discretion

RENDELL & PATRICK and SECRETARY TO THE DFaCS (No. 2004/711)

Decided: 2 July 2004 by D. Trowse.

The issue

In this matter the key issue was whether Rendell and Patrick should be considered to have been in a marriage-like re-

lationship, the consequence of which would be that their rates of income support payment would be reduced.

Background

Rendell and Patrick began a relationship in 1985. Shortly after Patrick became pregnant, Rendell moved into shared rental accommodation at Melrose Park with her, her father and brother. Rendell did not wish the pregnancy to proceed, and had never paid maintenance in respect of his son Leigh, born in March 1986. The evidence was that Rendell and Patrick ceased their relationship when Leigh was born, though they continued to live at the same address, and both contributed to the rent. Rendell engaged in other relationships. In 1991 Patrick and her son moved from the home to live in a housing trust unit at Giles Plains, closer to where her father and brother had themselves moved in 1987, and in 1991 she gave birth to a daughter by another father, from whom she received maintenance payments. Patrick was in receipt of parenting allowance at the single rate, whilst Rendell, from 1995, received disability support pension at the single rate.

The move to Giles Plains proved to be difficult financially for Patrick, and she also had personal safety concerns and schooling difficulties with her son. She and Rendell had maintained occasional contact, and in early 1996 she agreed to return with her children to the Melrose Park home, and to contribute to rent and utility costs. She and Rendell then, in mid-1996, jointly leased a property in Mitchell Park, the rent for which was paid on a rotating basis, and in respect of which, in their bond application, they indicated they were not a couple.

Discussion

The Tribunal considered the various requirements contained in s.4(3) of the Act. In respect of *financial aspects*, the Tribunal noted that Rendell and Patrick had no joint assets, and no legal obligations in respect of each other, and each contributed to rental and utility costs. Regarding *the nature of the household*, Rendell and Patrick occupied different areas of the house, owned separate furniture, and each took responsibility for their own room cleaning, laundry and cooking, though occasionally they did dine together. The support and care of the two children was the prime responsibility of Patrick. She did provide meals, and do laundry for Rendell during short periods when he was unwell and confined to bed. Rendell occasionally con-

veyed Patrick's younger child to school when Patrick was unavailable due to her own studies, and he had some ongoing interaction with his son Leigh, although their bond was described as not strong. As to the *social aspects* of their relationship, the Tribunal noted that Patrick and Rendell had some mutual friends, but also separate ones, and that they did not hold themselves out as married to each other. There had been no *sexual relationship* between them since 1986. They did not consider that the relationship would last indefinitely, but rather that *the nature of their relationship* was one of companionship and support and, more importantly, of financial necessity. Their housing arrangement would have ended had suitable alternative accommodation been made available to either Patrick or Rendell by the South Australian Housing Trust.

The Tribunal noted the decision in *Secretary, Department of Social Security and 'SRJ'* (AAT 10970, 29 May 1996) that the continuing role of a biological parent in the life of his child is not indicative of a marriage-like relationship, and concluded that the relationship between Rendell and Patrick was 'consistent with that found in friendship of long standing' (Reasons, paras 43-44). Thus Patrick and Rendell were not members of a couple nor in a marriage-like relationship.

Formal decision

The Tribunal set aside the decision under review.

[P.A.S.]

Carer allowance: meaning of 'special reasons'

SECRETARY TO THE DFaCS and WALKER
(No. 2004/381)

Decided: 16 April 2004 by
A. Cunningham.

Background

Since 1998 Walker had received carer allowance (CA) for her son. From January 2002 until September 2002, he was spending three nights a week at a youth service home. From 14 September 2002 he spent four nights a week at the home. Centrelink was advised of this arrangement in May 2002. Walker's son had been

diagnosed with autism, severe epilepsy, attention deficit hyperactivity disorder (ADHD) and intellectual disability, and required the necessary level of care for the purposes of a person qualifying for CA. In May 2002 Centrelink reduced Walker's CA. The SSAT referred the matter back for reconsideration with a direction that Walker did not cease to be qualified for CA for her son while he was resident at Devonfield, and therefore temporarily absent from her care for a period of up to 173 days in the 2002 calendar year. The Secretary sought a review of the decision of the SSAT.

The issue

The issue was whether there were any special reasons to extend the 63-day limitation period contained in s.957(3).

The legislation

The qualification provisions for CA are set out in s.957 (1) of the *Social Security Act 1991* ('the Act').

957(1) Subject to subsection (3), if:

- a person is qualified for carer allowance because a care receiver or care receivers are receiving care and attention on a daily basis; and
- the care receiver or care receivers temporarily cease to receive care and attention that would qualify the person for carer allowance;

the person does not cease to be qualified for carer allowance merely because of that cessation ...

957(3) However, the period, or the sum of the periods, for which subsection (1) or (2), or a combination of those subsections, can apply is:

- 63 days in any calendar year; or
- another period that the Secretary, for any special reason in the particular case, decides to be appropriate.

Whether special reasons?

Walker submitted that the special circumstances of her case justified the extension of the 63-day limitation period and that there should not be a pro rata reduction of her CA. Walker had cared for her son on her own since April 2001. She was subjected daily to some kind of physical and verbal abuse from her son. She reluctantly took the advice of medical specialists and placed him in respite care three nights a week in January 2002. The care of her son became progressively worse and Walker increased his period in respite to four nights a week. Walker paid the cost of respite care and had other additional costs which left her with between \$30 and \$50 each week from her Centrelink benefits.

The Tribunal considered various medical reports that confirmed Walker's son's behaviour and the results of the physical assaults upon her. The medical reports recommended that her son spend time in care.

The Tribunal considered the term 'any special reasons'. It referred to a range of decisions that have considered similar terms and how the discretion should be exercised. The decisions include:

- *Zomaya and Secretary, Department of Family and Community Services* (2002) AATA 1190
- *Radmilovich and Secretary, Department of Family and Community Services* (2002) AATA 779
- *Secretary, Department of Social Security v Le-Huray* (1996) 138 ALR 533
- *Beadle v Director-General of Social Security* (1985) 7 ALD 670
- *Ivovic and Director-General of Social Services* (1981) 3 ALN N95
- *Krzywyk and Secretary, Department of Social Security* (1988) 15 ALD 690
- *A and Director-General of Social Services* (1982) No A81/36
- *Secretary, Department of Social Security and Porter* (1997) AATA 11804
- *Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634.

The Tribunal noted that there must be a factor or factors which justify an exception to the principle of liability which the Act otherwise establishes. Essentially the decision maker in exercising its discretion must make a decision which is consistent with achieving the objectives of the relevant legislation. The Tribunal also noted that the decision maker must be prepared to respond to the special circumstances of any case by reason of which a strict enforcement of the legislative provisions would produce an unjust, or unreasonable or otherwise inappropriate result.

The Tribunal referred to the purpose of a carer allowance as stated in the Centrelink guide to payments: carer allowance helps parents or carers to care for children and adults with a disability at home. The Tribunal also noted the various examples of how the discretion was to be exercised contained in the Social Security Guide.

The Tribunal in referring to *Drake and Minister for Immigration and Ethnic Affairs (No. 2)* 1979, 2 ALD 634 noted that in reviewing the exercise of a discretionary power, ordinarily any