

Law could no longer be described as a person to whom unemployment benefit was payable, and s.124(1)(b) could

present no barrier to the payment of special benefit.]

The AAT affirmed the decision under review.

Special benefit: migrant guarantee

BLACKBURN and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/25)

Decided: 8 January 1982 by R.K. Todd, I. Prowse and M.S. McLelland.

Benjamin Blackburn migrated to Australia in 1975, from Mauritius. Shortly before his entry to Australia, his son-in-law (Broudou) signed a 'maintenance guarantee' under Part IV of the *Migration Regulations*.

In February 1976 Blackburn was granted unemployment benefit by the DSS. In August 1978, the DSS cancelled the unemployment benefit because Blackburn was over 65 (see s.107(1)(a) of the *Social Services Act*). As Blackburn had not resided in Australia for ten years he was not qualified for an age pension (s.21(1)(b)). But he was granted special benefit by the DSS.

In September 1980 the DSS established that Broudou had signed a maintenance guarantee for his father-in-law and, after assessing Broudou's finances, the DSS cancelled Blackburn's special benefit.

Blackburn appealed unsuccessfully against cancellation and then asked the AAT to review the decision. While the appeal and review were being dealt with, Blackburn and his wife were supported ('on a very restricted basis') by his three daughters: but no support was provided by Broudou.

The legal issues

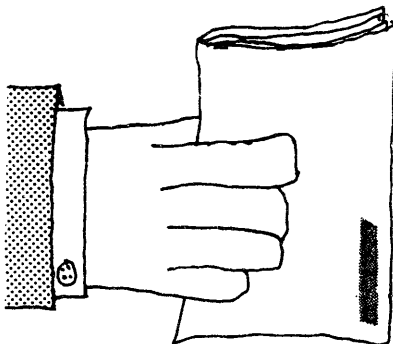
Section 124(1) of the *Social Services Act* gives the Director-General a discretion to pay special benefit to any person if he is satisfied that the person is unable to earn a sufficient livelihood. (The full text of s.124(1) is set out in *Law*, Q81/83, noted in this issue of the *Reporter*.)

The DSS argued that, in exercising the discretion to pay special benefit, the Director-General was entitled to take account of the maintenance guarantee.

The *Migration Regulations* provided (in Part IV) that the Minister could require a maintenance guarantee to be given for

any person seeking to enter Australia: reg.21. Where a guarantee had been given and maintenance of that person was provided by the Commonwealth (including benefit) for the person covered by the guarantee, the Commonwealth could recover the amount of maintenance provided from the guarantor: reg.22.

The terms of the guarantee signed by Broudou were as follows: . . . I . . . hereby guarantee that I will be responsible for the maintenance of the immigrant during [his presence in Australia] and declare that I give this maintenance guarantee for the purposes of Part IV of the *Migration Regulations*.



The effect of the guarantee

The AAT said it was 'difficult to see how the primary obligation to support seemingly created by this document could be enforced.' After the Commonwealth had expended funds on Blackburn's maintenance, there would be a debt owing from Broudou to the Commonwealth - 'but before that the situation is much less clear.' While the guarantee created a moral obligation on Broudou to support Blackburn, the *Migration Regulations* contemplated first the payment of special benefit to Blackburn and then the recovery by the Commonwealth from Broudou of the amounts paid:

This is entirely reasonable, for the primary social demand is that an individual be maintained in a state of security, albeit at a very reduced level. The secondary social demand is that the cost of such maintenance be adjusted as between Australian taxpayers

generally on the one hand and those who have 'sponsored' migrants on the other. We are at this stage concerned only with the primary social demand. Whether there should be a response to the secondary demand involves legal issues concerning, inter alia, the enforceability of the maintenance guarantee.

Reasons for Decision, para. 18.

The AAT considered that the problem of payment of special benefit must be approached in isolation from the existence of the maintenance guarantee.

The special benefit discretion

The question then arose whether the daughters' provision of financial support was a sufficient ground to exercise the discretion to pay special benefit against Blackburn. They had provided that support only after the cancellation of the special benefit. And 'the Australian system of social security does not make any assumption that children should support their adult parents': Reasons for Decision, para. 18. (The AAT distinguished *Beames*, 2 SSR 16, where a 15-year-old boy had been refused special benefit because of his parents' financial support.)

The AAT concluded that 'ultimately our prime consideration must be a compassionate approach to the security in society of this applicant', and that the s.124(1) discretion should be exercised in his favour. (It was conceded that he was, because of age and physical disability unable to earn a sufficient livelihood.) The AAT set aside the decision under review.

Taking account of the fact that Blackburn had been supported by his daughters, the AAT decided that special benefit be granted at the maximum rate, from the date of the AAT decision.

Finally, the AAT warned that it was possible that Broudou would be required to repay to the Commonwealth any special benefit paid to Blackburn and that the family would 'need to consider whether they should make provision for this': Reasons for Decision, para. 21.

Sickness benefit: recovery from employer's insurer

SAQQA and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/44)

Decided: 3 December 1981 by A.N. Hall, L.G. Oxy and I. Prowse.

In August 1978, George Saqqa was granted sickness benefit by the DSS. Payment of the benefit continued until 2 August 1979.

On 7 March 1980 the NSW Workers' Compensation Commission ordered that Saqqa's former employer pay him workers' compensation for the period from 11 August 1978 to 9 May 1979. This pay-

ment was in respect of the same incapacity as the sickness benefit.

On 23 May 1980 the Director-General of Social Services served a notice on the employer's insurer, claiming a payment of \$4049.86 from the insurer under s.115(6) of the *Social Services Act*. The insurer paid this amount to the DSS on 18 June 1980, deducting it from the money due to Saqqa under the order of 7 March 1980.

Saqqa asked the AAT to review the Director-General's decision to recover the \$4049.86 from the insurer.

The Legislation

Section 115 of the *Social Services Act* is, in the AAT's words, 'lengthy and somewhat complex.' Sub-section (1) provides that the rate of sickness benefit payable to a person is to be reduced by the amount of workers' compensation the person is receiving or entitled to receive, so long as the sickness benefit and the workers' compensation cover the same period and the same incapacity.

If sickness benefit is paid without any deduction (where, for instance, the award of compensation comes after the