Unemployment benefit

Section 1 112(5) provides that additional unemployment benefit is payable where a person has the custody, care and control of a child or 'is making regular contributions towards the maintenance of a child'.

Section 106A of the Act provides that a person cannot be treated as a child for the purposes of unemployment benefit, unless the person is living in Australia or unless 'the Director-General is satisfied that the claimant or beneficiary intends to bring the person to live in Australia as soon as it is reasonably practicable to do so.'

The Tribunal decided that Qazag was making regular contributions towards the maintenance of his daughter in Jordan and, therefore, he was qualified to receive extra unemployment benefit under s.112(5) of the Act.

Section 105A did not defeat his claim for that extra benefit because, although his daughter was living outside Australia, he intended to bring his daughter to live in Australia as soon as Jordanian law would permit him – that is as soon as it was 'reasonably practicable to do so':

> The fact that such a lengthy period [that is, some 4½ years after Qazag applied for the extra unemployment benefit] is necessarily involved must, of course, be taken into account in considering the genuineness of the intention to bring the child to Australia and the reality of the intention ever being able to be carried out. A mere genuine wish on the claimant's part is insufficient. But, in the special circumstances of this case – and I stress that each case must be decided on its own particular facts – I am satisfied that the intention is both genuine and realistic, and will be carried out as soon as possible.

(Reasons, para. 20)

The AAT rejected an argument based on s.131(2) (now s.112(6B)), to the effect that a limit of 4 years should be imposed on the time within which a claimant or beneficiary could intend to bring his child to live in Australia. Section 131(2) provided that the rate of benefit payable to a beneficiary should be calculated without regard to a child, where the child was a person to whom s.106A(b) applied and –

> (a) the child has not been brought to live in Australia within a period of 4 years commencing on the first day in respect of which the supplementary rate was so taken into account; or
>
> (b) at any time within that period of 4 years, the Director-General is satisfied that the person does not intend to bring the child to live in Australia as soon as it is reasonably practicable to do so

The AAT said that although the section set a limit of 4 years on the time during which additional benefit would be paid for a child covered by s.105A(b) if the child had not been brought to Australia within that period of 4 years, the section did not control s.106B:

> The requirement that the applicant intends to bring the child to Australia as soon as it is reasonably practicable to do so is not a requirement to bring the child to Australia within 4 years and I do not think that there is any clear intention evidenced by the legislation that such a requirement is to be implied. In the absence of a clear intention to the contrary . . . welfare legislation should be given a beneficial construction.

(Reasons, para. 20)

Formal decision

The AAT affirmed the decision not to pay family allowance to Qazag; and set aside that the decision not to pay additional unemployment benefit to Qazag.

Age pension: portability

ENGLISH and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/142)

Decided: 20 June 1984 by R. Balmford, H.E. Hallowes and H.W. Garlick.

Leo English was born in Australia in 1907. After training as a priest, he left Australia in 1936 and, since that time, he had lived and worked in the Philippines, where he had permanent residence status. He retained his Australian citizenship and an Australian passport and returned to Melbourne (where his brother and sisters lived) on several occasions, spending a total of 4 years (in broken periods) in Australia since 1936.

He returned to Australia in December 1981, lodged his claim for age pension and returned to the Philippines in January 1982. When he left Australia, the DSS suspended payment of his pension, claiming to act under s.83AD(1). English then applied to the AAT for review of that decision.

The legislation

Section 21(1) of the *Social Security Act* provides that a man is qualified to receive an age pension if –

- he has reached the age of 65;
- he is residing in and physically present in Australia when he claims the pension;
  and
- he has at any time being continuously resident in Australia for at least 10 years. Section 20(2) provides a claimant shall be deemed resident in Australia during any absence from Australia if he was a resident of Australia within the *Income Tax Assessment Act*.

  Section 6 of the *Income Tax Assessment Act* provides that 'resident of Australia' means a person whose domicile is in Australia, unless the Commissioner of Taxation is satisfied that the person's permanent place of abode is outside Australia.

Section 83AD(1) of the Act provides that where a former resident of Australia has returned to Australia, claimed a pension and left Australia 'before the expiration of the period of 12 months that commenced on the date of his return to, or his arrival in Australia', any pension granted as a result of the claim is not payable while the pensioner is outside Australia.

Residence and domicile

Evidence was given to the Tribunal that the religious order of which English was a member directed its members as to the place in which they should work; each member was obliged to go where he was sent and to remain there until recalled. English had been working for many years on the preparation of an English-Tagalog dictionary, a complex and urgent task; and, according to the religious order, English (the man) was to remain in the Philippines until this work was finished and then return to Australia.

The AAT pointed out that English had a domicile of origin in Australia:

> The abandonment of a domicile of origin and acquisition of a new domicile of choice in another jurisdiction is effected by *residing* in a country other than that of the domicile of origin with the *intention* of continuing to reside there indefinitely (*Udney* v *Udney* (1869) LR 1 Sc. & Div. 441).

(Reasons, para. 14)

Although English had left Australia and resided in the Philippines since 1936, thus satisfying the first requirement for a change of domicile, he could not be said, the AAT said, to have formed a voluntary intention to remain indefinitely in the Philippines. Indeed, it would be difficult for a person living under the rule of the religious order to which English belonged to establish the necessary intention to acquire a domicile of choice in a country to which he had been sent.

Because English had maintained his domicile in Australia, and because the Commissioner of Taxation had not indicated that he was satisfied that English's 'permanent place of abode [was] outside Australia', it followed that English was a 'resident of Australia' within the meaning of the *Income Tax Assessment Act*. Therefore, he should 'be deemed to have been resident in Australia during the period of his absence from Australia' – that is, between 1936 and 1981.

The AAT then decided that the extended meaning of 'resident in Australia' applied not only to qualification of age pension in s.21(1) of the Act, but also to the portability provisions, in particular s.83AD of the Act. It followed, therefore, that English's entitlement to be paid his pension while he was outside Australia was not affected by s.83AD: this was because, at the time when English returned to Australia, he was 'resident in Australia' and 'not a person who formerly resided in Australia'.

Formal decision

The AAT set aside the decision under review and directed that English had, at all times since lodging his claim for age pension, been entitled to receive payment of that pension.

Special benefit: migrant guarantee

SAKACI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/389)

Decided: 5 July 1984 by J.D. Davies J, R.C. Jennings and J.R. Dwyer.

In 1980, Mehmet Sakaci, who was then 70 years-of-age, migrated to Australia with his wife. Before he was permitted to enter Australia, his son, A, executed a maintenance agreement for each of his parents. These guarantees were in the following form:

> I . . . hereby guarantee that I will be responsible for the maintenance of the immigrant [while the immigrant is in Australia] and declare that I give this maintenance guarantee for the purposes of Part IV of the *Migration Regulations*.

After arriving in Australia, Sakaci and his wife lived with A until early 1982 when they went to live with a neighbour. Sakaci was granted a special benefit from March 1982, presumably on the basis that A did not have sufficient income to enable him to honour his maintenance guarantees.

However, in May 1983, the DSS cancelled Sakaci's special benefit because (to quote from the reasons supplied to the AAT under s.37 of the *AAT Act*),

> another person had signed a maintenance guarantee under the terms of Part IV of the *Migration Regulations*, and such person was considered to be in a position to honour the terms of the guarantee which included maintenance of the applicant . . .

Sakaci applied to the AAT for review of that decision.

The legislation

Section 124(1) of the *Social Security Act* gives the Director-General a discretion to pay special benefit to any person if the Director-General is satisfied that the person is 'unable to earn a sufficient livelihood'.

The *Migration Regulations* provided, in Part IV, that the Minister could require a maintenace guarantee to be given for any person seeking to enter Australia: reg. 21. Where such a guarantee had been given and the person covered by the guarantee was provided with maintenance by the Commonwealth, the Commonwealth could recover the amount of maintenance provided from the guarantor: reg. 22(1).

The Regulations gave the Minister for Social Security a discretion to write off any debt due to the Commonwealth under reg. 22(1): reg. 21(3).

The effect of the guarantee

The Tribunal said that the reason given by the DSS for cancelling Sakaci's special benefit showed 'an incorrect approach'. A decision to grant or cancel a special benefit under s.124 of the *Social Security Act* should be based only on 'circumstances bearing upon the condition in life of the applicant for, or recipient of, the special benefit and of persons dependent upon him.'

On the other hand, a decision to enforce or to write off the debt created by reg. 22 of the *Migration Regulations* would be based primarily on the circumstances of the debtor, that is the maintenance guarantor (in this case A):

> What should not be done is to attempt to enforce a maintenance guarantee by refusing to grant, or by cancelling, a special benefit which is properly payable to a person who is the subject of a maintenance guarantee. Such an action enforces a maintenance guarantee not against the maintenance guarantor but against the person whose maintenance was guaranteed. And it introduces into the consideration of a s.124 discretion circumstances which are relevant principally to the exercise of a discretion under the *Migration Regulations*. Such a course of reasoning will vitiate a decision.

(Reasons, p. 5)

The AAT noted that this view had also been expressed in *Blackburn* (1982) 5 *SSR* 53. The AAT agreed with the general approach in that case but said that the Tribunal had gone too far in saying that 'the problem must be approached in isolation from the existence of the maintenance guarantee':

> The existence of a maintenance guarantee often forms part of the relationship between parents and their children and has an effect upon the way in which they structure their lives and their financial circumstances. Such matters are relevant to the exercise of a s.124 discretion. Thus, the existence of the maintenance guarantees should not, in the present case, be totally disregarded, for they have had a bearing upon the support which [A] has given to his parents. That support is a relevant circumstance in the exercise of the s.124 discretion. What is improper is to attempt to enforce the maintenance guarantees indirectly by cancelling the special benefit at a time when the parents were not, in fact, receiving support from [A]. If the maintenance guarantees were to be enforced, they should have been enforced against [A] and not against the applicant.

(Reasons, pp. 5-6)

The AAT's assessment

The AAT noted, in the present case, Sakaci had moved out of his son's house because of family friction. At the time when the special benefit was cancelled, A was not supporting his parents, they did not wish to return to his house, and A did not wish them to return unless the Commonwealth were to enforce the maintenance guarantee against him and recover from him any special benefit paid to his parents. Even after the special benefit was cancelled, Sakaci and his wife did not move back into their son's house for about 5 months, during which period they had no means of support.

Since Sakaci and his wife had moved back into A's house, they had been supported by A.

The AAT said that 'persons who are without support should not be granted a special benefit if there are reasonable means readily available to them by which they can obtain support.' However, in assessing whether it was proper and reasonable for parents to live with and be supported by their children, both the DSS and the AAT should be guided by 'the actions of the persons themselves':

> We think that the fact that the attempt to have the parents live happily in the home failed is a sufficient indication that the step taken by the parents to move out was reasonable and proper in the circumstances.

(Reasons, p. 9)

Accordingly, the AAT said, there was, in May 1983, no means of financial support reasonably available to Sakaci:

> For these reasons, therefore, we think that the decision to cancel the special benefit was wrong. It was a decision taken with a view to enforcing indirectly the maintenance guarantees. It took into account irrelevant circumstances. Having regard to the circumstances as they stood, the special benefit ought not to have been cancelled. We shall, therefore, set aside the decision under review.

(Reasons, p. 10)

However, the AAT said, from the time Sakaci and his wife moved back into A's house, they had been supported by A. Consequently, special benefit should not be paid from October 1983. It did not matter that their move back to A's house was caused by the incorrect cancellation of special benefit:

> Whatever the cause, from the time when the applicant and his wife returned to their son's home, they were supported by their son . . . and they did not require support from the Commonwealth under its social welfare legislation . . .
>
> The Tribunal was invited to determine that the applicant would be entitled again to a special benefit if he and his wife left their son's home. That is not a matter on which we have formed or expressed any view. That is not a matter within the ambit of the present view.

(Reasons, pp. 11-12)