

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.

ANNOTATED SOCIAL SECURITY ACT

published by Welfare Rights
Centre (Canberra)

PO Box 337, Civic Square, ACT

Available now : \$16 (including postage)

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 maintenance 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)

Formal decision

The AAT set aside the decision under review and decided that a special benefit be paid to Sakaci for the period from 27 May 1983 to 31 October 1983.

[Note: Shortly after this decision was handed down, the DSS issued new guidelines on assurances of support (as maintenance guarantees are now known). These guidelines introduce significant

changes. They are discussed in this issue of the *Reporter*, under the heading, **Administration.**]

Special benefit: drought-affected farmer

KIRSCH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/400)

Decided: 31 May 1984 by R.K. Todd.

Kirsch had purchased a large rural property in 1981. Because of the severe drought, he could not plant crops and, by September 1982, he had accumulated debts of \$150000.

At about this time, the State Bank approved a crop advance to Kirsch, including a living allowance of \$5500 and he placed his property on the market for \$260000.

At the end of August 1982, Kirsch applied to the DSS for a special benefit, which was granted for the period from 9 August to 6 October 1982, the day before the crop advance was made available to Kirsch by the State Bank. (The DSS calculation that the living allowance, when divided by the rate of special benefit payable to Kirsch, would last him until June 1983.) Kirsch asked the AAT to review the DSS decision terminating his special benefit.

The legislation

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

Inability to earn

The AAT said that it was satisfied that Kirsch was, throughout the relevant per-

iod, unable to earn a sufficient livelihood. That inability was to be measured by considering whether there was any measure which Kirsch could have reasonably undertaken to obtain a livelihood. It would have been unreasonable to expect Kirsch to leave his family and his property during the drought to seek employment elsewhere (the prospects of which were extremely slight). Moreover, the depressed rural economy during the drought meant that the sale of his property and of any stock on his property would not have been a sensible or responsible course.

The discretion to grant special benefit

The AAT said that it was appropriate for the discretion to grant a special benefit to be exercised in favour of a primary producer who was, for a period of time, struggling because of the drought. In exercising that discretion, the AAT said, there were several factors to be taken into account, including the crop advance made to Kirsch by the State Bank, the special benefit paid to him up to 6 October 1982 and 'the underlying community support which protected the applicant, and certainly others like him, to a degree which would defy any urban comparison.'

The AAT expanded on this last point:

In this kind of case a mechanism demanded by Australian agricultural conditions comes into operation and losses over short periods of time are absorbed on a wider front to support the rural economy. The banks, too, accept that a primary producer may require a larger than normal overdraft facility when the credit provided by the rural business community is stretched to the limit. In the

applicant's case, the impression given is that the rural community and the financial institutions that are a part of that community were of considerable support in assisting him to cope with the drought and its financial consequences.

(Reasons, para. 26)

The Tribunal then reviewed Kirsch's financial situation between October 1982 and April 1983 and concluded that the money advanced to him in October 1982 had no 'residual effect after the end of February 1983' and that he had no 'real opportunity to make any realistic budgetary plan for the extension of his finances beyond that date': Reasons, para. 29.

There was, the AAT said, a period of urgent need for financial support between the end of February 1983 and 18 April 1983, when Kirsch's wife was granted unemployment benefits:

The hardship and difficulties that beset the country side were, of course, felt by all, but the applicant has suffered in the extremes. The simple truth of the matter is that the applicant desperately required income to support himself and his family. Balancing all the factors I have mentioned leads me to the conclusion that the applicant is entitled to special benefit from the beginning of March 1983 to the date on which the applicant's wife began receiving unemployment benefits.

(Reasons, para. 30)

Formal decision

The AAT varied the decision under review by providing that Kirsch receive special benefit for the period 1 March 1983 to 17 April 1983.

Unemployment benefit: work test

FARAH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/137)

Decided: 4 June 1984 by W.A.G. Enright.

Juan Farah asked the AAT to review a DSS decision to recover from him an overpayment of unemployment benefit amounting to \$321.64. According to the DSS, the overpayment had been made when Farah was paid unemployment benefits for a 4 week period, during which he was not 'unemployed' within s.107(1)(c)(i) of the *Social Security Act*.

During that period, Farah had worked as a commission agent, making a net loss of \$63. Farah told the AAT that, before undertaking this work he had been told by the DSS that he would not be disqualified for unemployment benefits and that the amount of his income from the

work would be taken into account in fixing the level of his benefit.

Farah also claimed that this was a case in which the Director-General should have exercised his discretion, under s.107(3) of the *Social Security Act*, to treat Farah as unemployed notwithstanding that he had undertaken paid work.

Finally, Farah claimed that the circumstances of his case was such that the discretion to pursue recovery should be exercised in his favour.

Not "unemployed"

The AAT first considered whether there had been an overpayment of unemployment benefit to Farah: this depended on whether Farah was, while working as a commission agent, 'unemployed' within s.107(1)(c)(i) of the *Social Security Act*. On this point the AAT said:

I do not think that the failure of the enter-

prise marks him as unemployed during the relevant period . . . He was, in the relevant period, no different to be briefless barrister waiting dejectedly in his chambers for his profitable week, or the farmer mending fences or disposing of dead livestock with no prospects of income for many months after the drought breaks . . .

(Reasons, para. 20)

Should the work 'be disregarded'?

Section 107(3) gives the Director-General a discretion to treat a person as unemployed despite the fact that the person has undertaken paid work -

if the Director-General is of the opinion that, taking into account the nature and duration of the work and any other matters relating to the work that he considers relevant, the work should be disregarded.

The AAT said that this was not a case in which the discretion in s.107(3) should be exercised: the kind of work under-