said the DSS should not seek recovery by deductions from any pension, unless her son was still living at home contributing to the household income.

Formal decision

The AAT set aside the decusion under review and remitted the matter to the Director-General with a direction that the overpayment not be recovered under s.140(1).

JULIAN & JULIAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/109-10)

Decided: 16 November 1983
by J.O. Ballard

The AAT *varied* a DSS decision to recover an overpayment of $754 from each of Mr and Mrs Julian.

The overpayment, of an invalid pension and a wife's pension, was caused by Mr Julian's failure to inform the DSS of worker's compensation payments received by him.

The AAT said that the overpayments were recoverable by the DSS under s.140(1) of the *Social Security Act* (which allows recovery of an overpayment caused by a pensioner's failure to comply with the requirements of the *Social Security Act*.

But several factors were relevant to the discretion contained in s.140(1):

(a) Public money had been paid which should not have been paid

(b) Mr Julian's failure to advise the DSS was due to misunderstanding between him and the Department, to Mr Julian's disability and to the poor information which he had on his compensation payments.

Taking those factors into account, the AAT decided that only half the overpayment should be recovered, to be repaid at the rate of no more than $10 a fortnight.

PAINTER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/118)

Decided: 9 December 1983
by I.R. Thompson.

The AAT *affirmed* a DSS decision to recover an overpayment of $2955 of widow's pension, caused by the applicant's failure to inform the Department of interest on investments paid to her between 1976 and 1980.

The Tribunal said that the overpayment was recoverable under s.140(1) of the *Social Security Act* and that, on balance, there was no basis for exercising any discretion in favour of the applicant: she should have known that the DSS had relied on her for information about her investment income and any hardship involved in repayment would be outweighed by 'the paramount consideration that she [had] received an amount of public moneys to which she was not lawfully entitled'.

KARNEZIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/59)

Decided: 8 December 1983
by J.O. Ballard.

The AAT *varied* a DSS decision to recover an overpayment of unemployment benefit caused by the applicant understating his wife's income.

The DSS had initially attempted to recover the overpayment (of $1311) under s.140(1) of the *Social Security Act* as a lump sum. The AAT believed that recovery in this way, or by instalments, would cause unreasonable hardship to the applicant. However, as Karnezis had recently been granted an invalid pension, it was 'not unreasonable' to recover the overpayment under s.140(2) of the Act, by deductions of $10 a fortnight from that pension.

Special benefit

KAKOURAS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/76)

Decided: 21 December 1983 by R.K. Todd

Dimitrios Kakouras migrated to Australia in 1972, from Greece. He commenced working soon after his arrival and retired at the age of 65 in October 1979. As he had not been resident in Australia for 10 years he did not qualify for age pension. (See s.21(1) of the Act.)

Kakouras applied unsuccessfully for special benefit in November 1979. The applicant and his wife lived with and were supported by their son from October 1979 until early 1981, when the applicant and his wife returned to Greece to visit a sick relative. After his return to Australia in October 1981, he was granted special benefit apparently on the basis that a member of the Greek community, who had signed a maintenance guarantee in respect of Kakouras when he first came to Australia, had died.

The issue before the AAT was whether the discretion to grant special benefit should be exercised in favour of the applicant for the period from November 1979 to December 1981.

The legislation

Section 124(1) of the *Social Security Act* gives the Director-General a discretion to grant special benefit to a person who is not receiving a pension, is not qualified for another benefit and –

> (c) with respect to whom the Director-General is satisfied that by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

The maintenance guarantee

Though not argued before the AAT, the DSS had apparently based its decision not to grant special benefit for the period in issue upon the existence of the maintenance guarantee.

The Tribunal referred to its decision in *Blackburn* (1982) 5 *SSR* 53 which had made it clear that eligibility for special benefit was to be considered in isolation from any maintenance guarantee. It further approved of the point made by the SSAT in the present case, that the guarantee could not have been enforced by the applicant.

Exercise of discretion: relevance of son's support

The Tribunal nevertheless decided that the discretion to grant the benefit should not be exercised. It was doubtful whether the discretion would have been exercised while the son supported the applicant (see *Takacs* (1982) 9 *SSR* 88). As to the period when the applicant was overseas, a grant would normally be made only where the trip was made from 'fairly extreme personal need'.

The AAT discussed the retrospective payment of special benefit:

> I do not subscribe to the view that retrospective payment of special benefit should be denied on the footing that an applicant therefore has after all survived the threatening situation in which he or she had been placed . . . For instance if, in a case where the discretion should clearly have been exercised but in fact was not, an applicant had managed somehow to borrow a sum or sums of money in order to survive, should he or she not be granted benefit retrospectively in order to discharge an obligation that ought never have had to be brought into existence? I should have thought that an affirmative answer would be demanded.

(Reasons, para. 8)

Formal decision

The Tribunal affirmed the decision under review.

GUVEN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/117)

Decided: 29 November 1983 by R. Balmford.

The applicant first applied for special benefit on 30 October 1980. This claim was rejected on 17 February 1981. Mrs Guven appealed unsuccessfully to an SSAT and then applied to the AAT.

The facts

Mrs Guven came to Australia from Turkey with her husband in January 1979. Their first child was born in April 1980. In October 1980 Mr Guven, then unemployed, returned to Turkey to do his military service. He returned to Australia in July 1982.

Mrs Guven resided (for the most part) with her husband's parents during his absence from Australia. In July 1981 the Guvens' second child was born. (In November 1981 Mrs Guven was granted a retrospective payment of special benefit from 21 April 1981 to 24 August 1981, that is, from 12 weeks before to six weeks after the birth of her second child).

The legislation

Section 124(1) of the *Social Security Act* gives to the Director-General a discretion to grant a special benefit to a person who is unable to earn a sufficient livelihood. (The legislation is set out in *Kakouras* in this issue of the *Reporter*.)

'Unable to earn a sufficient livelihood'

Guven said that, as she needed to care for her children, she was unable to earn a sufficient livelihood. The DSS argued that she deliberately chose not to earn a sufficient livelihood, taking on the role of housekeeper in the home of her parents-in-law.

The AAT referred to *Te Velde* (1981) 3 *SSR* 23 where the meaning of 'unable' in s.124(1) was taken not to mean 'impossible' but rather 'an act which in all the circumstances, the person could not reasonably be expected to do'. The Tribunal considered that, in the circumstances, Mrs Guven was 'unable' to earn a sufficient livelihood. The Act did not require her to leave her children with some other person so as to be able to seek work.

'By reason of her domestic circumstances of for any other reason'

The SSAT had dismissed Mrs Guven's appeal because her financial difficulties were not due to 'domestic circumstances'. According to the SSAT, Mr Guven's leaving Australia to undertake military service in Turkey was not a 'domestic circumstance'.

The AAT did not agree. The husband's *absence* was a 'domestic circumstance'. Further to that, the need to care for her children and the inability of other family members to do so were also 'domestic circumstances' which caused her inability to earn.

In addition, the circumstances could fall within the further provision of 'for any other reason' in s.124(1). That reason must be personal to the applicant (see *Te Velde* (supra) and the above reasons satisfied that requirement.

Should the discretion be exercised?

In considering the exercise of the discretion the AAT commented:

> 48 . . . it appears to me that the real reason for the continuing refusal of special benefit to Mrs Guven is a strongly held view within the Department of Social Security that special benefit should not be granted to an applicant whose husband is serving in the Turkish Army which does not pay its soldiers. No real argument was submitted, or visible in the papers before the Tribunal, as to why such a grant was seen as undesirable; as to why a woman and two little children dependent on a man in that situation were seen as less deserving of support by the taxpayer than, for example, a woman and children dependent on a man in prison . . . in T32 on page 7 the following passage appears:
>
> *'Special benefit cases of this type are most difficult to determine. Specific guidelines are not available. On the one hand is the abrogation by the husband of his immediate family responsibilities to meet long entrenched expectations by his former home country, which are reinforced by the Turkish community. The expectation of the Turkish husband is that in his absence his family and/or the Turkish community will support his family. On the other hand is the question of the Australian Government's obligation to financially support the wife and children in the event that the husband's family and/or the Turkish community fail to or refuse to meet their culturally inherent obligation. Of course the associated wider question which does then arise is what other ethnic communities, philosophical or religious groups should also be considered if similar absences by breadwinners occur.'*
>
> [I]t is the last sentence of the passage which is significant. That sentence seems to imply a concern that if this application is granted, a number of other applications will also have to be granted.
>
> 49. One might have been forgiven for thinking, on the basis of T32 and T33, that the officers of the Department of Social Security saw their duty as to protect the revenue, rather than to help the needy . . . In general, the purpose of social welfare legislation is to help the needy, not to protect the revenue.

Referring to the DSS attitude that a woman whose husband is serving in the Turkish Army is not eligible for special benefit, the AAT said that such a principle obscured consideration of the individual case (see *Te Velde*).

In the present case, the AAT could see no reason for not exercising the discretion in favour of the applicant.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that the applicant be paid special benefit for the relevant period.

SIVIOUR and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/56)

Decided: 23 December 1983 by J.O. Ballard, R.A. Sinclair and J.T. Linn.

John Siviour applied to the AAT for review of a DSS decision rejecting his claim for special benefit.

The facts

Siviour left the RAAF with a back disability in 1979. He received some worker's compensation and a disability pension (under the *Repatriation Act*) of $20 a week.

He then went to work on his father's farm, located at first in Western Australia and, after his father sold that property and bought another, in South Australia.

The South Australian farm ran into severe financial difficulties (due in large part to Siviour's disability, his father's illness and a severe drought).

At first Siviour's father lent his son money, on a regular basis, to support Siviour and his family. But the father ran out of money and Siviour applied for special benefit in July 1981. (In fact, this application covered the period to December 1982 when Siviour was able to make himself available for work off the farm and he was granted unemployment benefit.)

The legal issues

The DSS argued that the discretion in s.124(1) (the legislation is set out in *Kakouras*, this issue) should not be exercised in this case as the applicant had sufficient livelihood having regard to the loan from the father, the disability pension and the compensation payment.

The DSS also argued that if special benefit was paid it should be calculated under s.125 by taking into account the amount lent by the father and the disability pension.

Was the applicant 'unable to earn a sufficient livelihood?'

The AAT referred to *Te Velde* (1981) 3 *SSR* 23, where the Tribunal had said that 'unable to earn a sufficient livelihood' in s.124(1) did not mean 'impossible' to earn, but unable 'in all the circumstances'.

In this case the applicant fell within the criteria of s.124(1). It would have been unreasonable to expect him to turn his back on the farm venture and leave his father on the farm to seek work elsewhere. By reason of physical disability and domestic circumstances he was 'unable to earn a sufficient livelihood for himself and his dependants'. He was thus entitled to a proper exercise of the discretion in s.124(1).

The AAT refused to take the loan from the father into account in assessing the amount of special benefit. However, the disability pension should be taken into account.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that the applicant was entitled to special benefit over the relevant period.