of Social Security, that the BVG pension was essentially an invalid pension and carried no prerequisite that the individual had been the subject of Nazi persecution. Evidence from the same source indicated that there existed another pension in West Germany called a *'Bundesentschadigungsgestez'* (BEG) pension which was specifically for persons who suffered persecution under the Nazis.

Legislation

For the purposes of income testing aged pensions (s.33(12)), it is first necessary to determine the extent of the pensioner's income. Section 3(1) of the Act defines income in general terms but specifically exempts certain receipts from that definition. Receipts exempt from the definition of income are not taken into account for income testing purposes under s.33(12). One of the exemptions from the definition of income in para. (ka) which exempts:

> '(ka) an amount paid by way of compensation by the Federal Republic of Germany, or by a State of that Republic, under the laws of that Republic, or of that State, relating to compensation of victims of national socialist persecution.'

Decision

The AAT noted the distinction between the BVG and BEG pensions and found that the BVG pensions were not specifically related to compensation for Nazi persecution. The Tribunal did not go beyond this point in its reasoning and held by the BVG pension did not answer the description in para. (ka) of s.3(1) of the Act. Several earlier AAT decisions were referred to without explanation, including *Kelleners* (1988) 47 *SSR* 616, *Kolodziej* (1985) 26 *SSR* 315, *Teller* (1985) 25 *SSR* 298 and *Evans* (1987) 38 *SSR* 480.

The effect of the Federal Court's decision in *Kelleners* was that pensions received from overseas sources, albeit pensions payable by reason of persecution which pensioners had undergone during the war, were nevertheless income within the meaning of s.3(1) unless they were specifically exempted by the definition of income.

Formal decision

The decision of the SSAT, that no overpayment had occurred, was set aside.

[A.A.]

Unemployment benefit: receipt of Austudy

SECRETARY TO DSS and BRYCE (No. 6259)

Decided: 11 October 1990 by K.L. Beddoe.

The DSS applied to the AAT to review a decision of the SSAT to grant Susan Bryce unemployment benefit from 25 July 1988. Bryce had been a full-time student until that date, when she changed her status to part-time student. She had been in receipt of Austudy benefits since the commencement of 1988. When she went to the CES in July 1988 to register for full-time employment, she did not apply for unemployment benefit because she thought that she was still entitled to Austudy benefits. This apparently arose from incorrect advice given to her by a CES officer.

Bryce continued to receive Austudy benefits until 1 December 1988. She applied for unemployment benefit on 3 November 1988 and began to receive that payment on 7 November 1988. A review of her Austudy entitlement at about the same time determined that she had received $1302 to which she was not entitled as she had ceased to be a full-time student on 25 July 1988. Bryce refused to repay this amount to the Department of Education, Employment and Training until she was paid unemployment benefit from 25 July 1988.

The effect of the Austudy payment

The AAT referred to s.127 of the *Social Security Act* which postponed unemployment benefit for 13 weeks where the applicant had ceased a full-time course of education. The Tribunal noted that, even if it was assumed that Bryce was deemed to have applied for unemployment benefit on 25 July 1988, s.127 would have postponed her entitlement until 23 October 1988. This was 2 weeks prior to the date on which unemployment benefit was in fact paid.

However, it was the operation of s.136 that decided the case against Bryce. Section 136(1)(a) provides that, where a person is in receipt of a payment under a prescribed educational scheme, the person is not entitled to unemployment benefit. Section 136(4) provides that Austudy is a 'prescribed educational scheme'.

According to the AAT, there had clearly been an Austudy payment made in this case. It was argued by Bryce that an Austudy payment had not been made because it was now claimed that this was an overpayment. To this the Tribunal responded:

> 'I do not think that can be the correct interpretation of the provision because it of necessity requires that the meaning of "payment" must be qualified to mean "payment to which the person is entitled under the *Student Assistance Act*". In my view "payment" when used in the context of subsection 136(1) is not so qualified and means amount paid or disbursement. It does not reflect a qualification as to entitlement to the amount paid; merely the fact of an amount paid.'

Although the AAT expressed its sympathy with Bryce – she had always acted *bona fide* and without intent to defraud – it could not find her eligible for unemployment benefit on any basis before 23 October 1988. But her continued receipt of Austudy benefits until 1 December precluded her from unemployment benefit until that date.

This was also not a proper case for the exercise of the discretion in s.125(2)(b) to treat the application for unemployment benefit as being made within a reasonable time of the application for employment. The erroneous advice from the CES would seem to suggest its consideration, but to so exercise it would be to circumvent the sections of the Act mentioned.

Formal decision

The AAT set aside the decision of the SSAT.

[B.S.]