'24. I see no basis upon which the decision to grant special benefit to Chan with effect from 5 August 1985 could be justified, given that he was at that time qualified to receive unemployment benefit. That decision, however, is not before me.'

Moreover, the AAT noted that the DSS representative 'was unable to suggest any basis upon which Mr Chan . . . could be found to be not eligible for unemployment benefit'. The representative had submitted that it was desirable as a matter of policy that someone in Chan's position not be required to lodge fortnightly income statements; but the AAT commented:

'However commendable that attitude may be, it does not appear to me to have any foundation in the Act and if it is to be applied, the Act will require amendment.'

(Reasons, para. 26).

The AAT then considered Chan's eligibility for special benefit for the period of his absence, noting that he had passed the 'gates of eligibility' for the exercise of the discretion since, under s.116(1)(b) of the Act, he was not during that period qualified to receive unemployment benefit.

The discretion

The AAT decided that it was not appropriate to exercise the discretion in his case because consistency in decision-making indicated that the DSS policy should be followed, and because Chan had been supported by his relatives while in Malaysia.

The decision

In addition to setting aside the SSAT decision, and substituting for it a decision that the cancellation of special benefit was correct, the AAT commented on the implications of this decision, specifically, the suggestion that for a considerable period, Chan had been receiving a benefit for which he was not qualified. The AAT noted that no question of an overpayment arose for the period from August 1985 while Chan was in Australia, assuming he had received the same amount as he would have had he been in receipt of unemployment benefit. And, for the period of overseas absence from September 1987 to March 1988, no question of overpayment arose because Chan would not have been qualified to receive unemployment benefit while out of Australia; and the DSS had exercised the s.129(1) discretion in his favour.

[R.G.]

Special benefit: assurance of support

PIKULA and SECRETARY TO DSS (No. 5950)
Decided: 31 May 1990 by J.A. Kiosoglous, B.C. Lock and D.B. Williams.

Marianna Pikula appealed against an SSAT decision to cancel her special benefit.

Pikula migrated to Australia from Poland in 1984 when she was 69 years old. Her son had signed an assurance of support guaranteeing her maintenance for the first 10 years of her time here and had honoured that obligation to the date of the AAT hearing.

Pikula became an Australian citizen on 23 June 1989. She had been granted special benefit on 2 November 1987 at the full rate as it was considered she was not receiving a sufficient livelihood. This was cancelled in June 1988, on the ground that her son was earning sufficient income to support her. Special benefit was regranted at one-third of the full rate; she again appealed and the SSAT decided her son and daughter-in-law were able to support her and cancelled her special benefit. This appeal concerned that final decision.

The evidence

Pikula gave evidence that she lived with her son and daughter-in-law in a separate room that was adequately furnished. Although she normally ate with her son and daughter-in-law, she was unable to eat meat and at times she therefore prepared food for herself. If she was in need of clothing or other incidentals, her son paid for them. Her son and daughter-in-law gave evidence that they were in debt with both a large mortgage and other personal loan commitments. Pikula explained that she wanted a special benefit in order to cease being a drain on her son and daughter-in law. She was upset when they quarrelled about money and felt that if she was independent this source of irritation would be removed.

The legislation

Section 129(1) of the *Social Security Act* gives the Secretary a discretion to grant a special benefit to a person not receiving a pension or eligible for unemployment benefit—

'(c) with respect to whom the Secretary 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 assessment

Pikula submitted that, in the exercise of the discretion in relation to special benefit (it being conceded that the conditions precendent to that discretion were established), regard should be had only to her financial position, not that of her son, the guarantor. She noted that the obligation to care for parents is different to the obligation to care for children, and that special benefit should be paid at the one-third rate, given that she was receiving food and shelter.

The Tribunal considered a series of previous decisions on special benefit in similar circumstances including *Takacs* (1982) 9 *SSR* 88, *Blackburn* (1981) 6 *SSR* 53, *Abi-Arraj* (1982) 8 *SSR* 82, *Guven* (1983) 17 *SSR* 173, *Macapagal* (1984) 21 *SSR* 236, *Sakaci* (1984) 20 *SSR* 221 and *Bahunek* (1985) 24 *SSR* 287.

The Tribunal said that it preferred the approach in *Sakaci* (special benefit should be paid where a maintenance guarantee/assurance of support had been signed and where the applicants had moved out of the guarantor's home) and *Takacs* (no special benefit payable where applicant was living with guarantor and being supported in straitened but adequate circumstance) to that of *Macapagal* (applicant living with guarantor receiving board and lodging, special benefit should be paid at one-third rate) and *Blackburn* (special benefit paid at maximum rate to applicant living with his daughters).

The AAT concluded that 'the applicant is receiving an adequate livelihood in the home of her son and daughter-in-law': Reasons, para.22.

The AAT went on to consider the inconsistencies in past decisions. It was particularly concerned with the 'one-third rate' decisions of *Macapagal* and *Blackburn*. It noted that the effect of this was to grant a special benefit at the rate of some $81 a fortnight. This was substantially more than pensioners, provided with full board and lodging in hostels regulated by the *Aged or Disabled Persons Homes Act* 1954, were allowed to retain from their age pension plus benefit for needs other than board and lodging. The amount under this legislation for a single person came to some $46 per fortnight.

Formal decision

The Tribunal found that a sufficient livelihood was provided to the applicant and affirmed the decision under review.

[J.M.]