1992 direction on waiver, made under s.1237(3) of the 1991 Act. This led the AAT to apply the principles in *Hales* (1983) 13 *SSR* 136 to the question of waiver. However, it noted that the result would be the same, if the Minister's direction were applied.

After outlining the family's precarious financial circumstances, and Hartnett's partner's medical condition, the AAT decided not to waive the right of the Commonwealth to recover the debt, and not to write off the debt. However, it suggested that if their circumstances changed, she should seek a fresh exercise of the discretion.

Formal decision

The AAT varied the SSAT decision by deciding that Hartnett had been overpaid FAS between 13 July 1989 and 29 November 1990. The AAT also substituted 'family payment' for the reference to 'family allowance' in para. c of its decision, dealing with recovery of the outstanding debt by means of withholdings.

[R.G.]

Waiver: assurance of support debt

SECRETARY TO DSS and SARACIK

(No. 8525)

Decided: 8 February 1993 by P.W. Johnston, K.J. Taylor and S.D. Hotop.

Background

In October 1985 Ivan Saracik signed an Assurance of Support to sponsor his parents' entry into Australia. Under the Assurance he agreed, inter alia, that if special benefit was paid to them, he undertook to repay those funds. The Assurance was expressed to have effect for 10 years from the date of signature or to the date that Australian citizenship was granted to the person(s) being sponsored.

Saracik's parents entered Australia on 9 April 1986. Mrs Saracik commenced employment but this terminated on 30 April 1988 and on 9 May 1988 she applied for special benefit. The Department sought information from the Department of Immigration, Local Government and Ethnic Affairs regarding the existence of an Assurance of Support, and received advice on 28 June 1988 that an Assurance had been entered into and that Mrs Saracik had been approved for Australian citizenship on 15 June 1988.

She was granted special benefit with effect from 9 May 1988, and this was advised to her in writing on 4 July 1988. However, no mention was made of any possible liability which could result because of the Assurance. From that time, Mrs Saracik continued to be paid special benefit but the debt raised by the Department related only to payments made in the period 9 May 1988 to 13 July 1988 as Mrs Saracik became an Australian citizen on 14 July 1988.

Mr Saracik was advised by letter dated 12 February 1992 that he owed the Department an amount of $1894.56 representing special benefit paid in the period 9 May to 13 July 1988.

Saracik asked the Social Security Appeals Tribunal to review the decision.The SSAT waived the Commonwealth's right to recover the debt pursuant to paragraph (g) of the Ministerial Determination dated 8 July 1991 issued under s.1237(3) of the *Social Security Act* 1991. The Department then asked the AAT to review the decision of the SSAT.

Jurisdiction

Doubt was raised about the AAT's jurisdiction to review the decision to recover the debt. The AAT noted that an Assurance of Support debt was a debt 'under' the 1947 Act which, by virtue of s.1235 of the 1991 Act, is included as a debt within chapter 5 (the recovery provisions) of the 1991 Act. Therefore it is recoverable (and hence able to be waived) under the 1991 Act. Accordingly, the AAT held that the decision to recover the debt, and the decision of the ARO affirming it on 7 April 1992, were decisions under the 1991 Act being made in respect of debts recoverable under chapter 5 of that Act. They were also reviewable by the SSAT by virtue of s.1247 and by the AAT pursuant to s.1283 of the Act.

Liability

The AAT noted that at the time Saracik signed the Assurance of Support, regulation 22 of the *Migration Regulations* in force at that time provided that an amount paid by way of special benefit to a person who is the subject of an Assurance of Support is a debt due and payable to the Commonwealth by the person who gave the assurance. These regulations were subsequently repealed and replaced with regulations having similar effect in 1989.

Saracik had signed an Assurance under Reg. 22 and the AAT was 'satisfied as a matter of legal liability that, since special benefit was paid to Mrs Saracik during the period 9 May 1988 to 13 July 1988, a debt was and remains payable, by virtue of Reg. 22(1) (now replaced by Reg. 165 of the *Migration Regulations*), by the respondent to the Commonwealth in the amount of $1894.56': Reasons, para. 24. On that basis, the AAT held that the decision that there was a debt due to the Commonwealth should be affirmed.

Waiver

The AAT then went on to consider whether the decision of the SSAT to waive the debt was the correct or preferable decision and was divided on this issue, which was decided by majority.

The majority decision (P.W. Johnson and S.D. Hotop)

The majority first decided that the SSAT had been correct in relying on s.1237(1) of the 1991 Act as the source of the power to waive since the decision to recover was made under the 1991 Act, not the 1947 Act. While uncertainty had been raised about the applicability of the 1991 Ministerial Direction to Assurance of Support debts, the majority decided that whether the discretion was at large and only constrained by considerations of the kind recognised by the Federal Court in *DGSS v Hales* (1983) 13 *SSR* 136 or whether it was confined by either of the Ministerial Determinations made under the 1991 Act, if the AAT found that special circumstances exist which are extremely unusual or exceptional, the discretion could be exercised in Saracik's favour.

The majority noted that the SSAT's decision had centred around the fact that Saracik had no chance to provide support under the Assurance in lieu of payment to his mother because he was not advised that such a debt had commenced to accrue in May 1988. The Department had argued that special benefit was payable to Mrs Saracik independently of the existence of the Assurance, but the majority found that argument 'completely untenable'. While it was noted that some earlier AAT decisions 'might have lent some credence to that submission' (for example, *Re Blackburn* (1981) 5 *SSR* 53; *Re Takacs* (1982) 9 *SSR* 88 and *Re Abi-Arraj* (1982) 8 *SSR* 82), later decisions of the AAT have rejected that view (see *Re Pikula* (1990) 56 *SSR* 752).

The majority found that, had Saracik been advised that his mother had applied for special benefit prior to the first payment on 4 July 1988, he would have been prepared to meet his obligation under the Assurance. No explanation had been provided as to why the issue of the Assurance was not raised with Mrs Saracik, and why she was not informed of the liability that her son would incur if she received a benefit prior to the grant of Australian citizenship. The majority concluded, therefore, that the amount of special benefit in issue was unnecessarily paid, given Saracik's willingness to support his parents.

Secrecy obligations

The Department had argued that they were unable to notify Saracik of the grant and payment of special benefit because of the operation of the *Privacy Act* 1988 and of s.19 of the *Social Security Act* 1947 which provided that an officer could not, *except in the performance or exercise of any duty function or power as an officer*, divulge any information concerning any person under the Act to another person. The majority pointed out that at no time had this argument appeared in the reasons explaining why Mr Saracik was not informed about his mother's claim. The majority rejected the argument concerning the *Privacy Act* as the Act was not in force at the relevant time, and therefore focused on s.19 of the 1947 Act.

It was noted that past departmental practice had been to inform assurors of claims for benefit which could give rise to liability on their part. Certainly the current guidelines indicated that this was the case. The Guide to the Administration of the Act also required the assuror's financial circumstances to be closely examined before a grant of special benefit could be made.

The majority commented that presumably these procedures had regard to s.1312 of the 1991 Act which imposes confidentiality requirements similar to those that were contained in s.19 of the 1947 Act. The Tribunal concluded that it had been the usual and authorised practice of the Department to advise both the claimant and the assuror of the obligations imposed under an Assurance of Support and the consequences of a grant of special benefit. However, the fact that these procedures were long standing did not necessarily make them legitimate if they are unlawful, and the majority then turned to consider whether s.19 prevented the DSS from disclosing this information.

The majority held that informing an assuror about a claim by the assured forms part of the duties and functions of an officer and, hence, falls within the exception: s.19(2). As Saracik was both the person whose affairs were necessarily involved (because he was incurring a collateral liability) and to whom, in the public interest, inquiries should have been made in order to avoid unnecessary expenditure of public funds by the Commonwealth, the majority rejected the submission that s.19 constituted a bar on disclosure.

Having held that both Mr Saracik and his mother should have been fully informed of the nature of the payments and the consequences in light of the Assurance, the majority went on to consider whether it was appropriate to exercise the discretion to waive recovery.

Special circumstances

In assessing 'special circumstances' justifying waiver, the majority stated that regard must be had to the context and purposes of the Act and all relevant circumstances must be considered. The AAT considered several cases in which the failure to provide advice to an assuror had been given considerable weight by the Tribunal (see for example, *Secretary to DSS and Aquino-Montgomery* (1991) 63 *SSR* 883 and *Secretary to DSS and VXR* (1992) 65 *SSR* 914). Similarly, in *Re Vuong* (1992) 70 *SSR* 1001 the Tribunal had waived the debt as a result of the failure to explain matters to the applicant or to notify him of circumstances which might have a deleterious effect on his financial well-being.

As a result, a majority of the Tribunal considered that the failure to inform Saracik, which was a failure even to follow the Department's own procedures, warranted a conclusion that the decision to recover the money was unfair. This conclusion was further warranted by the fact that no action had been taken until early 1992 to recover the debt, a matter that was also not explained by the Department. 'The situation is therefore one where the respondent finds himself some considerable time after the event called upon to pay a debt arising from circumstances over which he had no control at the time': Reasons, para. 60.

The failure to inform Saracik of the grant of benefit, taken in conjunction with the failure to inform him of the existence of the debt, were considered sufficient 'to warrant a finding by the Tribunal that there were special circumstances in the sense that the combination of those circumstances gives rise to a situation which is extremely unusual and exceptional': Reasons, para. 61. For that reason, the majority affirmed the decision of the SSAT to waive recovery of the debt.

The minority (K.J. Taylor)

The dissenting member did not agree with the conclusion on waiver. In his view, insufficient attention had been paid to Saracik's obligations, and too much to the obligations of the DSS. Having signed an assurance for his parents, Saracik had a duty to ensure that they understood the nature of his undertaking and as he had failed to honour his obligation under the assurance, he should now pay the moneys due. Despite the failure of the DSS to raise the debt in a more timely fashion, the minority did not consider the circumstances sufficiently extreme to contemplate the exercise of the discretion to waive the debt.

Formal decision

The AAT, by majority, affirmed the SSAT decision to waive the Commonwealth's right to recover the debt.

[R.G.]

Overpayment: waiver; decision under review

SUMMERS and SECRETARY TO DSS

(No. 8524)

Decided: 10 February 1993 by S.A. Forgie, J.D. Horrigan and E.T. Keane.

On 6 November 1991 DSS decided to recover an overpayment of unemployment benefit and job search allowance in respect of the period 6 June to 22 August 1991 totalling $1408.40 from Mr Summers. This decision was affirmed by an SSAT on 5 March 1992.

Decision under review

The AAT first decided that, although the application for review by the AAT under s.1283(1) of the *Social Security Act* 1991 was in respect of the decision of the SSAT, it did not agree with the conclusion of the AAT in *Hawat* (16 November 1992) that the decision