Assurance of support debt: no distinction between power to raise and recover debt

HRISTOV and SECRETARY TO DSS
(No. 11378)

Decided: 12 November 1996 by Purvis J.

Background

Hristov signed an assurance of support in respect of his parents on 28 November 1987. They arrived in Australia on 5 February 1989. Special benefit was paid to the parents for the period 27 February 1989 to 14 June 1991. Legal proceedings were commenced by the DSS in November 1994 to recover the amount of $27,917.08 (being the special benefit paid) together with interest and costs. Those proceedings were adjourned pending the AAT hearing.

The issue

The issue is whether the decision to raise a debt is separate and distinct from the decision to recover the debt.

The legislation

Section 1227 of the *Social Security Act 1991* (the 1991 Act) sets out various means by which the Commonwealth can recover the debt if 'a person is liable to pay an assurance of support debt'. Section 23(1) of the 1991 Act defines 'assurance of support debt' to include:

> 'a debt due and payable to the Commonwealth, or a liability of a person to the Commonwealth because of the operation of subregulation 165(1) of the Migration (1989) Regulations as in force on or before 19 December 1991 in respect of the payment to another person of special benefit under Part 2.15 of the 1991 Act or special benefit under section 129 of the 1947 Act.'

Regulation 165(1) of the Migration (1989) Regulations provides that where during a period for which an assurance of support has been given in respect of a person, support of that person has been provided by the Commonwealth, an amount equal to the support provided, is 'a debt due to the Commonwealth . . . by the person who gave the assurance of support'. Subregulation (2) provides that a debt due and payable under subregulation (1) may be sued for and recovered in a court by the Commonwealth. Subregulation 163(1) provides that support of a person includes payment of special benefit.

Ultra vires

Hristov submitted that there was no assurance of support debt, as no delegate with authority to do so, had validly raised a debt. The decision of the DSS delegate to raise the debt was beyond statutory power and ultra vires. This submission relied on the contention that the decision to raise a debt is separate and distinct from the decision to recover the debt. It was submitted that the legislative provisions relating to assurance of support debts suggests the power to make a decision that a debt exists, is found in the *Migration Act 1958* and the Migration Regulations, while the power to make a decision relating to recovery is found in the 1991 Act.

It was argued that s.1227(1) of the 1991 Act is a provision that is solely concerned with the recovery of a debt. It does not support the power of a DSS delegate to ascertain the existence of a debt. Whereas reg. 165(1) of the Migration (1989) Regulations clearly provides for the determination that a debt exists. This determination must be exercised by a delegate of the Secretary, Department of Immigration and Multicultural Affairs, and there is no provision for delegation of this power to a DSS delegate.

The DSS contended that the determination as to whether an assurance of support debt exists, is not dependent on whether a decision has been made, but whether a debt, as defined, exists. An assurance of support debt arises by force of law where the objective criteria in reg. 165(1) of the Migration (1989) Regulations are satisfied.

The AAT analysed in detail several decisions in this area including *Matteo and Director-General of Social Services* (1981) 5 *SSR* 50; *Secretary, Department of Social Security and Mathias* (1992) 60 *SSR* 823; *Director-General of Social Services v Hangan* (1982) 45 ALR 23; *Ibarra and Secretary, Department of Social* Secrity (1991) 60 *SSR* 822; and *Taylor v Secretary, Department of Social Security* (1988) 43 *SSR* 554.

The AAT found that liability to pay an assurance of support debt does not arise under s.23(1) of the 1991 Act, as it is an interpretative section. Rather liability to pay an assurance of support debt, arises under reg. 165(1) of the Migration (1989) Regulations.

The AAT was not satisfied that 'it can be said that the decision to raise a debt is necessarily distinct from the decision to recover the debt, and this is certainly not so in respect of the recovery provisions dealt with in the cases discussed above. The decision to recover a debt in those cases included the consideration of the legal and factual matters which went to the existence of a recoverable debt under those sections': Reasons, para. 42.

The Tribunal concluded:

> 'The decision to recover an assurance of support debt under s.1227 of the 1991 Act is not dependent on an antecedent and distinct decision that an assurance of support debt has been raised. This is clear from the discussion of the cases of *Hangan* (supra) and *Re Ibarra* (supra). For a valid decision to be made under s.1227 of the 1991 Act, the delegate of the respondent must be satisfied that the "legal and factual elements of recoverability" exist. The elements identified by the Tribunal in *Re Ibarra* at 319 continue to be the relevant elements for the purposes of the 1991 Act. In considering whether a person is liable to pay an assurance of support debt as defined in the 1991 Act, it is not ultra vires for a delegate of the respondent to reach the conclusion a debt exists for the purposes of the 1991 Act by operation of subregulations 165(1) of the Migration (1989) Regulations.'

(Reasons, para. 50)

Formal decision

The AAT affirmed the decision under review

[M.A.N.]

Enrolled in a full-time course of education: overpayment and waiver

SECRETARY TO THE DSS and McAVOY
(No. 11263)

Decided: 26 September 1996 by J.R. Handley.

The DSS raised an overpayment of job search allowance and newstart allowance of $37,574.25 in respect of the period 21 February 1992 to 13 June 1995 on the basis that McAvoy was enrolled in a full-time course of education during that period.

The facts

McAvoy enrolled as a full-time student at the University of Sydney to undertake a Doctorate in Arts by research commencing on 21 February 1992. He was not required to attend the university at set hours and his enrolment was conditional upon him completing the PhD within 5 years.