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.

Prior to commencing the doctorate McAvoy enquired with the DSS as to how he should answer the question on the Application for Payment of Newstart Allowance form relating to whether he was enrolled for a course as a full-time student. He was advised to tick the 'No' box on the basis that the DSS saw a distinction between course work, and research work, and did not regard a research doctorate as a 'course'. McAvoy repeated this enquiry when the form was changed in 1993 and in the course of several reviews by the DSS and was always given the same advice.

Enrolled as a full-time student?

The AAT reviewed the case law relating to whether a person is 'enrolled in a full-time course'.

In determining whether McAvoy was enrolled as a full-time student, the AAT accepted that this requires consideration of both the enrolment particulars held by the university, and the facts surrounding the study undertaken. In view of the hours he spent in research and his enrolment status, the AAT was satisfied that McAvoy was enrolled as a full-time student.

Enrolled in a course of education?

The AAT saw no distinction between a student enrolled in a 'course of education' and one conducting a PhD by research. It decided that as a 'course of education' includes a research doctorate, McAvoy was enrolled in a course of education.

Waiver

Having found that there was an overpayment of job search and newstart allowance the AAT determined that the overpayment was a debt pursuant to s.1224 *Social Security Act 1991* (the Act). This was on the basis that the debt occurred due to McAvoy making false statements to the DSS. The AAT then considered whether the debt should be waived.

The AAT referred to s.1237A(1) of the Act which provides that a debt must be waived if it was attributable solely to an administrative error made by the Commonwealth, and the payments were received in good faith by the debtor. It decided that McAvoy's enquiries with the DSS had lead him to complete the forms in the way he did, and thus the debt was caused by administrative error. The AAT reviewed the meaning of 'good faith' and decided that his conduct evidenced good faith.

The AAT then went on to consider whether the debt could, in the alternative, be waived under s.1237AAD, which provides a discretion to waive a debt if certain criteria are met and special circumstances exist which make it desirable to waive the debt.

The AAT discussed the criteria of s.1237AAD which had to be satisfied. It did not accept the submission of the DSS that errors committed by DSS officers in the giving of advice similar to that given to McAvoy, were not special because they were so common. The AAT concluded that the debt could also be waived on this ground.

Formal decision

The AAT's formal decision was:

- to set aside that part of the decision of the SSAT made on 1 February 1996 which decided that McAvoy was not enrolled in a full-time course of education and to substitute the decision that McAvoy was enrolled in a full-time course of education;
- to set aside that part of the decision of the SSAT made on 1 February 1996 that there was no debt to the DSS by McAvoy and to substitute the decision that a debt exists in the sum of $37,574.25; and
- to affirm that part of the decision of the SSAT 'that if there be a debt raised against Mr McAvoy the right of the Commonwealth to recover should be waived pursuant to the provisions of s.1237A(1)'.

[A.A]

Disability support pension: valuation of property

KEREMELEVSKI and SECRETARY TO THE DSS (No. 11247)

Decided: 17 September 1996 by M.T. Lewis and I.R. Way.

Keremelevski sought review of a decision of the SSAT which purported to affirm the decision of an Authorised Review Officer of 18 January 1995 to affirm a primary decision of the DSS on 22 December 1994 to reduce the rate of disability support pension (DSP) paid to Keremelevski, because of the value of a property owned by him and his wife.

Keremelevski first received the DSP in 1991. The property, a house in poor condition at Cronulla, was not his principal home and so was an asset under s.11(1) of the *Social Security Act 1991*. It was first valued by a 'roadside valuation' in February 1992 by the Australian Valuation Office (AVO) at $200,000. Several subsequent valuations were conducted by the AVO, including a sworn valuation as at November 1993 at $284,000 and another as at June 1995 at $310,000.

Keremelevski challenged these valuations in declarations of estimated value, based on numerous estimates of the market value of the property by real estate agents, ranging from $250,000 to $280,000. However, he did not obtain a private valuation.

Jurisdiction of the AAT

The AAT was unable to identify the primary decision dated 22 December 1994, referred to by the SSAT. Instead, it identified a primary decision of 29 April 1994 and two decisions by a review officer, in June 1994 and, after further contact had been made with Keremelevski, in January 1995. It decided that as there was an identifiable primary decision by the DSS to reduce the Keremelevski's DSP on 29 April 1994 on the basis of the AVO valuation, it concluded that it had jurisdiction to hear the matter in spite of the SSAT decision.

The AAT decided that the matter related to the valuation of the property through the entire period that the DSP was paid. Further, it considered, and the DSS agreed, that it had jurisdiction to consider the valuations made up to the time of the hearing, including the valuation of June 1995 at $310,000.

Valuation of property

The AAT accepted that the correct valuation of the property must be determined assuming both a hypothetical willing but not anxious seller, and a hypothetical willing but not anxious purchaser, following *Spencer v Cth* (1907) 5 CLR 418.

On this basis, the AAT accepted all the AVO valuations, in particular the two sworn valuations, finding that they were careful and conservative, in contrast to some of the real estate agent valuations submitted by Keremelevski. The increase in value of the property was the result of its prestigious location. The AAT consequently determined that at all material times the valuations of the property provided by the AVO were to be used in calculating the rate of DSP payable to Keremelevski.

Formal decision

The AAT set aside the decision of the SSAT, and substituted its decision that