

disputed the figure of \$7500 assessed as living expenses at the SSAT. Maher estimated living expenses for the two households as \$4160. This lower figure would entitle her to AUSTUDY in 1997.

#### General living expenses

The evidence before the AAT was that Maher had first lived at home for 2 months in 1997, and then rented accommodation closer to university. She estimated her own grocery bills at \$18-26 a week, and told the Tribunal that she was assisted with loans from her sister and boyfriend.

She commenced employment in July 1997, but did not advise the DEETYA of this, nor did she mention it to the SSAT. Not mentioned before the SSAT also was that Maher had accrued some savings by the time of her SSAT hearing (August 1997).

The AAT examined the figures concerning general living expenses as found by the SSAT (\$7500) and as now estimated by Maher (\$4160). The figure as found by the SSAT would mean general living expenses of \$72 a week for each household,

while Maher's estimate relied on accepting a figure of \$40 a week of expenditure for each household. The AAT was not prepared to accept such a low figure in the absence of evidence of the parents' domestic expenditure, particularly where Maher's father had recorded a figure of \$12,500 when estimating general living expenses in May 1997. It is clear from the AAT's decision that the AAT considered the SSAT generous in attributing only \$7500 to general living expenses, however the AAT adopted that figure — it seems in the face of somewhat unsatisfactory evidence on the point.

The AAT then turned to the issues of Maher's employment, and her borrowings and savings. The Regulations required that earnings and savings be taken into account and this meant that the total figure to be calculated under 'Finance' in calculating actual means increased.

Borrowings are to be taken into account pursuant to regulation 12N(3), which provides that the Secretary may impute a value to a transaction engaged in for the benefit of a parent or member

of the family, as if the parent or member of the family had expended the amount. The AAT, however, declined to impute a value to borrowings because the evidence about the borrowings was unsatisfactory.

Calculating the overall figures, the AAT found that the actual means of the Maher family were \$35,712. The after tax income of a 'notional parent' as calculated under the Regulations was \$33,405. This meant that the actual means of the Maher family exceeded the after tax income of the notional parent by \$2307. AUSTUDY therefore was not payable to Maher in 1997.

#### Formal decision

The AAT affirmed the decision under review.

[M.C.]

## Federal Court Decisions

### Debt: language barrier

ZAFIRATOS v SECRETARY TO THE DSS  
(Federal Court of Australia)

**Decided:** 9 September 1998 by Kiefel J.

The SSAT had found that Zafiratos had been overpaid various benefits amounting to a debt of \$62,199.22. However, this debt did not arise because of the operation of s.1224(1) of the *Social Security Act 1991* (the Act). The AAT set aside the SSAT decision and found that the debt was as a result of s.1224(1). Zafiratos appealed to the Federal Court claiming that he had not been provided with a proper interpreter and that he had not been given a fair hearing.

#### The facts

Zafiratos claimed unemployment benefits in February 1987, sickness benefits in November 1989 and an invalid pension in October 1991. In each claim form he directed that his benefits be paid into an account in the name of his wife and his father-in-law. A similar direction was made in review forms. Zafiratos was paid at the married rate on the basis that his

wife did not work. During the whole period, Zafiratos' wife was working. Zafiratos was also paid rent allowance. It was later shown that he lived in a house owned by his wife.

Zafiratos' wife pleaded guilty to fraud charges, whilst Zafiratos was acquitted of fraud in October 1995.

#### The law

Section 1224(1) provides:

'If:

- (a) an amount has been paid to a recipient by way of social security payment; and
- (b) the amount was paid because the recipient or another person:
  - (i) made a false statement or a false representation; or
  - (ii) failed or omitted to comply with a provision of this Act or the 1947 Act;

the amount so paid is a debt due by the recipient to the Commonwealth.'

#### The AAT decision

Zafiratos had argued before the AAT that even though he lived in his wife's house, they were separated under the one roof. All documents relating to the debts were completed by his wife, and not translated to him correctly. He agreed that he signed the forms. With respect to the record of interview with the Federal Police, Zafi-

ratos argued that he had not fully understood the questions and his answers had been poorly interpreted. Finally Zafiratos stated that he could not access the bank accounts into which the benefits were paid.

The AAT did not accept that Zafiratos was a truthful witness. It noted that he deliberately prevaricated, and it did not accept that Zafiratos was unable to understand English. The AAT made a number of findings of fact, namely:

- in the statement to the Federal Police, there was no indication that Zafiratos and his wife were separated, and Zafiratos showed a knowledge and understanding of his wife's business;
- Zafiratos regularly drove his wife to work and was aware of her hours of employment;
- Zafiratos attended the DSS office on a number of occasions with his wife. The AAT did not accept that he could not understand the forms;
- Zafiratos understood his financial situation well enough to enter into a loan agreement in which he stated falsely that he was self-employed;
- Zafiratos gave evidence that he withdrew funds from the account in the name of his wife and father-in-law;

- Zafiratos and his wife travelled together to Greece in 1994.

The AAT concluded that Zafiratos and his wife were living as a married couple, and it was not until Zafiratos realised the seriousness of his situation he asserted that they were separated. The AAT found that Zafiratos had made a false statement to the DSS and as a result had been paid a benefit.

#### A proper interpreter

The Court found that Zafiratos had been provided with a professional interpreter for 2.5 days of the 3-day hearing. For the first half day he had agreed that one of the witnesses would interpret for him. No complaint was made of the interpreter's performance during or after the hearing at the AAT. Zafiratos had been represented at the hearing. The Court viewed the transcript and was satisfied that Zafiratos had been supplied with an appropriate interpreter for the hearing at the AAT. Kiefel J. noted 'Determining whether language is a barrier to another person is difficult and caution is necessary': Reasons, p.3. The Court was satisfied that there was compelling evidence open to the AAT to find that Zafiratos was able to understand spoken English.

#### The fairness of the hearing

The Court rejected Zafiratos' arguments that the DSS had been given unlimited time to present its case and that the AAT had cut off his representative. A perusal of the transcript showed that this was not so. A claim that the AAT was biased had no substance at all according to Kiefel J. The AAT had shown appropriate interest in Zafiratos' case and had given him an opportunity to comment where it was necessary.

The Court noted that Zafiratos seemed to be under the misapprehension that because he was acquitted of fraud charges there could be no debt. It also rejected Zafiratos' claim that the record of interview with the Federal Police should not have been admitted into evidence. The Court found it was clearly admissible evidence.

#### Formal decision

The appeal by Zafiratos to the Court was dismissed with costs.

[C.H.]

## Compensation preclusion: special circumstances; irrelevant matters

**HAIDAR v SECRETARY TO THE DSS**  
(Federal Court of Australia)

**Decided:** 20 August 1998 by Hill J.

Haidar had been precluded from receiving a social security payment for a period of 63 weeks because he had received a compensation lump sum. This decision was affirmed by the SSAT, but set aside by the AAT which decided that the preclusion period should be reduced to 47 weeks.

#### The facts

During the relevant period Haidar was entitled to be paid the sole parent pension because he had the custody of his two children in Australia. Haidar was injured in December 1991 at work and was eventually paid a lump sum payment of compensation of \$67,000. The DSS applied s.1165 of the *Social Security Act* (the Act), and decided that a preclusion period of 63 weeks applied to the payment of benefits to Haidar. It considered whether s.1184 of the Act should apply and decided that it should not.

#### The law

Section 1184(1) is an ameliorating provision of the Act, and it provides:

'For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:

- (a) not having been made; or
- (b) not liable to be made;

if the Secretary thinks it is appropriate to do so in the special circumstances of the case.'

#### The AAT decision

The AAT found that there were special circumstances justifying the exercise of the discretion in s.1184. The DSS subsequently accepted that there were special circumstances in this case. The special circumstances found by the AAT were the ill health of Haidar, the ill health of his family and the breakdown of his marriage. Haidar's daughter had spent 3 years of her life in hospital. Her medical condition was caused by her mother's alcoholism. Haidar's son had also required 2 operations and follow-up medical treatment. Haidar was responsible for

the financial welfare of 2 other children living in Lebanon. Haidar had a limited understanding of English, and it was not clear whether he understood his rights in relation to the payment of compensation and social security benefits, or whether he would have understood any legal advice given to him. Haidar had survived on income which was far less than he received when he was employed. It was difficult for him to pay for the family's basic needs.

Following the separation from his wife, there were no furnishings or household goods left in the family home. The children had limited clothing, and Haidar had to borrow money to set up a new home. Even though Haidar lived in government housing, his circumstances were described as 'dire'. The AAT found that advice given to Haidar following the settlement of his claim and his lack of understanding of that advice, although not special circumstances, contributed to his situation.

By the time of the AAT hearing, Haidar had served the preclusion period and was once again receiving benefits. The effect of the AAT decision would be that the DSS would have to repay a sum of money to Haidar. The AAT found that the preclusion period should be reduced from 63 to 47 weeks as this reflected the hardship and difficulties Haidar and his family had experienced during the preclusion period. According to the AAT it took into account Haidar's present circumstances, which remained straitened, even though improved. Haidar was currently meeting his living expenses and had reduced his debt significantly.

#### The discretion

The first matter to be addressed was whether it was appropriate to treat the whole or part of the compensation payment as not having been made. Section 1184 required the AAT to determine the relevant part of the lump sum which was to be treated as not having been made. It then followed that the period of the preclusion would be reduced according to the statutory formula.

It was argued that the AAT had failed to provide adequate reasons for the exercise of its discretion, had placed too much weight on Haidar's financial circumstances at the time of the AAT hearing (after the end of the preclusion period), and had failed to give weight to the significant findings of fact made by the Tribunal when deciding there were special circumstances. It was also argued that the AAT's decision was unreasonable because it was so manifestly unfair that no reasonable decision maker would conclude this, and that the AAT had taken