

Administrative Appeals Tribunal Decisions

Assurance of support: form not approved; waiver and special circumstances

GUNN and SECRETARY TO THE DSS
(No. 19990087)

Decided: 16 February 1999 by S.A. Forgie.

Background

Gunn is the daughter of Gorupic who is the only child of Besednik. In 1991 Gorupic travelled to Croatia to visit his mother, Besednik. She was very unhappy and Gorupic arranged for her to travel to Australia. Besednik arrived in August 1991 with a temporary entry permit. On 28 April 1992 Gorupic nominated his mother for the grant of resident status. Besednik lived with Gorupic but he was not eligible to sign an assurance of support. Gunn signed an assurance of support for Besednik on 2 April 1992. Due to a number of delays, the first time an assessing officer examined Besednik's application was in September 1993. Because the assurance of support was 12 months old, Gunn was asked to sign another. She did this on 25 August 1993. Besednik's application was finalised on 12 November 1993. As a result of Besednik's medical costs, Gorupic sought assistance from the Department to get a Health Care card for his mother. On advice from the Department, Besednik lodged a claim for special benefit on 10 December 1993.

The issue

Had Gunn incurred an assurance of support debt and if so, should all or part of the debt be waived or written off.

The legislation

Assurances of support are the subject of Part 5 of the Migration (1993) Regulations made under the *Migration Act 1958*. The form and duration of an assurance of support is prescribed in regulation 5.7 of the Regulations. The liability of a person giving an assurance of support is set out in regulation 5.9.

'(1) If a person receives a payment in the form of:

- (a) a job search allowance payable under Part 2.11 of the Social Security Act 1991; or
- (b) a newstart allowance payable under Part 2.12 of that Act; or
- (c) a special benefit payable under Part 2.15 of that Act;

and an assurance of support has effect in respect of the person when he or she receives the payment, the person who gave the assurance is liable, subject to this regulation, to pay to the Commonwealth the amount of the payment.'

Section 1227 of the *Social Security Act 1991* provides that an assurance of support debt can be recovered under the Act. Part 5.4 of the *Social Security Act 1991* sets out the circumstances when recovery of the debt may be waived. Sections 1237A and 1237AAD are relevant.

Was an assurance of support given?

Regulation 5.7 provides that an assurance of support must be on a form approved by the Minister. The Department was unable to provide evidence that the form signed by Gunn was an approved form. The Tribunal found that the form signed by Gunn was not on a form approved by the Minister or his delegate, but it was satisfied that it was substantially in a form approved some months later by the Minister through a delegate.

The Tribunal then considered whether an assurance of support can be given on a form that has not been approved by the Minister and whether completion of a form approved by the Minister is imperative before it can be said that a person has given an assurance of support. The form of paragraph 5.7(1)(a) of the Regulations is mandatory. The Tribunal considered the difference between mandatory and directory requirements as discussed in *Mr B v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 120. The Tribunal concluded that it must 'consider not only the literal meaning of the words used in para. 5.7(1)(a) but also the policy of the legislation and notions of fairness and ensure that none is frustrated': Reasons, para. 42.

'The policy behind the provisions relating to an assurance of support is clear from the provisions themselves. It is that the Australian community should not be required to provide financial support to certain persons within two years of their either entering Australia or of their being granted the relevant entry permit, whichever is the later date. The 1993 Regulations also make it clear that, in cases in which an assurance of support is either requested or required, an entry permit will not be granted unless an assurance

of support has been given. That is to say, it is mandatory that an assurance of support be given in relation to the person before he or she will be granted a Class 806 Entry Permit.'

(Reasons, para. 42).

The Tribunal concluded that the policy of the 1993 Regulations relating to assurances of support and relevant sections from the *Social Security Act 1991* require an interpretation of Regulation 5.7 that there need only be substantial compliance with the formal requirements of an assurance of support. The Tribunal considered that a finding that there needs to be strict compliance with the form would frustrate the policy behind the provisions but also be unfair to Besednik as she would be found not to have complied with clause 806.73.

As Gunn had completed the form given to her on two occasions by officers of the Department of Immigration and Multicultural Affairs, the Tribunal found that there had been substantial compliance with Regulation 5.7. It was satisfied that Gunn had completed an assurance of support and that she was liable to repay the amount of special benefit paid to Besednik.

Waiver of debt and special circumstances

The Tribunal followed the reasoning in *Secretary, Department of Social Security and Kratochvil* (1995) 37 ALD 515 that the equivalent of s.1237A(1) could not apply to Gunn's situation even if there was administrative error. This was because Gunn did not receive the payments and so it could not be said that the debtor (Gunn) received the payments in good faith.

The Tribunal then considered the application of s.1237AAD. The Tribunal was satisfied that neither Gunn nor Besednik made any false statement or omission nor failed or omitted to comply with a provision of the *Social Security Act 1991*.

In relation to special circumstances, the Tribunal was satisfied that Gunn understood the implications of signing an assurance of support form; that when she signed the second assurance of support in August 1993 her financial circumstances were not as healthy as they were when she signed the first in April 1992; and that she signed the assurance on the understanding that her father Gorupic would take responsibility for any money she may have to repay. But the Tribunal did

not consider that these circumstances were special.

The Tribunal then considered the wider circumstances involved in the processing of Besednik's application for a Class 806 Entry Permit and her living conditions during that process. This included the length of time during which her son, Gorupic supported Besednik, before she claimed special benefit.

'That time included some 9 months before she applied for a Class 806 Entry Permit and then some 19 months before consideration was completed and the Entry Permit granted. There was a further month before Besednik claimed Special Benefit.'

(Reasons, para. 52)

The Tribunal concluded that it was to be expected that an application for a Class 806 permit would take some months to process. But it considered that the additional delay in processing the application was a circumstance out of the ordinary. Neither Besednik nor Gunn caused the delay but it resulted from officers of DIMA being unable to get the further medical evidence they required. Additionally, the Tribunal was satisfied that Gorupic would have continued to support Besednik on his single pension had it not been for a deterioration in her health.

'Given the scheme of the legislation and the policy behind an assurance of support, it is unreasonable to expect that Mrs Gunn should bear responsibility under the assurance of support for amounts of special benefit paid during a period of time equivalent to the time during which the granting of the Entry Permit was delayed by circumstances outside her control or that of Mr Gorupic, Mrs Besednik or even that of the officers of DIMA. The particular delay in this case, takes it outside the ordinary range of circumstances applying in cases concerning debts arising under assurances of support and into those, which may be described as special.'

(Reasons, para. 56)

The Tribunal noted that the special circumstances referred to in s.1237AAD need not refer specifically to the circumstances of the debtor who in this case was Gunn.

The Tribunal considered whether the debt should be waived or written off. It decided that in the circumstances it was appropriate that the debt should be waived. The 6-month period to be waived was for the last 6 months of Besednik's payments. This was on the basis that had the delay not occurred, the assurance of support would have come into effect 6 months earlier and would have not related to that last 6 months.

Formal decision

The Tribunal set aside the decision of the SSAT dated 8 December 1997 and substituted a decision that:

- the decision of the delegate of the respondent dated 3 July 1996 to raise and recover an assurance of debt of \$15,952.00 as affirmed by an authorised review officer on 13 May 1997 was varied by waiving that part of the debt that related to the amounts of special benefit paid to Mrs Besednik during the period 9 May 1995 to 9 November 1995; and
- the decision was otherwise affirmed.

[M.A.N.]

Assurance of support: waiver and special circumstances

NEHMA and SECRETARY TO THE DFaCS
(No. 19990219)

Decided: 9 April 1999 by S.M. Bullock.

A delegate of the Secretary to the Department of Social Security decided to raise and recover an assurance of support debt of \$8147.20 from Nehma. This decision was affirmed by the authorised review officer and the SSAT. Nehma appealed to the AAT.

The issue

There was no dispute that a debt of \$8147.20 was owed to the Commonwealth by Nehma. The issue was whether or not that debt should be recovered.

The law

The *Social Security Act 1991* defines 'assurance of support debt' at s.23 by reference to the Migration Regulations; and, relevantly, in respect of payments to another person of job search allowance.

Section 517A of the Act provides that:

'A person is not qualified for job search allowance in respect of a period if the Secretary is satisfied that throughout the period:

- (a) an assurance of support was in force in respect of the person (in the section called the assuree); and
- (b) the person who gave the assurance of support was willing and able to provide an adequate level of support to the assuree; and
- (c) it was reasonable for the assuree to accept that support.'

Section 1227 of the Act states that if a person is liable to pay an assurance of support debt, this is a debt due to the

Commonwealth. Section 1236 deals with write-off.

Section 1237A(1) states:

'Subject to subsection (1A) the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.'

Section 1237AAD states:

'The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or false representation; or
 - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.'

Background

Nehma migrated to Australia from Bulgaria in 1991. On 5 September 1994 she signed an assurance of support in relation to her mother, Andreeva. Nehma lodged a bond of \$3500 in relation to the assurance of support. Andreeva first arrived in Australia on 22 February 1995, and lived with Nehma and Nehma's husband for some months. On 29 March 1996 Andreeva lodged a claim for job search allowance.

Nehma stated that she was aware when she signed the assurance of support that if her mother received benefits from the Department there was a possibility that she (Nehma) would incur a debt. After Andreeva had lived with the family for some months family relationships became strained. Nehma's husband was unemployed and Nehma herself was on maternity leave.

Nehma and Andreeva approached the Department to obtain advice about the possibility of social security benefits for Andreeva. Nehma stated, and the AAT accepted her evidence, that she had asked a departmental officer if there would be any difficulties for her should her mother receive benefits. She was told there would be no problems, because the assurance of support had been in existence for a year. Andreeva also asked about possible difficulties, and was also assured there would be no problems arising from the existence of the assurance of support. These questions were asked at two separate visits to the Department. The existence of the assurance of support was clearly stated on Andreeva's application for job search allowance. Nehma stated, and this was accepted by the AAT, that had she been made aware that a debt