s.52A(1) of the *Farm Household Support Act 1992*.

[M.C.]

Compensation: lump sum preclusion period and special circumstances

QX99C and SECRETARY TO THE DFaCS (No. 19990310)

Decided: 12 May 1999 by E.K. Christie.

Background

The applicant was injured in an accident on 19 June 1991 and on 11 June 1998 received a lump sum settlement of $100,000 for damages and $35,000 for costs.

A preclusion period of 121 weeks was imposed, that is from 19 June 1991 to 12 October 1993 and an overpayment for an amount of $15,554 was raised. This was affirmed by the SSAT.

The applicant argued that the preclusion period did not apply to him as there had been no loss of income — he had been receiving unemployment benefits both before and after the accident. This was not addressed by the AAT.

The applicant also argued that there were special circumstances in his case due to:

- legal and financial reasons.
- medical reasons.
- geographical reasons.

Legal costs

The applicant stated that his costs were $70,200 — more than twice that allocated in the order and over half of the entire payment. The applicant said that although there may have been overcharging, it was unlikely that a successful claim could be made against the lawyer to reduce these costs.

Financial reasons

The applicant had $8000 left and this had been set aside for emergencies. The remainder of the money had been spent on necessities and was not spent frivolously.

Medical reasons

The applicant's condition was deteriorating. Constant medication was required and special costs, such as for a wheelchair and special bed would also be necessary.

Geographical reasons

The applicant lived on an island off the Queensland coast. Property values had dropped significantly. Attempts to sell had been unsuccessful and he would not be in a position to relocate on the mainland from the proceeds.

The issues

Was this a situation that justified the application of s.1184? If so why?

Another issue raised was in relation to disclosure of information before the Tribunal. This was not an issue discussed in the decision.

The law

Section 1184 allows the length of a preclusion period to be decreased in cases of special circumstances.

The AAT referred to *Reuben and Secretary, Department of Social Security* (AAT Decision 11879, 20 May 1997) and stated that it would 'consider the applicant's circumstances as a whole, i.e. by considering not only his financial situation, but also his health care needs and social conditions': Reasons, para. 30.

Legal costs

The AAT found that legal costs totalled $70,200 — twice the costs allocated and 52% of the lump sum.

The AAT relied on the case of *Secretary, Department of Social Security and Hulls* (1990) 57 *SSR* 766 quoting:

> 'That is not to say that s.156 ... will never be available for legal costs. The particular facts of the case might make them — the amount of them — a special circumstance.'

(Reasons, para. 30)

Also considered was the case of *Secretary, Department of Social Security and Haining* (1992) 62 *SSR* 960 where it was found that if legal costs are 'a very large portion' of the lump sum, then the 50% rule may not be appropriate: Reasons, para. 30.

Financial reasons

The AAT concluded that it was reasonable to keep the $8000 for emergencies, especially given the applicant's age and medical condition. Also a Statement of Financial Circumstances showed that weekly expenditure was 40% greater than income.

Ongoing costs for medical care were acknowledged together with a finding that the portion of the lump sum that had been spent was spent on necessities and not spent frivolously.

Conclusion

The AAT concluded that the additional legal costs of $35,200 were a special circumstance when considered in proportion to the lump sum received and in the context of the applicant's heath needs, his financial circumstances, his social condition and the likelihood that the additional legal costs would not be recovered by the applicant.

The AAT stated:

> 'The Tribunal concludes that the set of circumstances, outlined above, would lead to an unintended and unfair result if the compensation preclusion period, as determined, were to be imposed. As the Tribunal pointed out in *Ivovic and Director-General of Social Services* (1981) 3 ALN N95, Section 1184 of the Act was specifically designed *"... to allow the decision-maker the fullest opportunity to consider the particular circumstances of each case".*'

(Reasons, para. 31)

It was ordered that the preclusion period be shortened with respect to the amount of the additional legal costs incurred, i.e. $35,200.

It was further ordered that disclosure of information before the Tribunal be prohibited except to named persons and that the applicant be known as QX99C for the purposes of the review.

Formal decision

The AAT varied the decisions by deciding that part of the $100,000 settlement should be treated as having been not made because of special circumstances.

[R.P.]

Assurance of support debt; special benefit discretion; waiver of debt

STOJANOVIC and SECRETARY TO THE DFaCS (first respondent) and PASAGIC (second respondent) (No. 19990304)

Decided: 24 February 1999 by S.A. Forgie, A.M. Brennan, I.R. Way.

The case involved an assurance of support debt. The AAT in exercising the discretion under s.739A(7) of the *Social Security Act 1991* (the Act) considered the Minister's Guidelines issued under s.739C of the Act. The AAT applied the

decision of the Federal Court *Riddel v Secretary DSS* 114 ALR 340 to the effect that the Guidelines were not an exhaustive statement of all situations. The AAT found that special benefit was payable and that there was an assurance of support debt but that part of the debt should be waived for special circumstances.

The facts

The assurer, Stojanovic, was a member of the Australian Red Cross who had provided an assurance of support for a Bosnian refugee, Pasagic, who entered Australia on a permanent visa as the spouse of her sponsor, Mr Sirucic. Pasagic was subject to a newly arrived residents waiting period and applied for and was granted special benefit during the waiting period. Before signing the assurance Stojanovic had received advice from Centrelink that it would be difficult for Pasagic to obtain any Centrelink payment without Stojanovic's knowledge and/or agreement.

A few days after arrival in Australia Pasagic found her husband, Mr Sirucic, to be abusive. He had not treated her this way in Bosnia. She became frightened of him and left him to reside elsewhere. She believed that Stojanovic was a supporter of Sirucic and that she would not be safe residing with Stojanovic. Stojanovic told Centrelink that she would provide support (food, accommodation etc.) to Pasagic within her own home but would not provide an income to Pasagic. Pasagic was frightened of living with Stojanovic. Centrelink attempted to arrange a meeting between the two women, but Pasagic would not attend due to fear. Centrelink commenced paying special benefit to Pasagic.

The AAT found that there was no evidence of any objective basis to Pasagic's fear of either Stojanovic or Sirucic but that her fears were genuinely held. Pasagic did not fear her husband at the time of migrating to Australia, nor did she know that Stojanovic had provided an assurance of support — subsequent knowledge of this, and her fear of her husband, were a substantial change in circumstances. Further, her fear meant that she could not reside in Stojanovic's home and this was a substantial change of circumstances within the meaning of s.739A. As such special benefit was properly payable to Pasagic.

The AAT found that Stojanovic owed the assurance of support debt but that the circumstances were so unusual that part of the debt should be waived due to special circumstances (s.1237AAD). The whole of the debt should not be waived as Stojanovic was at all times willing to provide support to Pasagic in her own home — the fact that such support could not be provided was due to circumstances beyond the control of both Stojanovic and Pasagic. Stojanovic was at all times prepared to meet her obligations under the assurance of support and should continue to be permitted to do so. Accordingly the AAT estimated the cost to Stojanovic of providing support to Pasagic in her own home and found this to be $60 a week.

Formal decision

- The decision that special benefit was payable to the second respondent from 13 May 1997 was affirmed.
- The decision on the assurance of support debt was set aside and the AAT substituted a decision that the amount of the assurance of support debt to be raised and recovered from the applicant for the period 13 May 1997 to 11 August 1997 was to be calculated at the rate of $60 a week.

[Ca.H.]

Assurance of support debt and garnishee

DE ALWIS AND SECRETARY to THE DFaCS (No. 19990361)

Decided: 27 May 1999 by J. Dwyer.

Background

On 2 December 1982 De Alwis had signed an assurance of support for his mother-in-law, Mrs Silva, who later lodged a claim for special benefit in May 1984. At that time De Alwis signed a statement acknowledging that special benefits payable to his mother-in-law 'would be a debt repayable' should his financial circumstances improve.

De Alwis was advised that Mrs Silva would be paid special benefits commencing 31 May 1984. De Alwis was reminded that the special benefits paid to Mrs Silva would become a debt.

Mrs Silva became an Australian citizen on 23 July 1987 and in September 1987 a debt of $13,721 was raised. In June 98, a garnishee notice was served on De Alwis' employer, requiring deductions of $50 a week.

The SSAT decided that there was no assurance of support debt since s.1227 of the *Social Security Act 1991* (the Act) did not apply to assurances of support signed before the Migration (1989) Regulations.

De Alwis raised 3 points:

- that he was misled by Department officers, who had indicated that any special benefit paid to his mother-in-law would not be recoverable from him, unless he acquired property or assets;
- that he had paid taxes, helped the Australian community, particularly by his work for his church, and that the government should not 'hound' him;
- his financial circumstances — he had remarried and contributed to the support of his wife's two daughters by an earlier marriage.

The issues

The Tribunal considered the following issues:

- whether there was a debt under s.1227;
- whether the Department could give the garnishee notice. A garnishee notice under s.1233(1) of the Act can only be given in limited circumstances, including where a debt is recoverable under s.1227A or s.1230C of the Act, or under the *Social Security Act 1947*. Section 1230C of the Act specifically provides that a debt recoverable by garnishee notice includes a debt due to the Commonwealth under s.1227 of the Act.

The law

Section 23 of the Act defines an assurance of support debt as:

> '... a debt due and payable by a person to the Commonwealth, or a liability of a person to the Commonwealth, because of the operation of:
>
> (a) subregulation 165(1) of the Migration (1989) Regulations as in force on or before 19 December 1991; or
>
> (b) regulation 164C of the Migration (1989) Regulations as in force after 19 December 1991 and before 1 February 1993; or
>
> ...
>
> in respect of the payment to another person of:
>
> ... .
>
> (i) special benefit under section 129 of the 1947 Act;'

The Tribunal considered whether a debt arose 'because of the operation of subregulation 165(1) of the *Migration (1989) Regulations* as in force on or before 19 December 1991': Reasons, para. 18.

When De Alwis signed the assurance of support in 1982, the Migration Regulations that were in force were the Migration (1959) Regulations. However,