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,

regulation 166 of Migration (1989) Regulations contained a transitional provision which had the effect of applying regulation 165 to 'maintenance guarantees' given before 1989 'in accordance with regulations that were in force', as if those maintenance guarantees were 'assurances of support'.

Was De Alwis' assurance of support a 'maintenance guarantee' ... 'given in accordance with regulations that were in force' when it was signed?

The document was headed 'Assurance of Support', although the Migration (1959) Regulations made no reference to this term which was not introduced until 1987.

The Department referred to the case of *Secretary to the Department of Social Security and Kratochvil* (1994) 82 *SSR* 1146:

> 'By virtue of sub-section 166(1) of those Regulations [the Migration 1989 Regulations] the provisions of Regulation 165 apply in relation to maintenance guarantees given before the commencement of the Regulations in accordance with regulations that were in force under any of the Acts repealed by the Act as if those maintenance guarantees were Assurances of Support. There are two problems with this section. Clearly the intention is that Regulation 165 is to have the effect of incorporating a previous maintenance guarantee, as they were called, but it says nothing about previous assurances of support. As already noted, in this case the Assurance of Support was given under the previous Regulation 22 of the Migration Regulations.
>
> We are satisfied, however, that because of the operation of the Migration Regulations there was in fact a debt due to the Commonwealth because of the payments made to the respondent's mother under the *Social Security Act 1947*. We think the intention of the Migration Regulations is clear and that there was no intention that an Assurance of Support given under Regulation 22 was somehow to be different to a maintenance guarantee as referred to in Regulation 166 of the Migration Regulations as they applied on or before 19 December 1991.'

The AAT considered this case but decided that:

> 'the precise definition in the Act and the precise terminology of the Regulations cannot simply be ignored. Regulation 166 of the Migration (1989) Regulations is quite specific in describing the maintenance guarantees to which reg 165 is to apply "as if those maintenance guarantees were assurances of support". The maintenance guarantees are those given "in accordance with regulations that were in force under any of the Acts repealed by" the Migration Act 1958. So far as the evidence before me establishes, the document signed by Mr De Alwis does not meet the description in reg 166. Neither does any debt which may arise under the document meet any of the descriptions in the definition of assurance of support debt in s.23 of the Act.'

(Reasons, para. 29)

Conclusion

The Tribunal concluded that as there was no evidence that the assurance of support signed by De Alwis was a maintenance guarantee in the form approved by the Minister under the Migration (1959) Regulations. Therefore regulation 166 did not apply and consequently neither did regulation 165.

The debt was not an assurance of support debt as defined in s.23, and not a debt under s.1227. Consequently, there was no debt that could be recovered by a garnishee notice under s.1230C.

Formal decision

The AAT varied the decision of the SSAT and substituted a new decision that there was no assurance of support debt under s.23 of the *Social Security Act 1991* and thus no debt due to the Commonwealth under s.1227.

Accordingly there was no debt which may be recovered by garnishee notice under s.1230C and s.1233 of the Act.

[R.P.]

Federal Court decisions

Age pension: disposal of asset; constructive trust

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

Decided: 23 June 1999 by O'Loughlin J.

The Agnews appealed to the Federal Court against the decision of the AAT that their assets exceeded the asset test limit for the payment of age pension.

The facts

Mr and Mrs Agnew lodged claims for age pension in May 1996, both of which were rejected. Prior to September 1995 Mr Agnew was the registered proprietor of a farm, Rosedene. Since the late 1970s the Agnews and their 3 sons had carried on the business of farming on Rosedene in partnership. By June 1995 the partnership owed a debt of $371,105. This debt was secured by registered mortgage over Rosedene and, in part, by personal guarantees of the Agnews.

The partnership was dissolved on 1 July 1995 on terms that allowed the Agnews to retire while the 3 sons continued to operate the farming business. The continuing partners assumed liability for all debts of the partnership and indemnified the Agnews in respect of those debts. In return, the Agnews' share of the partnership vested in the 3 sons. There would also be no adjustment to the partners' capital accounts. In June 1995 Mr Agnew's capital account was in debit for $51,768 and Mrs Agnew's in credit for $8314.

On 19 September 1995 the Agnews agreed to sell Rosedene to Rosedene Nominees Pty Ltd, a trustee company of the Rosedene Family Trust for $450,000. This was agreed by all to be a fair market value. The trust was created on the same date for the benefit of the 3 sons and their families. The trust company took over liability for the existing mortgage.

In evidence to the AAT Agnew stated he had intended giving Rosedene to his sons in 1980 but the cost of stamp duty had prevented this. In 1980 Agnew had given up farming and moved to the city. His sons had continued working on the farm. In the following years they expanded the farm and upgraded it. Agnew and his wife had not drawn any profit from the farm since they left in 1980, but according to the AAT they had derived some tax benefit. The expansion of the farm by the sons had been funded by the debt of $371,105. When the Agnews had left in 1980, the partnership had an overdraft of $6500. The mortgage had been entered into after the Agnews left the farm, and they had simply signed the papers. The farm had more than doubled in size under the management of the sons.