officer at the counter and handed in her fortnightly NA claim form. SRQQ told the Tribunal that she spoke to the officer very briefly and told her that she may go overseas. SRQQ was informed by the person that there would be no difficulties with her travelling overseas and that she was a 'special case'. SRQQ told the Tribunal that the officer told her that she 'did not have to worry about anything'.

SRQQ submitted that, on the basis of this advice, she thought that question in relation to overseas travel on the NA application form for the period 20 June 1998 to 3 July 1998 did not apply to her. She understood she could travel overseas without impacting adversely on her NA.

SRQQ submitted that she is an honest person and had acted in good faith, acting on the advice provided to her by a departmental officer. SRQQ submitted that she was entitled to rely on the advice of this officer as that person had knowledge of the operation of social security law and policies.

The Department submitted that even if SRQQ had been given incorrect advice by the Department, this did not allow SRQQ to disregard her notification requirements under the Act or to falsely state that she had not travelled overseas when in fact she had. Additionally, the Department submitted that even if incorrect advice was given, this did not cause the debt. Rather it was SRQQ's failures and omissions under the Act to inform the Department of her overseas travel that caused the debt. The Department argued there was nothing in the advice (if it had been given) which would have caused SRQQ to disregard her obligations to inform the Department of various circumstances in various letters to her.

Was advice given?

The Tribunal found it could not prove or disprove that advice was given to SRQQ that there was no impediment to her undertaking such travel. The Tribunal accepted that SRQQ attended a Centrelink office but the Tribunal:

> had no way of knowing what the advice was, on what basis it was given and further what SRQQ's interpretation of it might have been in respect of the advice itself. What is clear to the Tribunal is that SRQQ genuinely believes that the advice she was given indicated that she would be able to travel overseas without any impediment to her Newstart Allowance. The Tribunal accepts SRQQ's belief that she was advised that she could travel overseas, while noting that this does not necessarily mean that such advice was given.

(Reasons, para. 60)

An overpayment

The Tribunal found that SRQQ did not comply with the requirement that she must tell the Department if she was going to travel overseas. Further, it found that she answered a question incorrectly when she indicated that she had not travelled overseas, when in fact not two days earlier she had returned from an overseas trip.

The Tribunal found that, despite any advice provided to her, SRQQ was clearly obliged as a social security recipient to inform the Department of certain things. SRQQ did not do this. In so finding, the Tribunal did not in any way consider that SRQQ deliberately failed to comply with her obligations under the Act.

> SRQQ did not inform of her possible overseas travel or later of her actual travel, not because she was trying to gain benefit for herself but because she genuinely believed that she did not have to inform the Department. This belief was, unfortunately for SRQQ, misconceived. As SRQQ told the Tribunal, nothing in the advice provided to her by the Departmental officer suggested that she should break the law. Accordingly, the Tribunal finds that SRQQ received Newstart Allowance for the period 27 June 1998 to 3 July 1998 when she was not entitled to do so. This overpayment in the amount of $166.15 is a debt due to the Commonwealth pursuant to section 1223 of the Act. Further, the Tribunal finds that because SRQQ omitted to comply with her requirements under the Act to notify of her intending travel and indeed made a false statement that she had not travelled when in fact she had, then a debt of $166.15 can also be raised under section 1224 of the Act.

(Reasons, para. 61)

Recovery of debt

The Tribunal next considered whether the debt should be recovered. The Tribunal considered there was no possibility that the debt could be written off as SRQQ has a capacity to repay the debt, her whereabouts were known and there would be nothing gained in postponing the debt.

In relation to waiver, the Tribunal concluded there was no sole administrative error as SRQQ has omitted to comply with the requirements of the Act and also inadvertently made a false statement. Pursuant to s.1237AAD the Tribunal found that SRQQ did not knowingly fail to comply or make a false statement. In considering whether there were special circumstances, the Tribunal recognised SRQQ's multiple health problems but noted she was able to work and conduct her life. The Tribunal did not consider that SRQQ's financial situation was unusual.

The Tribunal considered SRQQ's submission that incorrect advice was a special circumstance and rejected this. Finally the Tribunal commented.

> The Tribunal regrets SRQQ's concerns about the Department and others involved in the review process. These circumstances are however not able to be considered by the Tribunal in relation to the manner in which the debt was caused or as a special circumstance.

(Reasons, para. 68)

Formal decision

The decision under review was affirmed.

[M.A.N.]

AUSTUDY: income

THOMPSON and SECRETARY TO THE DFaCS (No. 2001/0088)

Decided: 30 January 2001 by R.D. Fayle.

Background

The Social Security Appeals Tribunal affirmed a decision of the Secretary, DFaCS to reduce the amount paid to Thompson in disability support pension (DSP) due to receipt of income from a university scholarship.

In January 2000 Thompson applied for and was granted a university scholarship to complete her honours degree. The scholarship was paid into Thompson's bank account by two payments of $3000 each. Thompson advised Centrelink of the scholarship, and there was some discussion as to how the money should be treated. On 1 May 2000 a Centrelink officer decided to treat the scholarship money as income which then gave an annual income of $9630 including a lump sum of $6000. On 5 May 2000 the applicant received an advice that based on the new annual income, her DSP had been reduced to $237.81.

Thompson argued that the money should not be included as income for the purposes of DSP.

The Tribunal addressed in some depth the question of 'income' and the scholarship being awarded 'for educational purposes only'.

There is no mention specifically of 'scholarship' in the Act, but s.8(8) states:

> The following amounts are not income for the purposes of this Act:
>
> ...

(zj) a payment of an approved scholarship awarded on or after 1 September 1990;

Section 8(1) of the Act states:

In this Act, unless the contrary intention appears:

approved scholarship' means a scholarship in relation to which a determination under section 24A is in force;

Section 24A(1) of the Act states:

The Minister may determine in writing that a scholarship, or a class of scholarships:

(a) awarded outside Australia; and

(b) not intended to be used wholly or partly to assist recipients to meet living expenses;

is an approved scholarship, or a class of approved scholarships, as the case may be, for the purposes of this Act.

As the scholarship was not awarded outside Australia it could not be an approved scholarship for the purposes of the Act.

Under s.8(1) of the Act:

'earned, derived or received' has the meaning given by subsection (2);

'income', in relation to a person, means:

(a) an income amount earned, derived or received by the person for the person's own use or benefit; or

(b) a periodical payment by way of gift or allowance; or

(c) a periodical benefit by way of gift or allowance;

but does not include an amount that is excluded under subsection (4), (5), (7A) or (8).

'income amount' means:

(a) valuable consideration; or

(b) personal earnings; or

(c) moneys; or

(d) profits;

(whether of a capital nature or not);

Section 8(2) of the Act defines 'income' as:

(a) an income amount earned, derived or received by any means; and

(b) an income amount earned, derived or received from any source (whether within or outside Australia).

The scholarship was for $6000 payable in two equal installments and as such it was paid periodically. The scholarship therefore, in the opinion of the Tribunal, falls within the genre of 'a periodical payment by way of gift or allowance' (Reasons, para. 24). The Tribunal further found that there were no regulations abut the use of the money for educational purposes in the granting of the scholarship, whatever might be the expectation of both the university and Thompson. Therefore it is not exempt from being considered as income for the purposes of the Act.

Thompson further argued that the original decision maker appeared to have relied on s.1073 of the Act, which is not relevant to DSP. The Tribunal stated that as this section was not referred to in the decision letter of the authorised review officer, it was not necessary to consider this.

Formal decision

The Tribunal set aside the decision under review and substituted therefore:

- that the applicant derived $3000 income from the said scholarship on 2 March 2000; and
- that the applicant derived a further $3000 income from the said scholarship on 17 July 2000; and
- the matter be remitted to the respondent to recalculate the applicant's entitlement to DSP for the period under review accordingly.

[A.B.]

[Editors note: It is not clear what the financial consequences to Thompson are of this substituted decision].

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To which the prosecutor responded:

'I think it is that missed that there are plenty of information to take place but I'm afraid I don't know which one it is necessary I'd say, that's why I'm asking if there is any question you have, you can ask me I would like to answer anxiously.'

The Tribunal then said:

'Well, I think I've asked you everything that I need to know.'

The second Tribunal also rejected Aala's application, and in doing so made findings adverse to his credibility, specifically that certain claims had never been raised prior to the second Tribunal hearing. The claims had in fact been raised in the documents given to the Federal Court, which the second Member stated she had read. It was accepted that this was an honest mistake by the Tribunal Member, who thought she had been given all the documents lodged with the Federal Court, although the handwritten documents had not been provided to her.

Aala again lodged an application to the Federal Court. The Federal Court rejected the application, and Aala appealed to the Full Federal Court. The Full Federal Court in accordance with the decision in *Eshetu* accepted that the Federal Court had no jurisdiction "to set aside the decision of the Tribunal on the ground that it denied to the Appellant natural justice" noting that the submission was not without some substance'.

Aala then sought relief in the High Court by way of prerogative writ. By a majority, the High Court granted a writ of prohibition prohibiting the Department from acting on the decision of the Refugee Review Tribunal.

In the past 20 years great steps forward have been made in administrative review to relieve applicants from the difficulties of seeking to remedy defects in administrative action by way of prerogative writs. Now the High Court has had to return to their use as a way of granting some applicants natural justice. While the use of privative clauses as a means of ousting the jurisdiction of the Federal Court has only been particularly apparent in the area of migration applications, it may be one more indication of the movement away from allowing and encouraging review of government decision making.

As Mr Justice Michael Kirby said:

This is another case in which, in the absence of effective access to the Federal Court of Australia [134], an application has been made in the original jurisdiction of this Court for relief. In substance, the application seeks the remedies provided by the Constitution ...

I cannot forbear to mention that the debate reflected in the different opinions in this Court on this question illustrates once again the great inconvenience occasioned by the exclusion from the jurisdiction of the Federal Court of consideration of the legal requirements of natural justice [155]. In this matter, this Court has been involved, not in the elucidation of some important question of constitutional, statutory or other legal significance. The applicable principles are clear. This Court has been engaged in nothing more than the elucidation of the facts and the application to them of settled rules of law. In the event that the Parliament was of the opinion that consideration of arguments of procedural fairness (and administrative unreasonableness) was consuming too much time and cost in migration matters, both in the Tribunal and before the Federal Court, there must surely have been a better way of reducing those burdens than by heaping them upon this Court.

[A.B.]