garding acceptance of overseas qualifications and of employment generally in Australia, and that they would be unable to receive social security benefits for two years after their arrival. A condition of their approval was that they arrive in Australia by March 1999, which they did. When the family arrived in Australia they had approximately US$4000. They initially stayed with friends, but after about a week moved to rented accommodation, incurring furniture and other expenses in so doing.

In Bangladesh, Mr Sarkar held post-graduate qualifications in agriculture, and was the Director-General of the Rice Research Institute until his emigration to Australia. Prior to emigration, Mr Sarkar used collegial acquaintances to make contact with staff at the University of Sydney, as a result of which from April 1999 he obtained casual work at the Plant Breeding Institute at that University. He understood, and the Institute confirmed, that it was anticipated that a research scholarship would be offered to him, which would have allowed his casual employment to be extended and regularised. However, although the preliminary research proposal was accepted, the scholarship application was rejected by the funding sponsor, and his casual employment came to an end. He then applied in July 1999 for special benefit, as subsequently did his wife. Both applications were rejected due to imposition of the newly arrived residents' waiting period.

The law

There was no dispute that the Sarkars satisfied the qualifications for special benefit; the sole issue was whether the newly arrived residents' waiting period (a two-year non-payment period) should be applied to them. The *Social Security Act 1991* (the Act) provided by s.739A that this waiting period not apply 'if the person ... has suffered a substantial change in circumstances beyond the person's control'.

The Tribunal noted the decision in re *Secretary, Department of Social Security and Secara* 3(3) *SSR* 29 that, for this discretion to apply, the person must have suffered a 'change in circumstances' which is 'substantial' and 'beyond the person's control'. The Tribunal concluded that '... a substantial change encompasses a change in circumstances or of expectations which is greater than would normally be the case, a large or identifiably significant change to either a person's circumstances or their expectations' and that 'beyond a person's control "encompassed" ... situations where an event or expectation is changed because of something external to the person, an influence or event or illness which is unexpected and not within the person's ability to foreshadow or prevent ...' (Reasons, para.58).

In this situation, although Mr and Mrs Sarkar effectively had to apply three times to migrate, and finally had only a short time to make their final decision, the Tribunal did not accept that these disappointments and other event prior to their arrival in Australia constituted a substantial change in their circumstances, as they had every opportunity not to migrate had they so chosen.

However, Mr Sarkar had made a careful and reasoned decision to emigrate, and had realistic and high expectations that he would continue to be employed at the University of Sydney. The Tribunal held that a substantial change of circumstances had occurred when the approving authority rejected his scholarship application, an event which was unexpected and could not have been foreseen.

The decision

The Tribunal determined that Mr and Mrs Sarkar satisfied s.739A(7) of the Act and that therefore the newly arrived residents' waiting period should not apply to them.

[P.A.S.]

Compensation payment: lump sum; special circumstances

HARMAT and SECRETARY TO THE DFaCS (No. 2000/661)

Decided: 4 August 2000 by R. Handley.

The issue

The issue in this matter was whether special circumstances existed sufficient to justify the exercise of the statutory discretion to disregard part of a lump sum compensation payment made to Harmat. If so, this would have the consequential effect of reducing the payment preclusion period.

Background

Harmat was injured in a motor vehicle accident in March 1995, and in August 1998 settled her compensation claim in respect of the accident for $107,500 including $15,000 which was stated to be in respect of past and future economic loss. Centrelink treated 50% of the settlement amount as being 'the compensation part of the lump sum' and used this figure to calculate a preclusion period from March 1995 to August 1997. In turn, Centrelink sought to recover the benefits paid to Harmat during the preclusion period, which totalled $20,637.

The applicant had left school at the end of year 7, was now separated from her husband, and had never worked in either full or part-time employment. As a result of the accident, she suffered a neck injury leading to a cervical fusion, had trouble sleeping and was unable to drive. She had various non-accident-related health problems, including Ménière's disease. She had effectively expended all of the net proceeds of her settlement amount ($62,075) in repaying various loans and debts.

Harmat did not dispute the usual application of the 50% rule, but contended here that the settlement terms clearly identified that the economic loss component ($15,000) was less than half of the total settlement figure, and that this lesser amount should be used to calculate any preclusion period. She also contended that her health problems, inability to earn and expenditure of the settlement moneys in repaying debts, should be considered to be special circumstances.

The law

The issue for consideration here was whether any or all of the compensation payment paid to Harmat should be disregarded, in which case the corresponding preclusion period may be reduced. The relevant legislation is contained in s.1184(1) of the *Social Security Act 1991* (the Act) which provides that some or all of a compensation payment (and, so, a preclusion period) may be disregarded if considered appropriate to do so '... in the special circumstances of the case'. The Tribunal noted that the Federal Court in *Beadle v Director General of Social Security (1985)* 60 ALR 225 determined that the term 'special circumstances' should mean circumstances that are unusual, uncommon or exceptional, and ' ... must have a particular quality of unusualness that permits them to be described as special.' The Tribunal also noted the comment in the decision of *Groth* v *Department of Social Security* (1995) 40 ALD 541 that 'special circumstances' required something to take the case out of the ordinary, and that '... [if] something unfair, unintended or unjust had

occurred ... [then] there must be some feature out of the ordinary' (at 545).

The Tribunal considered the line of cases which deal with application of the 50% rule to compensation amounts, including *Secretary, Department of Social Security v Banks* (1990) 23 FCR 41 and *Secretary, Department of Social Security v Smith* (1991) 30 FCR 56, concluding that s.1184(1) can be used to address an injustice arising from the application of the usual 50% rule. Although dissection of the lump sum amount into components should not be encouraged (*re Fowles and Secretary, Department of Social Security* (1995) 38 ALD 152), such dissection was possible where a clear designation of an amount within the total settlement moneys as compensation for economic loss, had been made (*Secretary, Department of Social Security and Beel* (1995) 38 ALD 736.

The decision

In this matter the Tribunal concluded that the operation of the 50% formula gives rise to such an 'unreasonable and unjust result' — when considered in the light of the applicant's medical and financial situation — that the discretion contained in s.1184(1) should be exercised.

Formal decision

The Tribunal set aside the decision and substituted a decision that the portion of the lump sum settlement be treated as not having been made such that the compensation part of the lump sum is $15,000.

[P.A.S.]

Overpayment: policy puidelines and special circumstances

SORIANO AND SECRETARY TO THE DFaCS
(No. 2000/842)

Decided: 20 September by E.K. Christie.

Background

Soriano decided to bring his parents to Australia. He and his wife signed an assurance of support agreement. Twelve months after his parents arrived they moved out of Soriano's house without advising him. His parents were subsequently granted special benefit. Soriano was not told about this as was required by departmental policy.

An assurance of support debt of $18,213.47 was raised. This decision was affirmed by an authorised review officer and in turn by the SSAT.

The issue

The issues in this appeal were:

- whether there was a debt to the Commonwealth;
- whether the debt should be waived under the 'special circumstances' provisions of the Social Security Act.

The evidence

Soriano's evidence was that shortly after his parents arrived there were disagreements over small domestic issues. Ultimately his parents moved out although he did not know where they had moved until approximately four to six months later. He had no contact with his parents, nor did he know what they were doing. He also had no contact with Centrelink until he was asked whether his $5000 bond could be used. He agreed to this but was still not told where his parents lived.

Soriano conceded he knew that if his parents were paid special benefits that he may have to pay the money back. However, he thought that the $5000 bond would cover the debt. Soriano said that if he had been told that the debt was accruing then he would have taken action for dealing with this, for example, seeking assistance for his parents for alternative accommodation through friends.

The submissions

The first submission put on behalf of Soriano was that he was not liable for the debts as special benefits were not payable to his parents. It was submitted that there had not been 'a substantial change in circumstances beyond the assured's control' as referred to in the department policy guidelines.

It was also submitted that if a debt exists, then it should be waived on the grounds of special circumstances. It was submitted that policy guidelines specified the need for both parties to understand their potential obligations and that there was no attempt to ensure that Soriano understood his obligations and the possibility of an overpayment. It was submitted that if the guidelines had been complied with then Soriano may have continued to provide support, counselling or mediation may have been used to prevent a breakdown and special benefits would not have been necessary. It was also submitted that there was no change in Soriano's parent's circumstances that warranted payment of special benefits and any change that occurred was beyond Soriano's control.

On behalf of the Department it was argued that there was a very clear case of family breakdown and a sound basis to pay special benefits. It was argued that when Soriano signed the assurance of support that he gave a declaration to repay any special benefits paid to his parents during the relevant period. A failure to comply with policy guidelines did not relieve Soriano of his legal obligations. It was also submitted that Soriano had a capacity to repay the debt and that financial hardship, alone, did not make it desirable to waive the debt.

Should special benefits have been paid? The Tribunal concluded that there was a significant change in circumstances and that this warranted payment of special benefits to Soriano's parents.

Waiver

The Tribunal referred to the failure to comply with departmental policy guidelines, specifically:

- a failure to interview Soriano at the time that his parents claimed special benefits;
- a failure to refer Soriano and his parents to social work staff in order to resolve family conflict; and
- an omission to provide three-monthly reviews of the assurance of support and notify Soriano of the outstanding debt.

The Tribunal also noted that if the policy had been complied with Soriano would have had an opportunity to resolve family conflict through counselling or mediation. This opportunity was denied and was exacerbated by the Department's failure to advise him of his parent's location.

The Tribunal also concluded that Soriano may not have understood the implications of the overpayment.

The Tribunal found that there were special circumstances which were uncommon or unusual. The Tribunal therefore waived the amount of the debt.

Formal decision

The AAT set aside the decision under review, and substituted a decision that the whole of the debt accrued between 1 May 1998 and 30 May 1999 be waived under the special circumstances provision of the Act.

[R.P.]