Special benefit: illegal migrant

TUNCER and SECRETARY TO DSS
(No. A87/811)
Decided: 6 May 1988 by R.K. Todd, J.O. Ballard and N.J. Attwood

Ahmet Tuncer entered Australia illegally in April 1985. In June 1985, he applied to the Department of Immigration and Ethnic Affairs for refugee status. He was told that he would be permitted to remain in Australia pending a decision as to his position. The Department later decided to grant Tuncer permanent resident status under the *Migration Act* 1958 from 30 October 1986.

On 26 September 1986, Tuncer applied to the DSS for a special benefit. The DSS rejected his application on legal advice - because any right to benefit which Tuncer might have would be the result of his illegal act. However, the DSS later decided that Tuncer could be paid special benefit from 30 October, 1986, the date of his acquiring permanent resident status.

Tuncer asked the AAT to review the DSS decision to refuse him special benefit for the earlier period.

The legislation

Section 129 of the *Social Security Act* [formerly s.124] gives the Secretary a discretion to grant a special benefit to a person where the Secretary is satisfied that the person is 'unable to earn a sufficient livelihood'.

In 1986, s.131 [formerly s.127] permitted retrospective payment of special benefit. The section now allows payment of special benefit only from the date of the claim for special benefit.

Discretion to grant special benefit

At the hearing of the application for review, the DSS conceded that Tuncer should be granted special benefit from 24 September, 1986; and that retrospective payment of special benefit was possible, as s.127 of the Act stood in 1986. The issue was whether the discretion to grant a special benefit should be exercised in Tuncer's favour for the period between his arrival in Australia in April 1985 and 24 September 1986.

Tuncer told the AAT that, from April 1985 to September 1986, he had lived with friends and relatives. They had given him money during this period - small sums as gifts, larger sums as interest-free loans. As a result, he owed $8,350 to friends and relatives, who were not pressing him for repayment.

The AAT decided that the s.129 discretion should not be exercised in favour of paying Tuncer special benefit for the period prior to 24 September 1986.

The AAT said that, if Tuncer had been improperly refused special benefit during that period and had then borrowed money to support himself, 'elementary justice would appear to demand' a retrospective payment. But in this case Tuncer had been supported by 'advances of money repayment of which was merely hoped for in the event he obtained employment.' Although his position had been uncomfortable during that period and he now felt that he had a moral obligation to repay the people who had helped him financially, he had not been without financial support: Reasons, para.8.

Relevance of illegal entry

However, the AAT said, the illegality of the applicant's entry into Australia was not an important factor in the exercise of the s.129 discretion:

> 'It is common enough to refer to a special benefit as a "safety net", a useful enough phrase. As a civilized community Australia seeks not to countenance anybody within its borders being unable to survive. This is statutorily expressed in s.124/s.129 of the Act as the ability to "earn a sufficient livelihood". While it is undoubted that it is contrary to public policy that a person or his or her estate should benefit from his or her own criminal act (see *Halsbury* 4th Ed. Vol.11 para 572), we are here concerned not with the creation of an entitlement or a right through crime, but with the question of the exercise of a discretion.'

(Reasons, para.9)

In *Kandasamy* (1987) 37 *SSR* 470, the AAT had said the s.124 discretion 'should not be exercised in favour of a prohibited non-citizen without compelling reasons when someone has remained in this country with unlawful intent.' But that case, the AAT said, had involved an applicant convicted of a number of offences because of his status as a prohibited non-citizen. In the present case, Tuncer had been granted permanent resident status after some 2 years of illegal presence in Australia. The exercise of the discretion to grant special benefit would depend, the Tribunal said, 'upon the facts of each particular case'.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Invalid pension: 'permanently blind'

RESETAR and SECRETARY TO DSS
(No. V87/433)
Decided: 28 April 1988 by H.E. Hallowes.

Drago Resetar was granted an invalid pension in 1980 on the ground that he was 'permanently blind'. That decision was based on medical assessments. In May 1987, the DSS cancelled his pension.

After an appeal to a SSAT, Resetar asked the AAT to review the DSS decision.

The legislation

In May 1987, s.24 of the *Social Security Act* [now s.28] provided that a person was qualified for an invalid pension if the person was 'permanently blind'.

At that time, DSS guidelines stated that a person should be taken to be 'permanently blind' if the person's visual acuity on the Snellen scale, after correction by suitable glasses, was less than 6/60 in both eyes, or if there were 'collateral defects in vision'.

From January 1988, new guidelines provided that permanent blindness could be established either by the Snellen test (less than 6/60 in both eyes) or by the person's field of vision (constricted to 10 degrees of arc in the better eye).

The medical evidence

Resetar suffered from retinitis pigmentosa, which reduced his vision in poor light and restricted his field of vision. Two 1979 examinations had recorded Resetar's field of vision at 5 degrees and 2 degrees, and his visual acuity, according to the Snellen scale, at 6/9 and 6/36.

An examination in May 1987 had recorded almost no field of vision in Resetar's right eye, a 2 degree field of vision in the left eye and left visual acuity of less than 6/60. Another examination in May 1987, recorded visual acuity of 1/60 and a field of vision of less than 5 degrees in both eyes. These findings were confirmed in November 1987. However, another examination in April 1987 had recorded Resetar's visual acuity as 6/12 in each eye.

The other evidence

In 1982, Resetar was injured while working on a building site. In 1981, he obtained a licence to drive a motor vehicle; but he had not renewed that licence since 1984, following a motor vehicle accident. In 1985, Resetar was again injured while working as a builder's labourer.