Special benefit: resident of Australia

SECRETARY TO DSS and SAUNDERS
(No. N90/881)

Decided: 3 December 1990 by H.E. Hallowes.

The DSS sought review of a decision of the SSAT to grant Saunders special benefit at the rate of two-thirds of the unemployment benefit that would have been payable to him if he was eligible for that payment.

The facts

Saunders lodged a claim for special benefit on 23 July 1990. He stated that he was born in South Africa in June 1950 and was a South African citizen. He first came to Australia on a visitor's visa in November 1983 and stayed until March 1985.

Saunders returned to South Africa and came again to Australia in June 1990. He entered Australia on a 6-month visa and lodged an application for an extended eligibility temporary entry permit in July 1990. The basis for the application for this permit was that he was a remaining relative. His mother had lived in Australia since 1982 and he was staying with her.

Saunders told the AAT that he had no fixed abode in South Africa and had been living in a boarding house for homeless men prior to coming to Australia. His application for the extended eligibility entry permit was rejected in September 1990.

Saunders' mother was supporting him with assistance from voluntary welfare organisations. He had arrived in Australia with $200 which he had spent shortly after his arrival.

On 4 July 1990, Saunders lodged a claim for sickness benefit. He told the DSS that he had schizophrenia which had been diagnosed in 1983. He had a medical certificate which stated he had a nervous disorder rendering him unfit for work from 4 July 1990 to 1 October 1990. On 19 July 1990 this claim was rejected on the basis that he did not have permanent residential status.

He was also advised at this time that a work permit and an application lodged for permanent residence was the minimum required for special benefits. He was advised that a temporary visa was also required. Saunders then lodged the claim for special benefit on 23 July 1990. On 19 August 1990, he slipped and injured himself on some steps at a railway station, fracturing his heel bone and causing other complications.

The legislation

Section 129(1) of the *Social Security Act* provides that special benefit is payable to a person who is not in receipt of another pension, benefit or allowance under the Act and who by reason of age, physical or mental disability or domestic circumstances, or for any other reason, is unable to earn a sufficient livelihood. Section 129(3)(a) states that a person is not eligible for special benefit unless he or she is a resident of Australia.

Was Saunders 'a resident of Australia'?

The first issue to determine was whether Saunders was a resident of Australia as required by s.129(3)(a). The DSS submitted that s.129(3)(a) was a more restrictive section than if it required only that the claimant be an Australian resident. (Section 3(1) of the Act provides that an 'Australian resident' is a person who resides 'in' Australia and who is either an Australian citizen, the holder of a valid permanent entry permit, a resident return visa or an exempt non-citizen who is likely to remain permanently in Australia.)

The DSS submitted that the requirement under s.129(3)(a) that the person be 'a resident *of* Australia' was much narrower than if, as in s.3(1), it was required that the person be resident 'in' Australia. It was argued that s.129(3)(a) implied a requirement of permanence for eligibility.

Counsel for the DSS also referred to the decision in *Secretary to DSS and Etheredge and Hemple* (1989) 53 *SSR* 706. In that case the Tribunal had said that 'the words "resident of a State" point to a more intrinsic connection with the State than "residents therein" — in a State'. It was noted in *Etheredge* that the respondents had a strong desire to remain permanently in Australia and were likely to be able to remain there after the expiration of a two years. It was decided that, as holders of current temporary entry permits limited to 3 months, even though they had been held for 2 years, they were not residents of Australia.

Saunders referred to the Federal Court decision in *Hafza* (1985) 26 *SSR* 321. In that case, Wilcox J had said, in relation to the question whether a person retained her usual place of residence in Australia during an absence:

> 'The matter is not free from difficulty, but the considerations to which I have referred lead me to the conclusion that "usual place of residence" should be accorded a narrower construction than would be provided by answering the question whether the endowee remained a "resident" of Australia, in the general law sense. I think that the words "usual place of residence" in s.103(1)(d) should be read as *prima facie* limiting benefits to endowees who, during any particular period, ordinarily eat, sleep and live in a place in Australia. I emphasise that my conclusion is restricted to s.103(1)(d) and that it arises out of the particular terms of that paragraph.'

(Reasons, p.8)

Hafza was applied in *Segedin* (1990) 54 *SSR* 724, where a wife's pension was denied to the applicant on the basis that she was not an Australian resident because she had only a temporary connection with Australia.

The findings

The Tribunal acknowledged that Saunders wished to remain in Australia. But it also noted that he was aware that he was a visitor and he did not have permission to stay permanently. Although it was now known that his application for an extended eligibility entry permit had been rejected, it was also appreciated that this could be challenged. The AAT also referred to the clear desire on the part of Saunders to remain with his mother and the support he needed from her.

The finding of the Tribunal was that Saunders was not a resident of Australia. He had the status of a visitor with a tourist visa. The Tribunal found that the word 'of' in s.129(3)(a) imports a sense of belonging. Saunders had only been in Australia for a short period of time when he lodged his claim. In summing up the application, the AAT said:

> 'In deciding an application, not only must a claimant's intention be taken into account, but also the surrounding circumstances, the claimant's status at any particular time and the likelihood of his future status determined on the balance of probabilities. Although the respondent has found shelter here I find that he has not been settled here for a reasonable period. It is more likely than not at this time that the decision of Mr Houen [of the Department of Immigration, Local Government and Ethnic Affairs] will not be overturned and the respondent is unlikely to remain in Australia.'

(Reasons, p.9)

As a consequence, Saunders failed to satisfy s.129(3)(a) and was thus not eligible to receive special benefit.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that the respondent was not a resident of Australia under s.129(3) and was therefore not entitled to be paid special benefit.

[B.S.]