relevant employment were objectively no worse could not be said to have reduced the applicant's employment prospects. If he had moved to an area where there was no marine employment, there might be basis for saying that he had reduced his employment prospects; but 'if anything he improved his prospects of employment rather than reduced them by making the particular move': Reasons, para. 10.

Formal decision

The AAT set aside the decision under review and substituted a decision that Borowiecki did not reduce his employment prospects by moving from Mackay to Brunswick Heads.

[P.H.]

SECRETARY TO DSS and KITCHENER
(No. 6913)

Decided: 8 May 1991 by K.L. Beddoe.

Craig Kitchener was living and working in Sydney when he and his wife decided to move to Tabulam in north-eastern NSW. They sold their home in Sydney and bought a rural property, which they intended to farm.

However, on taking possession of the property, Kitchener discovered that the vendor had removed much of the property's plant, equipment and livestock.

Because Kitchener was unable to use the property to generate income, he applied for unemployment benefit.

The DSS rejected that application on the basis that Kitchener had reduced his employment prospects by moving from Sydney to Tabulam.

On review, the SSAT set aside that decision. The DSS appealed to the AAT.

The legislation

The AAT said that s.116(6A) of the *Social Security Act*, which declares a person who reduces her or his employment prospects by moving residence not qualified for unemployment benefit, was not relevant to the present case. That sub-section, the AAT said,

> 'can only apply to a person who is already in receipt of unemployment benefit and not, as is the case here, to a person who applies for unemployment benefit after having removed to the new place of residence.'

(Reasons, para. 4)

According to the AAT, the relevant provision was s.116(6A) which, in combination with s.126(4), provides that unemployment benefit is not payable to a person for a period of 12 weeks where the 'person has reduced his or her employment prospects by moving to a new place of residence without sufficient reason for the move'.

The range of reasons which are regarded as sufficient for the purpose of s.126(1)(aa) is narrowly defined in s.116(6B). They did not apply in the present case.

Self-employment not relevant

The AAT first held that the term 'employment prospects' in s.126(1)(aa) referred to prospects of employment arising out of a master/servant relationship and not to self-employment.

It followed that Kitchener's prospects of working his newly-acquired farm were not relevant to the question whether he had reduced his employment prospects by moving his place of residence.

Reduced employment prospects

The AAT then concluded that Kitchener reduced his employment prospects by moving from Sydney to Tabulam. This conclusion was based on evidence from CES officers that Kitchener had reasonable prospects of employment as a despatch manager in Sydney, but that such employment was unlikely to be available in the area of Tabulam.

The AAT also referred to Kitchener's disqualification from driving a motor vehicle and the absence of public transport which he could use to travel to any work which he might find.

Formal decision

The AAT set aside the SSAT's decision and substituted a decision affirming the DSS decision to defer payment of unemployment benefit to Kitchener for 12 weeks.

[P.H.]

Special benefit: applicant for refugee status

AL-SAEED and SECRETARY TO DSS
(No. 6701)

Decided: 27 February 1991 by P.W. Johnston.

Khaled Al-Saeed was born in Kuwait of Palestinian parents. In March 1990, he came to Australia on a 12-month visa, to undertake study here. Following the Iraqi invasion of Kuwait in August 1990, Al-Saeed lost all contact with his family in Kuwait and ceased receiving financial support from his father.

Al-Saeed then applied to the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) for refugee status; and, when this application was refused he lodged an appeal to the Determination of Refugee Status (DORS) Committee.

Al-Saeed's application to the DSS for a special benefit was refused on the basis that he was not 'a resident of Australia' as s.129(3)(a) of the *Social Security Act* then required. Following unsuccessful review by the SSAT, he asked the AAT to review that decision.

The legislation

Shortly before the hearing of Al-Saeed's appeal, s.129(3)(a) was amended, with effect from 1 August 1990. In its amended form, the provision required that, before special benefit could be paid to a person, he or she must fall into one of a number of categories, including 'an Australian resident', or a person to whom refugee status had been granted, or 'an applicant for that status who has been advised by [DILGEA] that he or she has a substantial claim to that status'.

The AAT avoided deciding whether Al-Saeed's eligibility for special benefit should be determined under the old or the new form of s.129(3)(a); although it said it was inclined to the view that the new version of the provision was applicable.

It was unnecessary to resolve that question, the AAT said, because Al-Saeed could not qualify for special benefit on either form of the provision.

The new provision

Al-Saeed could not qualify for special benefit under the new s.129(3)(a) because he was not 'an Australian resi-

dent', as defined in s.3(1); he had not been granted refugee status; and, it could not be said, 'in the light of views previously expressed by DILGEA, that the applicant has anything in the nature of a substantial expectation of being granted refugee status'.

The old provision

So far as the old form of s.129(3)(a) was concerned, the AAT noted the approach adopted in *Etheredge and Hemple* 19 ALD 178 - that a person's status as 'a resident of Australia' depended on the likelihood of the person being granted permanent residence and on the person having a firm intention to remain in Australia.

In the present matter, the AAT said, Al-Saeed 'probably has no settled intentions at all. He is in highly unusual circumstances where he literally does not know what his real options are . . . [T]he only intention that one could attribute to him is to stay in Australia until some other realistic option is presented to him': Reasons, para. 21.

An ex gratia payment?

In the end, the AAT said, Al-Saeed 'is in a position where the Act simply does not contemplate his circumstances': Reasons, para. 22.

The AAT noted that international law obliged a country receiving foreign nationals to provide those nationals with minimum standards of living; and that the inherent right to life was recognised in Article 6 of the International Covenant on Civil and Political Rights, to which Australia is a party. These obligations were not directly enforceable in Australian domestic law, but they could properly be taken into account when exercising executive discretions: *Ceskovic v Minister for Immigration* (1979) 27 ALR 423. These would be 'valid considerations to be taken into account when considering whether to make an *ex gratia* payment in respect of the applicant', the AAT said: Reasons, para. 26.

> 'It does not need this Tribunal to reflect on how the Australian government would be judged if through its various agencies it were to deny any responsibility for the applicant's plight in the highly exceptional circumstances where Australia itself is engaged in a war to liberate the land of the applicant's birth and former residence. At least until there is some certainty regarding the final outcome of the applicant's request for refugee status, some kind of *ex gratia* payment would seem to be in order on humanitarian and compassionate grounds. Whether it should be paid, how much, and under what conditions is a matter that properly lies for consideration by the respondent and not this Tribunal.'

(Reasons, para. 26)

Formal decision

The AAT affirmed the decision under review and recommended that the Secretary consider making an *ex gratia* payment to Al-Saeed.

[P.H.]

Special benefit: 'unable to earn'?

SECRETARY TO DSS and BARNETT

(No. 6756)

Decided: 7 December 1990 by D.P. Breen.

The DSS asked the AAT to review a decision of the SSAT to grant Wendy Barnett special benefit for 5 weeks.

The facts

Barnett lived in Innisfail, Far North Queensland. Her husband was a blocklayer and due to a prolonged period of wet weather could not find work. He then decided to pursue a career as a real estate salesman which first required a period of study. This course was taken rather than move to another area, which the family could not afford to do. They also had a 10-month-old baby which Mrs Barnett was breastfeeding at the relevant time.

Barnett inquired by telephone of the DSS office in Cairns whether they were entitled to any income support. She was told that her husband could not obtain unemployment benefits because he was studying but that they could claim special benefits. They lodged the necessary forms at the Innisfail office of the DSS.

Barnett inquired 2 weeks later when her claim had still not been processed. The Innisfail office rang Cairns and was informed that a cheque should arrive 'on Monday'. When no cheque arrived, she contacted the Cairns office and was then told that she should not have claimed special benefit and that she should have applied for unemployment benefit. The Cairns office said that she would have to make a statement as to why she had made such a claim.

A few days later, the Cairns office advised her that her statement was of no significance and that she would have to make new claims.

At this point Barnett contacted her local MP whose office rang Cairns DSS. The DSS informed the MP's office that Barnett would have to lodge another claim for special benefit and that they would advise the Innisfail office within 10 minutes as to the amount of the cheque she could receive immediately.

However, when the Innisfail office rang Cairns an hour later, she was advised that she was not entitled to any benefit. Barnett then appealed to the SSAT which decided to grant the special benefit. It was from that decision that the DSS sought review.

The DSS argument

The DSS accepted Barnett's version of the facts, as summarised above. The DSS argument was based on 2 grounds. The first was that Barnett was not 'unable' to work, and the second ground was that the SSAT had failed to consider the general discretion contained in the relevant section of the Act.

Section 129 of the *Social Security Act* states that a person may be granted special benefit, at the discretion of the Secretary, where the person is not in receipt of a pension or allowance, not eligible for unemployment or sickness benefit, whether 'by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any)'. Thus it is necessary to satisfy these preconditions before an exercise of the discretion can be considered. However, even if such preconditions are met, an applicant may still not be entitled to special benefit.

'Unable'

The DSS argued that Barnett could not say that she was 'unable' to earn a sufficient livelihood and thus could not satisfy one of the preconditions for payment. Her position was that she was breastfeeding her baby and had no-one to look after it during the day if she went to work. This meant that she would have to pay for child care. In addition, as the baby had rejected bottled formula milk she would have to force the baby to drink an expensive formula if she went to work.

In response, the DSS referred to Australian Bureau of Statistics figures, which showed that, as at June 1990, 60% of married couple families with both partners in the workforce had dependants and that this figure was increasing. The DSS also quoted a statistic which indicated that 49% of such families with children between the ages of 0-4 had the wife in the workforce. Their conclusion was that '[t]hese figures clearly show