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

that it is not unusual in today's society for the mothers of young children to participate in the labour force. The fact that a woman has a young child does not of itself give rise to an inability to earn a livelihood': Reasons, p.9.

The DSS referred to the decision in *Butt* (V81/13) where a similar fact situation arose. The AAT had there concluded that the applicant's desire to be available to breastfeed her son was not related to her inability to earn a sufficient livelihood. Based on this decision, the DSS submission was that Barnett had control over the circumstances which led to her being unable to go to work and that it was therefore inappropriate for her to be granted special benefit. It was argued that the appropriate payment to Barnett was family allowance supplement in these circumstances.

The DSS submission concluded:

> '. . . where a person's only reason for not joining the work force is a desire to remain at home and care for children then it is only in those situations specifically catered for under the *Social Security Act* that support is provided under that Act.
>
> The Department acknowledges with regret that Mrs Barnett's initial enquiries with the Department led to confusion and misunderstanding as to her entitlement. However this does not provide grounds for the exercise of the discretion to grant special benefit. The remedy which the Department undertakes should the SSAT's decision be set aside is to pay an amount equivalent to the family allowance supplement which could have been paid (such amount if any has yet to be calculated) from the date of Mr Barnett's first application for special benefit.'

(Reasons, p.10)

The discretion

It was also argued by the DSS that, even if it could be said that Mrs Barnett was unable to earn a sufficient livelihood, the degree of control which she had over her circumstances would affect the manner of the exercise of the discretion contained in s.129. The DSS relied on the decision in *Te Velde* (1981) 3 *SSR* 23 for this proposition. The DSS submitted that she could have influenced her husband's decision to leave the workforce and equally her decision not to join the workforce was within her control.

The DSS said:

> 'When considering the scope and object of the *Social Security Act* one has to consider that it provides income support and income supplement payments to persons in defined categories i.e. the aged, invalid, widowed, sole parents, unemployed, disabled. Assistance for families and children is provided for by way of family allowance and family allowance supplement. In the context of this legislation need alone does not create an entitlement to a benefit.'

(Reasons, p.8)

The AAT's view

Barnett submitted that the DSS could not maintain their proposition that the discretion in s.129 should be exercised against her because of the control she had over the circumstances which gave rise to her inability to earn a sufficient livelihood. She said that the misleading and erroneous advice given by the DSS had influenced the family to make the decisions it did and the family had relied on the expectations that the advice gave them about the family's short term financial security.

With respect to the argument based on her being in a position to control her circumstances which made her 'unable' to earn a sufficient livelihood, the AAT said:

> '. . . it did not occur to her that she should make herself available to join the workforce, leaving her young child at home in the care of her husband, again because of this advice. She did not think through to the point of making a conscious choice against being available to join the workforce in order to stay at home and care herself for the baby. Consideration of the proposition on her part to such an extent did not seem necessary.'

(Reasons, p.11)

The AAT noted that these points raised by Barnett impacted considerably on the DSS submission. The AAT referred to *Te Velde*, where it was said that the word 'unable' in the relevant section 'connotes an act which, in all of the circumstances, the person cannot reasonably be expected to do'.

The Tribunal reviewed the circumstances in the case including the climatic conditions which caused Barnett's husband to leave his work, the problems associated with finding alternative employment and of moving elsewhere, the advice given by the DSS at various points, the 10-month-old baby being breastfed and the difficulties in feeding the baby an alternative formula and the need to pay for child care if required. The conclusion reached was that in these circumstances Barnett was 'unable' to earn a sufficient livelihood.

On the question of how the discretion should be exercised, the AAT found that the DSS argument could not be upheld. The Tribunal commented:

> 'The circumstances which lead to Mrs Barnett's inability in June 1990 to qualify for unemployment benefit have been recorded. There were many features of these circumstances over which she had no control and there were features in respect of which her perception of a need for her to control them was altered, indeed, diminished, by the inappropriate advice which it is common ground she was given.
>
> So far as the further submission by the Department "that where a person's only reason for not joining the workforce is a desire to remain at home and care for children" is concerned, in my view, on the face of this case, the reasoning in *Butt's* case is distinguishable. Mrs Barnett was not giving vent to a desire but rather as she saw it a very real responsibility, a responsibility she was able to discharge (as opposed to making herself available to rejoining the workforce upon reliance upon the husband's presence at home to care for the baby) by dint of the raised expectation of the receipt of the benefit, the subject of her application.'

(Reasons, p.14)

Formal decision

The AAT affirmed the SSAT decision.

[B.S.]

Young homeless allowance

SECRETARY TO DSS and TU-NGUYEN TRAN
(No. 6392A)

Decided: 17 May 1991 by J. Handley.

Tu-Nguyen Tran applied for special benefit after leaving school and his father's home on 21 May 1990. He also applied for the additional allowance, payable to a young person receiving benefit who is homeless. The DSS refused both applications.

On review, the SSAT decided that Tran qualified for special benefit and the young homeless allowance.

The DSS appealed to the AAT, where it conceded that Tran qualified for special benefit during the relevant period — 22 May to 21 August 1990. But the DSS maintained that Tran did not qualify for young homeless allowance.

The legislation

Section 115 of the *Social Security Act* defines a 'homeless person' for the purpose of payment of additional allowance to a young person in receipt of a benefit. The issue in the present case was whether Tran was covered by para. (a)(ii) of that definition, as a person who did not live with his parent 'because domestic violence, incestuous harassment or other such exceptional circumstances make it unreasonable to expect the person to live at such a home'.

The evidence

In May 1990, Tran was 17 years of age and attending secondary school full-time, undertaking year 11. He realised