

Special benefit: unable to earn

MD and SECRETARY TO DSS
(No. Q88/452)

Decided: 12 June 1991 by D.P.Breen.

MD had been paid special benefit after his unemployment benefit was cancelled. The AAT was asked to review a DSS decision to cancel his special benefit. It was accepted that, if MD did qualify for special benefit, he did so under paragraph 24.1302 of the DSS guidelines which stated:

'The following groups of persons who may be accepted as persons with chronic labour force disadvantages may qualify for special benefit:

...

a person suffering from a psychiatric illness who, owing to his or her illness, will not seek medical attention, who is clearly unable to work or seek work.'

Psychiatric evidence

The decision of the AAT was primarily concerned with the psychiatric evidence that the Tribunal sought at an earlier hearing of this matter. MD had been for some time out of work and 'he was consumed with a passion to pursue his perception of what justice owed him' in respect of commercial dealings he had had with a particular company. He had purchased a drilling machine from the company on the strength of assurances that he would benefit commercially. When the machine did not deliver these benefits he was certain he was the victim of shady dealings.

The AAT asked a psychiatrist to prepare a report. The report was equivocal as to whether MD suffered from a psychiatric illness. The report leaned towards the view that he suffered from 'a form of psychiatric illness' but conceded that this was not clearcut. The psychiatrist was reluctant to describe MD as psychiatrically ill as that term would be commonly used by psychiatrists. But the strength of the forces driving MD together with the vexed nature of what constitutes such an illness allowed the psychiatrist to suggest that he could be said to suffer from such an illness. The report also stated that treatment at this stage would not assist MD.

The DSS argued that the discretion to grant special benefit had to be exercised very cautiously and not 'so broadly as to allow payment to someone who has adopted a course of action, quite deliberately, which prevents him from earning an income even though that choice might

be explicable by reason of the person's personality and past conditioning': Reasons, pp.5-6.

The AAT noted that the DSS advocate was 'somewhat dismissive' of the psychiatrist's report. The Tribunal commented that the impact of this dismissal was to a large extent lost because the DSS advocate had decided not to cross-examine the psychiatrist when given the opportunity.

The AAT concluded:

'All in all, on what I have read in letters written by Mr D, in what I have seen of him in the witness box in particular (on two occasions), and in the hearing room during general phases of proceedings, and on what I glean from the face value of the [psychiatric] report (having nothing other than its own face value by which to interpret it), I am of the view, that, whilst short of a diagnosable psychiatric illness carrying a label recognised in DSMIII, Mr D is obsessed to the point of extreme psychological disturbance with his pursuit of a remedy for the injustice he considers to have been done to him. I am also of the view that the expression "psychiatric illness" where it appears in paragraph 24.1302 of the departmental guidelines should be read widely, having regard to the scheme of the Act to which the guidelines are directed.'

(Reasons, p.6)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with the directions that

- (1) the applicant remains eligible for payment of special benefit,
- (2) he is eligible on the basis that he is a person suffering from a psychiatric illness who, owing to his illness, will not seek medical attention but is clearly unable to work,
- (3) Mr D will continue to be obsessed with the pursuit of justice against a company called Ingersoll-Rand until the processes of law, by which he seeks it, have been exhausted, and
- (4) payment of special benefit should continue to be made to his wife.

[B.S.]



Special benefit: residence

SECRETARY TO DSS AND
SRITHARAN

(No. V91/195)

Decided: 12 June 1991 by B.M. Forrest.

The respondent was a 52-year-old Sri Lankan man, married with 4 children. He held a current temporary entry permit, and had a pending application for refugee status, lodged shortly prior to the hearing.

He applied for special benefit on 30 August 1990. The application was refused, but the SSAT had substituted a decision that special benefit be granted from 10 December 1990 (the date of his application to the SSAT), finding that the respondent was a 'resident of Australia' within the meaning of s.129 of the *Social Security Act 1947*.

The issue was whether the applicant was residentially qualified for special benefit. This involved considering what legislation applied to him.

The legislation

At the time that the respondent lodged his claim on 30 August 1990, s.129(3)(a) provided that benefit was not payable unless he was a 'resident of Australia'.

After the respondent lodged his claim, and prior to the delivery of the SSAT decision on 15 January 1991, s.129 was amended by s.53 of the *Social Security Legislation Amendment Act 1990* (No. 6 of 1991) which was given royal assent on 8 January 1991. The new provision substituted a requirement that a claimant for special benefit fall within one of six categories; the only category potentially applicable to the Sritharan was that of 'an Australian resident'.

Retrospective operation of the new provisions

It was conceded by counsel for Sritharan that he did not meet the residence requirements of the amended s.129(3). Counsel argued that the amending Act should not apply for the period prior to 8 January 1991 (date of royal assent). He further submitted that Sritharan was a resident of Australia for the purposes of the Act prior to 8 January 1991; he therefore had an accrued entitlement to benefit and the amending Act provisions should not be construed as interfering with those rights.

Counsel also argued that the effect of giving the amending Act retrospective operation would be to require Sritharan to repay special benefits received.