Administrative Appeals Tribunal decisions

Special benefit: refugee claimant

FARAH and SECRETARY TO DSS (No. 7390)

Decided: 18 October 1991 by B.M. Forrest.

Farah, a Somali national, entered Australia in May 1990 and applied for refugee status in June 1990. The Department of Immigration (DILGEA) granted him a 6-month refugee (temporary) entry permit and the DSS granted him a special benefit.

When Farah's temporary entry permit expired in January 1991, DILGEA granted him permission to work as 'an illegal entrant' pending a decision on his application for refugee status. The DSS then cancelled his special benefit. After the SSAT affirmed the cancellation, Farah appealed to the AAT.

The legislation

Until 1 August 1990, special benefit could be granted to a person who was 'a resident of Australia' who was not an 'illegal entrant' under the *Migration Act* 1958, and who was unable to earn a sufficient livelihood: Social Security Act 1947, s.129.

The *Social Security Legislation Amendment Act* 1990, which was passed on 8 January 1991, amended s.129 with effect from 1 August 1990. The amendment limited the persons who could be granted special benefit to 'Australian residents', New Zealand citizens, persons to whom refugee status had been granted or who had been advised by DILGEA that they have a 'substantial claim' to refugee status, and to certain citizens of the People's Republic of China: s.129(3)(a). Further, special benefit could not be paid to an 'illegal entrant' under the Migration Act: s.129(3)(b).

'Australian resident' was defined to mean an Australian citizen or the holder of a particular status under the *Migration Act*.

No 'substantial claim' to refugee status

It was acknowledged that Farah was not an Australian citizen and did not hold any of the other statuses under the *Migration Act*. However, Farah's representative argued that Farah should be treated as a person with a 'substantial claim' to refugee status because he had been granted permission to work pending the processing of his claim to refugee status.

The AAT rejected this argument. The *Social Security Act* (in both the 1947 and 1991 versions) referred to a person who had been advised by DILGEA that he or she had such a substantial claim — so that it was not for the AAT to decide whether Farah had a substantial claim to refugee status. In the present case, the Department had consistently cautioned Farah that the grant of a temporary entry permit in June 1990 and the grant of permission to work in January 1991 carried no implication as the eventual outcome of his claim for refugee status:

> 'The grant of a temporary entry permit and the subsequent grant of a permission to work cannot be interpreted as advice of a substantial claim to refugee status.'

(Reasons, p.7)

In any event, the AAT said, Farah had been an 'illegal entrant' since the expiry of his temporary entry permit in December 1990; and, under both the 1947 and 1991 Social Security Acts, this was 'an insurmountable obstacle to obtaining special benefit': Reasons, p.8.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

SECRETARY TO DSS and BUQUET (No. 7475)

Decided: 14 November 1991 by R.A. Balmford, P. Burns and L.S. Rodopoulos.

Pierre Buquet was a French national married to a Lebanese national. They were ineligible to live together in either the Lebanon or France or in 2 other countries where Buquet had lived for substantial periods.

Buquet and his family came to Australia in August 1988 and claimed permanent residence on refugee grounds in February 1989. This claim was refused in December 1989 and Buquet then claimed permanent residence on compassionate grounds. (This claim was outstanding at the date of the AAT's hearing.)

Buquet was then granted a processing entry permit, which expired in May 1991. The DSS granted him special benefit in July 1989, which was cancelled in October 1990. A fresh claim for special benefit was rejected in December 1990 on the ground that Buquet was not a resident of Australia.

After Buquet asked the DSS to review that decision, rejection of special benefit was affirmed but on a different ground — that he was an illegal entrant under the *Migration Act*.

On review, the SSAT set aside the decision to reject special benefit and directed the Secretary to reconsider Buquet's eligibility, on the basis that he was not an illegal entrant. The DSS appealed to the AAT.

The legislation

The legislation which controlled Buquet's eligibility for special benefit is set out in the note on *Farah*, above.

Central to this legislation were the amendments to s.129 of the *Social Security Act* 1947 made by the *Social Security Legislation Amendment Act* 1990, which took effect retrospectively from 1 August 1990.

Illegal entrant?

The AAT said that it doubted whether the SSAT's decision was correct: to determine whether Buquet was or was not an illegal entrant, it would require expert evidence from the Department of Immigration (DILGEA). However, it was not necessary to pursue that aspect of the case, because the retrospective amendments to the *Social Security Act* 1947 made in January 1991 (see *Farah*, above) rendered Buquet ineligible for special benefit from 1 August 1990 on the ground that he met none of the requirements in s.129(3)(a) of the *Social Security Act* 1947, now in s.729(2)(f) of the 1991 Act. (The SSAT had apparently made its decision without the benefit of the legislation which effected those amendments).

Formal decision

The AAT set aside the decision of the SSAT and directed that Buquet had not met the eligibility requirements for special benefit from 22 November 1990.

[P.H.]