Special benefit: children of Migration Act claimant

SECRETARY TO DSS and UNDERWOOD
(No. 7620)

Decided: 20 December 1991 by D.F. O'Connor J.

Emma Morrell came to Australia on a visitor's visa in 1987. She formed a relationship with a man, Underwood, and had 2 children, C and L Underwood. In February 1991, the relationship between Morrell and Underwood broke down as a result of his violence and she moved into a women's refuge with her children. Her visitor's visa had expired by then; but her application to the Department of Immigration (DILGEA) for permanent residence (made in February 1990) had not been decided.

In June 1991, Morrell claimed special benefit for herself and, when this claim was rejected, she lodged a claim on behalf of her children in August 1991. The DSS also rejected that claim and she appealed to the SSAT.

The SSAT decided that special benefit should be paid to the 2 children at the rate applicable to a young person in receipt of job search allowance at the maximum 'non-independent rate'. The DSS appealed to the AAT.

The legislation

Section 729 of the *Social Security Act* 1991 provides that the Secretary may grant special benefit to a person if:

- no social security pension or benefit 'is payable to the person',
- the person is not disqualified for job search or newstart allowance on certain grounds (not relevant here),
- the person cannot earn a sufficient livelihood,
- the person is an Australian resident (that is, a person who is an Australian citizen or the holder of a particular status under the *Migration Act*), a New Zealand citizen, or the holder of one of several permits under the *Migration Act*,
- the person is in Australia; and
- the person is not an illegal entrant under the *Migration Act*.

Eligibility for special benefit

Unlike their mother, the 2 Underwood children were Australian citizens.

However, the DSS argued that they could qualify for special benefit because they were not persons to whom other pensions or benefits were not payable. It was argued on behalf of the DSS that a person could only be a person to whom other pensions or benefits were not payable where the person was initially qualified for a pension or benefit but for some reason the pension or benefit was not payable.

The AAT rejected this construction of s.729. There was no 'specific requirement in the Act that the person in receipt of special benefit be qualified to receive any other pension or benefit': Reasons, para. 12.

The AAT referred to the purpose of special benefit being 'to ensure that persons are not left without an acceptable standard of living where they are not able to obtain one for themselves, and to the requirement (stated in s.15AA of the *Acts Interpretation Act* 1901) to prefer the construction of any legislative provision which would promote the purpose or object underlying the legislation.

After referring to the facts that the *Social Security Act* was beneficial legislation; that the original *Benefits Bill* 1944 (which introduced special benefit) aimed to 'afford social security for all those who are in need in this country'; and that the 1987 'family package' had been designed to ensure that 'no Australian child need live in poverty in 1992', the AAT said:

> 'Thus there is no reason to presume that a child is not covered by the Act if they fulfil all the requirements of, and do not fall into an excluded category of, a provision of the Act.'

(Reasons, para. 14)

The AAT also noted that the 1991 Act had been drafted in a 'clear English' style designed to overcome problems of readability:

> 'An implication of this policy is that exclusions should not be read in where they are not explicitly stated.'

(Reasons, para. 15)

The AAT concluded that the Underwood children were qualified to receive special benefit.

Discretion

The AAT also rejected an argument put on behalf of the DSS that the discretion to grant special benefit should not be exercised in the children's favour because to do so would provide an indirect payment of benefit to their mother, who was an illegal entrant.

There was no evidence, the AAT said, that the children's mother would use the benefit for herself rather than her children; and her status was irrelevant to the question of payment to the children.

The AAT noted that the children's father could not presently be located, that there were no financial resources available to care for them, that they had no control over the delays in processing their mother's claim for permanent residency, that they were being supported by a women's refuge at considerable cost to the refuge and that to deny the children special benefit would conflict with Australia's international obligations under the United Nations Convention on the Rights of the Child (particularly the right to social security and an adequate standard of living).

Rate of benefit

The AAT agreed with the SSAT that the rate of special benefit payable should be the rate applicable to a young person receiving jobsearch allowance at the maximum non-independent rate. The independent rate was not appropriate because the children gained practical advantages from living with their mother.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Special benefit: children of refugee claimant

SECRETARY TO DSS and KUMAR
(Nos N91/19 and N91/20)

Decided: 15 January 1992 by D F O'Connor J.

H and N Kumar were born in Australia after their mother came here from Fiji on a temporary entry permit in 1981. At the time of the hearing of this matter they were 10 and 8 years old. Their mother was, at all relevant times, an illegal entrant; but they were and are Australian citizens.

In September 1990, the children's mother separated from their father because of his violence, taking the 2