undertake picking for the rest of the season.

The DSS told him he was able to do work other than picking and Dicker then said he would get another certificate explaining that he was unfit for all types of work. He was told to lodge a claim for Job Search Allowance. Dicker told the DSS that he had a 12-week suspension imposed by CES.

Dicker lodged a second certificate from Dr Davis which indicated that, not only was Dicker unable to do his usual work, but that he could not do any other type of work. The DSS then rejected his claim without explaining the reason for the rejection. The Departmental advocate told the AAT that the reason for rejection was that Dicker was not unfit for all types of work.

The AAT also noted that, after the decision had been made to reject Dicker's claim for sickness allowance, the DSS had phoned Dr Harris who apparently stated that even though Dicker had a brace on his left arm, he could do light duties.

Although it was not entirely clear what the nature of Dicker's employment had been before he claimed sickness allowance (Dicker did not take part in the hearing), it was accepted that he did not have a contract of employment that continued after he got tenosynivitis. Hence s.666(2)(a) did not apply to him. The AAT said that s.666(2)(b) applied and this required the Secretary to form an opinion as to the sort of work Dicker could reasonably be expected to do, and then whether he was incapacitated for that work:

> 'In forming an opinion as to the kind of work which Mr Dicker could reasonably be expected to do it is necessary to consider his employment qualifications and experience. There is no evidence that the primary decision-maker or the officer who reviewed that decision gave any consideration to these matters before Mr Dicker's claim was rejected or the rejection was affirmed.'

(Reasons, para. 18)

The AAT noted that the only evidence before the original Departmental decision-makers was that on Dicker's claim form which said that he worked as a labourer, left school at 17, reached Year 11 and had the 'SC' (presumably school certificate) qualification.

The only evidence as to Dicker's prior work history before the AAT was contained in the SSAT's reasons for decision which stated that he had previously worked as an infantry soldier, as a concreter, plasterer and labourer. The DSS advocate said that, as Dicker was right-handed, he was capable of doing clerical work, or could work as a car park or gate attendant, as a kitchen hand or night watchman.

The AAT concluded that the work Dicker could reasonably be expected to do, was work similar to that he had done in the past, that is, semi-skilled or unskilled labouring work. It was not reasonable to expect him to do clerical work, because it appeared he had no experience or qualifications for it. In relation to other work as a car-park attendant, kitchen hand or night watchman, the AAT stated that these required the full use of two arms, unless an employer made special arrangements:

> 'Even if there are some jobs available for car park attendants who do not have to drive and for gate keepers who do not have to manually open gates, it is my understanding that those positions are not readily available as they are usually kept by employers for their own employees who require light duties work. A kitchen hand would be required to use both arms in the course of his duties and a person employing a night watchman for security reasons would no doubt require one with two strong arms.'

(Reasons, para. 24)

The AAT concluded that, in relation to those without a continuing contract of employment to whom s.666(2)(b) applied, 'it is not reasonable to expect them to be able to attract employers who will offer them special conditions of employment to take account of incapacity due to sickness or accident': Reasons, para. 25.

The Tribunal concluded that Dicker was incapacitated for work in that he was incapacitated for work of a kind that he could reasonably be expected to do, that this incapacity was wholly caused by a medical condition and that it was likely to be temporary.

The DSS's relationship with Dicker

After making its decision, the Tribunal went on to comment on a statement made by Dicker on his appeal form to the SSAT: he had said that he thought staff at the Mildura DSS office did not like him. The Tribunal said '[t]here are matters in the documents which support that assertion': Reasons, para. 27.

For example 'the way in which the claim was rejected, without reference to the terms of the Act or to any manual, and without obtaining necessary information from Mr Dicker or giving weight to the fact that his arm was in a brace, are matters that give rise to some concern'.

There was also on the file evidence of a threat made by Dicker to an officer of the DSS. Whilst the Tribunal said this was to be deplored, it was 'understandable that Mr Dicker may have felt considerable frustration at that point'. The AAT concluded:

> 'It seems likely that Mr Dicker's relationship with the Department at Mildura will continue. It is to be hoped that efforts will be made by officers of the Department to achieve a more positive interaction.'

(Reasons, para. 28)

Formal decision

The decision under review was varied by substituting 'sickness allowance' for 'sickness benefit', but was otherwise affirmed.

[J.M.]

Special benefit: claimant for refugee status

BEIGMAN and SECRETARY TO DSS

(No. 8429)

Decided: 16 December 1992 by O'Connor J, D.P. Breen and T.R. Gibson.

Yuri Beigman entered Australia illegally in August 1991, claimed refugee status in September 1991 and was granted an unrestricted work permit pending the determination of his claim.

In November 1991, Beigman claimed special benefit. The DSS rejected his claim and the SSAT affirmed that decision. Beigman appealed to the AAT.

The legislation

Section 729(1) of the *Social Security Act* 1991 prescribes the qualifications for special benefit. The residence requirements are expressed in complex terms: the person must be an Australian resident, or the holder of a refugee (temporary) entry permit under the Migration Regulations, or an applicant for such a permit who has been advised by the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) that he or she has a 'substantial claim' for the permit; and the person must not be an illegal entrant

within the meaning of the *Migration Act* 1958.

In September 1991, the Migration Regulations were amended so that they no longer provided for the issue of refugee (temporary) entry permits. Those permits were replaced by domestic protection (temporary) entry permits, issued according to different criteria. However, the *Social Security Act* includes no reference to domestic protection (temporary) entry permits.

The AAT's decision

Evidence was given to the AAT by a DILGEA officer that DILGEA did not make preliminary findings on the processing of domestic protection (temporary) entry permits, nor does that Department make any determination that a claimant for refugee status has a 'substantial claim' for the relevant permit.

The AAT decided that special benefit could not be paid to a claimant for refugee status who was an illegal entrant to Australia.

Beigman could not be paid special benefit because he was an illegal entrant to Australia, whether or not he had a 'substantial claim' to refugee status. The question whether he had such a 'substantial claim' could only be determined by advice from DILGEA, neither the DSS nor the AAT having any power to investigate that question.

The AAT expressed concern at the failure of the *Social Security Act* to keep pace with changes to migration legislation and practice.

DILGEA's attitude to the AAT hearing

The AAT was also critical of the attitude apparently adopted by DILGEA when the officer from that Department was asked to give evidence to the Tribunal. First, DILGEA had insisted that a summons be issued to the witness; and, secondly, a legal officer from DILGEA had attended the AAT hearing with a 'watching brief' on behalf of the witness while she gave evidence. The AAT described both practices as 'extraordinary':

> 'Proceedings before this Tribunal are not adversarial but are designed to enable the Tribunal to reach the correct or preferable decision in the circumstances of the case. To this end the role of the parties is to assist the Tribunal in reaching its decision. The Tribunal expects departments and agencies involved in the review process to have an understanding of that role. In particular we would expect that where one department is called upon to provide evidence and assistance in a matter where another agency is a party, that department would be more than ready to unequivocally provide that assistance.'

(Reasons, para. 24)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Federal Court decisions

Family allowance: payment of arrears following setting aside of cancellation

SECRETARY TO DSS v O'CONNELL

SECRETARY TO DSS v SEVEL

(Federal Court of Australia)

Decided: 20 November 1992 by Wilcox, Lee and French JJ.

O'Connell's family allowance was cancelled by the Secretary in January 1990, after she had not responded to a notice posted to her former address. O'Connell reclaimed the allowance in August 1990, as soon as she discovered that payments had stopped. The DSS granted her the allowance but refused, in September 1990, to pay her the 8 months arrears between January and August 1990.

On review, the AAT decided that the January cancellation had not been the preferable decision, set it and the September decision aside and directed that the arrears be paid to the respondent: *O'Connell* (1991) 61 *SSR* 851. (At the same time, the AAT made the same decision in relation to Sevel, whose case presented identical facts.)

On appeal to the Federal Court, Jenkinson J decided that the AAT's decisions had not involved any error of law: *Secretary to DSS v O'Connell* (1992) 67 *SSR* 964.

The Secretary appealed to the Full Court of the Federal Court, which gave a single set of reasons in relation to O'Connell and Sevel.

The cancellation decisions

Section 168(1) of the *Social Security Act* 1947 authorised the Secretary to cancel a pension, benefit or allowance if the person did not respond to a notice. Both the AAT and Jenkinson J had observed that the Secretary had a discretion under this provision. The AAT had decided that the discretion should be exercised against cancellation; and Jenkinson J had held that the AAT's approach involved no error of law.

Before the Full Court, the Secretary did not challenge the AAT's decision to set aside the January decisions to cancel O'Connell's and Sevel's allowances and, the Full Court said, 'could hardly have done so'. Those decisions had originally been supported on the basis that the failure of each of the thousands of family allowance recipients to return the review forms posted to them indicated that the recipient's income exceeded the relevant limit. That basis, the Full Court said, 'was untenable'.

The effect of setting aside cancellation

The Secretary argued that the AAT's decisions to set aside cancellation could only take effect from the date of the AAT decisions: they could not be retrospective, because neither O'Connell nor Sevel had sought review of the cancellation decision within 3 months of the decision. This was because, the Secretary argued, a decision to resume payment of family allowance was a decision under s.168(3) of the 1947 Act; and s.168(4) of that Act provided that a decision under s.168(3) could only take effect, where that decision followed a request for the review of an earlier decision, from the date of the request if the request was made more than 3 months after notice of the earlier decision. The Secretary argued that the delay, by O'Connell and Sevel, in seeking review of the January 1990 cancellation decision meant that the AAT's decision to set aside the cancellation could only take effect from the date when they applied for review — August 1990.