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27 SOCIAL SECURITY

Including Student Assistance Decisions

Opinion

Exemption from the two-year waiting period for newly arrived residents

Sections 732(1)(da) and 739A of the *Social Security Act 1991* (the Act) impose a waiting period of two years during which newly arrived residents are ineligible to receive special benefits. However, s.739A(7) gives the Secretary a discretion to waive the waiting period in relation to a person who 'in the Secretary's opinion, has suffered a substantial change in circumstances beyond the person's control'. Further, s.739B provides that the Secretary must exercise the powers under s.739A(7) 'in accordance with guidelines from time to time in force under subsection 738C(1)'.

On 21 March 1997 the Minister gazetted guidelines under s.739C(1) under which an unsponsored claimant would not be entitled to special benefit unless the Secretary was satisfied that the claimant's available funds were depleted due to a number of specified events listed in the guidelines. However, on 25 June 1997 the guidelines were disallowed by the Senate.

On 25 July 1997, the Secretary issued an instruction containing guidelines to assist delegates in reaching an opinion under s.739A(7), which are essentially the same as those formerly set out in the repealed Ministerial guidelines.

There has been a recent spate of decisions regarding the circumstances in which a person may be eligible for an exemption from the two-year waiting period for newly arrived residents. In *Zoarder*, *Chelechkov* and *Secara* (reported in this issue) Justice Mathews set out a number of general principles, summarised below.

Where a person who lodged a claim and was rejected during the operation of the Ministerial guidelines in force between 21 March 1997 and 25 June 1997, applies for review, that person is to have their claim determined upon review applying the law as it exists at the time of the *de novo* review hearing.

The current guidelines issued by the DSS Secretary are not binding on a decision maker but are highly persuasive where a person's circumstances fall within the guidelines. If this is not the

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case, the decision maker must look at the case on its merits, in order to determine whether the matter otherwise falls within the exemption set out in s.739A(7).

Although the depletion of a person's funds can, of itself, constitute a substantial change in circumstances, this will usually be caused by some other significant event, so that the question will inevitably be whether that event was within the person's control. The depletion of limited funds on ordinary living expenses cannot, however, be categorised as 'substantial'.

The test of what constitutes a 'substantial' change must have a subjective as well as an objective component. Where a person arrives in Australia with insufficient funds or resources, believing, however, that those resources are sufficient to support them for a given period, in circumstances where that belief is reasonable at the time it is formed, the expenditure of the insufficient funds can be categorised as a substantial change in circumstances.

A change of circumstances occurring prior to a person's arrival in Australia can constitute the relevant change in circumstances encompassed by s.739A(7), provided that, at the time of the event which is relied upon as constituting the change, the person was irrevocably committed to the migration process.

The difference between a migrant's expectations as to a relevant aspect of life in Australia and the reality of life here can constitute a change of circumstances within s.739A(7), where the source of those expectations involves the inadequacy or inaccuracy of information available in the country of origin, rather than being the product of wishful thinking on the part of the migrant.

These principles have been applied in a number of subsequent decisions including *Tadros and Secretary to the DSS* (decided 26 February 1998), *Singh & Kaur and Secretary to the DSS* (decided 2 March 1998), *Fomin and Secretary to the DSS* (decided 12 March 1998), and *Shaikh and Secretary to the DSS* (decided 8 April 1998).

However there would appear to be some inconsistency in the application of the principles enunciated by Justice Mathews to a person's particular circumstances. In *Tadros* the AAT accepted that no adequate information was provided to the Tadros family informing them of changes to income support or the amount of funds they would need to take to Australia. Had the information been provided the family could have arrived earlier. Tadros had sought information from the Australian Embassy in Egypt about income support, but was unable to obtain clear information, apart from being told that income support was generally available for people who studied English or were looking for work. The AAT did not examine what information was set out in letters sent to the Tadros family about the migration process. Tadros formed the view that because she and her husband held qualifications listed as those to be considered for migration purposes, they would easily obtain work. No one informed her otherwise. She also believed that her English was adequate despite being told she would be required to undertake English language tuition upon arrival in Australia. Tadros arrived with about $4000, an amount that was expended on accommodation and living expenses within a short period. The AAT considered that the failure of the Embassy to provide relevant information about the Tadros' true employment prospects, the inadequacy of their funds and the difficulties their language skills would cause in finding employment, involved a change in circumstances, occurring after they were irrevocably committed to the migration process, which the AAT took as the date on which the application to migrate was accepted by the authorities.

On the other hand, in *Shaikh*, the AAT accepted that Shaikh had made significant efforts to obtain information about conditions in Australia, but little was available in Pakistan, and that he had been provided with inaccurate and misleading information about the application of a waiting period for benefits by the authorities in Pakistan. However, Shaikh's belief that he would find employment soon after arrival in Australia was considered by the AAT to be based upon his own unrealistic expectations. The inaccurate information provided regarding the waiting period was not relevant as it was not a factor relied upon by Shaikh in deciding to migrate. The failure by the Embassy to respond appropriately to Shaikh's inquiries did not change the situation. The information he did receive was scanty and accordingly the objective test as to what constitutes a substantial change could not be satisfied.

Again in *Singh*, the AAT accepted that, although the Singhs were provided with totally inadequate information and were ill prepared for what they faced in Australia, their migration plans were doomed to failure at the outset by their lack of resources, and were compounded by lack of up-to-date information about the employment situation. This could not constitute a change in circumstances, however.

As noted by Justice Mathews in *Fomin*, the unfortunate plight of newly arrived migrants who arrive with insufficient resources and find themselves subject to the two-year waiting period, is, in most cases, attributable to the failure of Australian authorities to adequately inform applicants about realistic employment prospects, the restrictions on available benefits and the funds needed to sustain them in Australia during a two-year period.

However, it is doubtful whether the mere failure of relevant authorities to provide information, even where that information is actively sought by a potential migrant, can, of itself, form the basis for a reasonable belief as to a given set of circumstances, as appears to have been accepted by the AAT in *Tadros*. It is also arguable that the AAT in that case failed to adequately explore the point at which the Tadros family became 'irrevocably committed' to the migration process. It would seem that the test requires more than the mere acceptance by the authorities of a person's application to migrate.

[A.T.]