Administrative Appeals Tribunal decisions

Special benefit: newly arrived residents' waiting period

ZOARDER AND KHATUN and SECRETARY TO THE DSS (No. 12632)

Decided: 18 February 1998 by Mathews J.

Zoarder and Khatun migrated from Bangladesh arriving in Australia on 27 March 1997. On 3 April 1997 they applied for special benefit, but were rejected on the basis that they fell within the two-year waiting period for newly arrived residents. An Authorised Review Officer and then the SSAT affirmed these decisions, and both appealed to the AAT.

The legislation

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 discretionary power 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, and pursuant to the combined effect of ss.46A(1)(a)(iii), 48(4) and 48(6) of the *Acts Interpretation Act 1901*, that disallowance is treated as a repeal. Accordingly, as at the dates Zoarder and Khatun lodged their applications for special benefit and were initially rejected, the guidelines, if valid, had the force of law.

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assist delegates in reaching an opinion under s.739A(7) which are essentially the same as those formerly set out in the repealed ministerial guidelines.

Were the Minister's guidelines valid?

It was firstly argued that the Minister's guidelines were invalid because they purported to fetter the otherwise broad discretion conferred upon the Secretary by s.739A(7), in that they failed to allow the decision maker to take into account all relevant circumstances, instead restricting consideration, in relation to unsponsored applicants, to those matters specified in the guidelines. Whilst it was unnecessary for the AAT to reach a firm conclusion on the issue, the AAT expressed the view that, on balance, the Ministerial guidelines were not inconsistent with the terms of s.739A(7), and were thus a valid exercise of the Minister's power under s.739C.

This was because the Secretary's obligation under s.739(7) is merely to form an opinion as to a particular state of affairs, namely whether a person has suffered a substantial change in circumstances beyond their control. The guidelines only specified those matters which the Secretary was entitled to take into account in forming that opinion. The discretion was thus different in nature from those under consideration in court decisions which have held that a statutory discretion cannot be fettered by a policy purporting to preclude consideration of the individual merits of a case. In *Perder Investments Pty Ltd* v *Lightowler* (1990) 25 FCR 150 and *Riddell* v *Secretary, Department of Social Security* (1993) 42 FCR 443 the discretion in each case related to the performance of a particular act, namely the approval of a licence and the waiver of a debt respectively.

Was the AAT bound to apply the Ministerial guidelines?

Due to the repeal of the ministerial guidelines, there had been a consequent change in the law between the time Zoarder and Khatun first lodged claims for special benefit, and the date of the AAT's decision. In those circumstances, subject to s.8 of the *Acts Interpretation Act 1901*, because the AAT determines applications for review on a rehearing *de novo*, where the question is whether an applicant should be granted a right, the law as it exists as at the time of the AAT's determination is applied, not the law as it existed at an earlier time: *Harris* v *Caladine* (1991) 172 CLR 84, *Costello* (1979) 2 ALD 944.

However, it was argued that s.8(c) of the *Acts Interpretation Act 1901* was applicable, and that either Zoarder and Khatun, or alternatively, the Secretary, had an accrued right to have the claims for special benefit determined in accordance with the law as it stood at the time the claims were made. Alternatively s.8(c) operated to preserve the Secretary's obligation to so determine the claims. If the ministerial guidelines applied, it was clear that the claims must be rejected because neither Zoarder or Khatun fell within the guidelines. The AAT rejected these submissions. The repeal of the guidelines merely altered the nature of the Secretary's obligation to determine claims; the guidelines did not create the obligation. Further no rights were accrued or incurred by Zoarder and Khatun which would bring s.8(c) into play because that section will only apply rights where the change in the law is disadvantageous to the person asserting the right. The Secretary could assert no such rights as a public official has no personal rights or obligations, and is thus outside the ambit of the provision.

The Secretary's guidelines

The AAT considered the Secretary's guidelines as providing a useful guide.

> 'If an applicant's circumstances fall within the terms of the guidelines, then there is a powerful basis for forming an affirmative opinion in terms of [s.739A(7)]. It would require strong countervailing considerations for a decision maker to do otherwise. However the failure of an applicant's circumstances to fall within the guidelines does not absolve a decision maker from considering the case on its merits and determining whether, according to the relevant material, the matter otherwise falls within subsection (7).'

(Reasons, para. 29)

Substantial change in circumstances beyond person's control

The AAT accepted evidence confirmed by the report of an educational counsellor, that Zoarder suffered from an anxiety state following his arrival in Australia, resulting from his dire financial situation and his inability to find work. The AAT considered this in itself was a substantial change because it significantly impeded his only option to secure financial independence, that is his ability to obtain employment. It was argued on behalf of the DSS that the anxiety state was a consequence of the decision to migrate with

insufficient funds, and was therefore not beyond Zoarder's control.

The AAT rejected this submission taking into account the sequence of events preceding Zoarder's and Khatun's entry into Australia. They had planned to migrate to Australia with the sum of $US9000, but due to the costs associated with the migration process, airfares and compulsory English tuition, their funds were depleted before arrival to $US3500. They had made unsuccessful attempts to inquire as to living costs in Australia, seeking information from the Australian High Commission as to the amount of money they would need to take to Australia. Although their inquiries were not answered, they believed the funds available would last them for a considerable period. The fact that their expectations were unjustified did not arise through any fault of Zoarder or Khatun, but the inadequacy of the information provided to them.

Formal decision

The AAT set aside the decision under review and remitted the matter back to the Secretary to determine Zoarder's and Khatun's entitlement to special benefit with a direction that the applicants fall within the exemption contained in s.739A(7) of the Act. They were thus exempt from the newly arrived residents' two-year waiting period.

[A.T.]

Special benefit: newly arrived residents' waiting period

CHELECHKOV AND ANTIPINA and SECRETARY TO THE DSS (No. 12631)

Decided: 18 February 1998 by Mathews J.

Chelechkov and Antipina, a married couple, were forced to leave their home in Uzbekistan due to civil unrest. They fled to Moscow, where they lived and worked for a time, before migrating to Australia on 13 July 1997. On 17 July 1997 they applied for special benefit, but their applications were rejected on the basis that they fell within the two-year waiting period for newly arrived residents, during which they were ineligible for benefits. An ARO and then the SSAT affirmed these decisions. Both Chelechkov and Antipina appealed to the AAT.

The legislation

The relevant legislation is set out at ss.732(1)(da) and 739A to 739C of the *Social Security Act 1991* (the Act) and is discussed in *Zoarder and Khatun* (reported in this issue). The circumstances of Chelechkov and Antipina did not fall within the guidelines issued by the Secretary to assist decision makers in the exercise of the discretion exempting newly arrived residents from the two-year waiting period, available under s.739A(7) of the Act. Thus the AAT considered the case on its merits to determine whether there had been a substantial change in Chelechkov and Antipina's circumstances beyond their control, entitling them to the exemption.

The facts

Chelechkov and Antipina had intended to migrate to Australia with the sum of $US2200, representing nearly seven months salary, an amount they believed would be sufficient to last them until they found work. Whilst in Moscow they made numerous inquiries from a variety of sources about the availability of work in Australia, and had been told that work in their field as computer programmers would be easy to obtain. They had also been advised that payment of the airfares to Australia could be made by way of a loan scheme operating through the International Organisation for Migration. The loan would not begin to be repayable until six months after their arrival in Australia. Between March and July of 1997 Chelechkov and Antipina set about obtaining Russian passports. It was a condition of obtaining such passports that they be de-registered as residents of Moscow, thereby losing their right to live and work there. On 1 July 1997 they went to the Australian Embassy to have their visas endorsed on their passports and learned for the first time that the loan scheme was no longer available. Chelechkov argued that by that time they had no other option but to migrate as they had no entitlement to remain in Moscow and nowhere to live. Neither could they return to Uzbekistan, due to the situation there. Thus they were forced to spend $US1750 on airfares, arriving in Australia with only $US440.

Depletion of funds — substantial change?

The AAT considered that the depletion of funds could, of itself, constitute a substantial change in circumstances, but that this would usually be caused by some other significant event, so that the question would inevitably be whether that event was within the person's control. The DSS argued that, although there had been a change in circumstances in this case, namely the depletion of funds, it could not be said to be substantial, because Chelechkov and Antipina had brought so little money to Australia it was inevitable that it would run out within a short period of time. The AAT agreed, stating that 'the change which occurs when such limited funds are gradually depleted through the payment of normal living expenses cannot be categorised as substantial': Reasons, para. 39.

Change in circumstances prior to arrival in Australia

Chelechkov and Antipina relied upon the circumstances arising in Moscow, resulting in the depletion of their funds, as constituting the relevant change in circumstances. The DSS argued that only a change of circumstances occurring after arrival in Australia was encompassed by s.739A(7). The AAT took the view that, in the absence of an express provision limiting the subsection, such a restriction should not be implied. Neither did s.21(b) of the *Acts Interpretation Act 1901* apply. That subsection provides that references in any Act to localities, jurisdictions and other matters or things are to be construed as references to such 'in and of the Commonwealth'. The AAT pointed out that the restriction in s.739A(7) argued for by the DSS was temporal, not geographic in nature.

The DSS also argued that the immediate cause of Chelechkov's and Antipina's poverty was not the failure to obtain the loan for airfares, but their decision to proceed with the migration process despite this, resulting in their arrival in Australia with insufficient funds. The AAT found this argument to be persuasive, but did not consider it to be applicable in Chelechkov's and Antipina's case because they were irrevocably committed to the migration process by the time they realised that the loan would not be available.

> 'It will be a question of fact in each case as to whether, at the time of the change relied upon under subsection (7), the applicant retained a realistic choice as to whether to continue with the migration or not. The further back in time one goes between the arrival in Australia and the event which is relied upon as constituting the change, the less likely it will be that the person was irrevocably committed to the migration process. If he/she had not reached that stage then it could not be said that the person's poverty in Australia was attributable to the change, but rather to the decision to migrate notwithstanding the change.'

(Reasons, para. 30)

'Substantial'

The DSS argued that the unexpected need to pay $US1750 for airfares could

not be said to be a substantial change, as it was expected that unsponsored migrants would have with them sufficient funds to maintain them for a two-year period. The loss of funds less than the amount necessary to sustain migrants for two years, could not therefore be said to be 'substantial' within the meaning of s.739A(7).

The AAT took the view that the test of what constitutes a 'substantial' change must have a subjective as well as an objective component. Chelechkov and Antipina believed that the amount of $US1750 would last them for five to six months during which time they would easily obtain employment. Those expectations were reasonable at the time given their personal circumstances and the advice that they received. In those circumstances the expenditure of that amount was significant and could be categorised as a substantial change in circumstances.

Formal decision

The AAT set aside the decision under review and remitted the matter back to the Secretary to determine Chelechkov's and Antipina's entitlement to special benefit with the direction that they fell within the exemption contained in s.739A(7) of the Act. They were thus exempt from the newly arrived residents' two-year waiting period.

[A.T.]

Special benefit: newly arrived residents' waiting period

SECARA and SECRETARY TO THE DSS (No. 12702)

Decided: 12 March 1998 by Mathews J.

Mr and Mrs Secara and their adult son, sought review of two SSAT decisions, affirming the decisions of the DSS not to grant them special benefit, because they were subject to the two-year waiting period for newly arrived residents, during which they were ineligible for benefits.

The legislation

The relevant legislation is set out at ss.732(1)(da) and 739A to 739C of the *Social Security Act 1991* (the Act) and is discussed in *Zoarder and Khatun* (reported in this issue). The Secaras' circumstances did not fall within the guidelines issued by the Secretary to assist decision makers in the exercise of the discretion exempting newly arrived residents from the two-year waiting period, available under s.739A(7) of the Act. Thus the AAT considered the case on its merits to determine whether there had been a substantial change in the Secaras' circumstances beyond their control, entitling them to the exemption.

The facts

The Secaras applied to migrate to Australia in 1993. In September 1996 they received a letter advising them that their applications had been successful. The letter also stated that there was no guarantee of employment in Australia, and that they would not be eligible for job search allowance or sickness allowance for the first 26 weeks after their arrival but were expected to support themselves. In November 1996 they placed their apartment on the market, expecting to receive approximately $US20,000. Shortly afterwards however the Romanian economy declined, the rate of inflation increased, and the property became difficult to sell. They were offered $US10,000 in March 1997. After calculating the payments they would need to make from this amount, they telephoned friends in Australia to ask if $US2000 would be sufficient to bring to the country. The friends promised to assist them during the 26-week waiting period, and the Secaras therefore proceeded with the sale of their apartment.

In the meantime, in February of 1996, they had received a telephone call from friends in Australia, urging them to migrate soon, as it was possible the waiting period might be extended. The Secaras therefore contacted the Australian Embassy in Belgrade and were advised that the Embassy knew nothing of a change, and that the 26-week waiting period would apply to them. Two days after their arrival in Australia they visited a CES office and first learned of the two-year waiting period. As a result they made claims for newstart allowance and special benefit on 7 May 1997.

They brought with them to Australia the sum of $US1400, and after staying with their friends for one week, where the space was limited, moved to rental accommodation. As a result their funds were soon depleted, and they were unable to obtain employment. Nevertheless their friends provided support for the first six months of their stay.

The issues

The DSS argued that the only relevant change in the Secaras' circumstances was the change in the law which extended the waiting period. The AAT agreed that neither a change in the law or a change in a person s knowledge about the law could, in itself, constitute a change in circumstances within s.739A(7).

The AAT also considered that the Secaras could not rely upon the change in economic circumstances occurring in Romania, which resulted in the depletion of their funds, as constituting the relevant change in circumstances. Applying the reasoning adopted by the AAT in *Chelechkov* (see above), such a change would need to occur at a time when the person was irrevocably committed to the migration process. In the Secaras' case the decisive step committing them to that process occurred when they decided to sell their apartment. At that time economic conditions had already eroded, so that their decision to proceed with the sale and migration process was the cause of their financial difficulties, not the decline in Romania's economic problems.

However, the AAT considered that the difference between a migrant's expectations as to a relevant aspect of life in Australia and the reality of life here could constitute a change of circumstances within s.739A(7).

> 'The change occurs when a migrant with false expectations as to life in Australia is confronted with, and required to accommodate to, the reality. The circumstances have both a subjective component (the migrant s expectations) and an objective one (the reality of life here). Whether the change is a substantial one will depend on the facts of each case. Whether it is beyond the control of the migrant will usually depend upon the source of the erroneous belief in the first place. If the migrant's expectation is merely the product of wishful thinking or a failure to make appropriate inquiries, then the change which occurs when expectation meets reality is probably not beyond the person's control. However, if the migrant's erroneous belief as to life in Australia is the product of misleading, inaccurate or inadequate information received in the country of origin, then the difference between the expectation and the reality might well constitute a change in circumstances beyond the person's control.'

(Reasons, para.38)

In the Secaras' case the substantial change occurred when they arrived in Australia with resources, including assistance from friends, to last six months and learned for the first time that the waiting period was in fact two years. It was beyond their control because they were given inaccurate information about the waiting period prior to their arrival.

Formal decision

The AAT set aside the decisions under review and remitted those matters back to the Secretary to determine the Secaras' entitlement to special benefit, with a direction that the two-year waiting period

did not apply as the Secaras came within the exemption contained in s.739A(7) of the Act.

[A.T.]

[Editor's Note: Centrelink has appealed to the Federal Court]

Family payment: debt: estimate of income

SECRETARY TO THE DSS and PYKE
(No. 12794)

Decided: 9 April 1998 by C. Webster.

The DSS determined that Pyke owed a debt of $3348.65 to the DSS, which was overpayment of family payment. On 13 November 1996 the SSAT decided to reduce the debt to $1601.45, by reducing the period of the debt.

The facts

Pyke claimed family payment on 23 June 1994, at which time she stated that she and her husband had a combined income of $25,299 for the 1992-93 financial year. She also provided an estimate of income of $19,097 for the 1993-94 financial year. On 4 July 1994 she provided an estimate of income of $21,000 for the 1994-95 financial year. From 14 July 1994 Pyke was paid family payment on the basis of estimates supplied by her.

On 1 November 1994 Pyke lodged a review of family payments for 1995-1996 and gave an estimate of $22,300 income for 1994-95. Her taxable income for 1993-1994 was $17,316. The DSS considered the estimate provided on 1 November 1994, but used actual income for the 1993-94 financial year for the purpose of calculating family payment from 1 January 1995. Pyke provided evidence from the ATO that her total income for 1994-95 was $30,498. The DSS raised an overpayment of $3348.65 on the basis that Pyke's estimate for the financial year 1994-95 was less than 75% of her joint income for 1994-95.

The issue

The issue for determination by the AAT was the meaning of 'regard is had to the person's taxable income for a tax year' in s.885(a) of the *Social Security Act 1991*.

The law

Section 885 provides:

'If:

(a) in working out the rate of family payment payable to a person, regard is had to the person's taxable income for a tax year; and

(b) that taxable income is an amount estimated by the person; and

(c) the Commissioner of Taxation subsequently makes an assessment of that taxable income; and

(d) the estimated amount is less than 75% of the amount assessed by the Commissioner;

the person's rate of family payment is to be recalculated on the basis of that taxable income as assessed by the Commissioner.'

'Regard is had to'

It was agreed by both parties that the DSS had regard to Pyke's estimate of taxable income in paying family payment from payday 7 July 1994 to 1 January 1995, as it had relied on Pyke's estimate of her 1994-95 income provided in July 1994. From 1 January 1995 Pyke's rate of additional family payment was calculated using her base year, that is 1993-94, as this produced a higher rate of payment. The SSAT decided that as the rate of additional family payment had been calculated using actual income for 1993-94 from 1 January 1995, s.885 could not be relied on to raise an overpayment.

However, the AAT stated:

'If that estimate had not been provided the respondent (Pyke) would have had to advise if her income went over $27,905. The effect of providing an estimate of income in November 1994 was therefore to provide a buffer zone of $1,828 above the figure of $27,905. If the respondent's [Pyke's] income had fallen between $27,905 and $29,733, no overpayment would have resulted, as her estimate of $22,300 was within 75 per cent of her final taxable income. The applicant took into account the respondent's estimate, although it did not use that estimate for the purposes of calculation of the additional family allowance.'

(Reasons, para. 20)

The AAT held that the normal meaning of the term 'regard to' in the context of s.885, is to take into account or consider. The DSS was entitled to use Pyke's base year for the purposes of calculating the rate of income, although it was aware of the estimate and had regard to it. The difference between the amount Pyke was paid and the amount she was entitled to receive was $3348.65.

Formal decision

The AAT set aside the decision of the SSAT and affirmed the original decision that Pyke owed a debt of $3348.65 to the Commonwealth.

[A.B.]

Family payment debt: estimate of income

SECRETARY TO THE DSS and WILBRAHAM
(No. 12665)

Decided: 27 February 1998 by K.L. Beddoe.

The authorised review officer affirmed decisions that Wilbraham had been overpaid family payment as follows:

- 8 June 1995 to 21 December 1995: $4404.00
- 4 January 1996 to 1 August 1996: $4916.00

On 1 May 1997 the SSAT affirmed the debt of $4404.00, and substituted a decision that there was a debt due to the Commonwealth of $1229.20 for the period 4 January 1996 to 15 February 1996. The SSAT decided there was no debt due to the Commonwealth for the period 29 February 1996 to 1 August 1996.

The issues

The issues were whether Wilbraham had underestimated income by not including capital gain in the estimate for 1994-95; and whether the DSS had acted correctly in not accepting Wilbraham's estimate of income for 1995-96.

The facts

On 26 May 1995 the DSS advised Wilbraham that she was to be paid family payment of $293.60 a fortnight starting on 8 June 1995. The letter was a 'recipient notification notice' informing Wilbraham that she was required to notify the DSS of certain matters, including if 'self employed or paid on an estimate and your combined income is likely to be more than $28,685'.

On 23 February 1996 Wilbraham lodged a review form which disclosed taxable income for her and her partner in 1994-95 as a negative amount, $9274 loss each. She also provided an estimate of total income for 1995-96 of $20,000. Wilbraham and her partner signed the form which included a statement which read as follows:

'If I/we have provided an estimate of my/our income, I/We agree that my... Family Payment is to be recalculated if my actual income is not within 10% of my estimate and that I may have to repay any overpayment which results.'

Family payments were made on the basis of the estimate for 1994-95, but not on the basis of the 1995-96 estimate which was not accepted. It was not clear to the Tribunal why Wilbraham's taxable income for 1994-95 was assessed by the