The rate of pension payable is calculated on an annual rate, which is divided by 26 and paid every fortnight. Section 271(1) provides that each instalment is to be paid on the pension payday on which the person is qualified and it is payable. That is, the person will be paid a full instalment of the pension on each payday during the period it is payable, and nothing on a payday outside that period (see s.42(2)).

The Court rejected the argument that a pension could be paid if a person was qualified on a payday although not qualified on any of the preceding 13 days. Section 270 assumed the entitlement to payment of the pension continued throughout the period. This was supported by s.42(2). So, a person is required to satisfy the qualification requirements throughout the whole of any period when the pension is being paid. For Lowe or Schembri to be paid the pension they must have an SPP child, Sarina, during the whole of the instalment period of 14 days. Neither Lowe nor Schembri had Sarina for a continuous period of 14 days, and therefore neither had any entitlement to the sole parent pension. Whilst regretting this conclusion, Drummond J noted:

> 'there does not appear to be any insuperable administrative difficulty in the way of introducing into this frequently amended Act a scheme which would provide for the payment of a sole parent pension to each of the carers of a child in circumstances like the present.'

(Reasons p.12)

Natural justice

Drummond J decided he did not have to decide whether or not the AAT had denied Lowe natural justice because it had prejudged the case. The evidence showed the AAT had given its decision after a very short hearing of 10 minutes. The telephone hearing had been designated as a preliminary conference only. At the conference the AAT member indicated he had reached a decision that the SSAT decision was correct, and unless Lowe objected he would make a final decision. The Federal Court noted that Lowe probably acquiesced given the strong view expressed by the AAT member. Drummond J found this approach unorthodox, but declined to find it was a breach of natural justice given the other conclusions in this case.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

[Contributor's note: As a result of the introduction of the *Payment Processing Legislation Amendment (Social Security and Veterans' Entitlements) Act 1998*, the comments of the Court on payability may be of little significance. The DFaCS has decided to appeal to the Full Court of the Federal Court.]

Special benefit: newly arrived resident's waiting period

SECRETARY TO THE DSS v SECARA AND SECARA (Federal Court)

Decided: 26 November 1998 by Von Doussa, O'Loughlin and Mansfield JJ.

The Secaras claimed special benefit on 1 August 1997. Their claims were rejected on the basis that the Secaras had not served the 2-year newly arrived residents' waiting period. The DSS appealed to the Federal Court against the AAT decision that the residents' waiting period did not apply to the Secaras.

Background

The Secaras applied to immigrate to Australia from Romania in 1993. In September 1996 they were notified that their application had been successful. They were advised that they were entitled to work in Australia, but that there was no guarantee of employment. The letter also stated that they would not be eligible to receive unemployment benefits or sickness allowance for the first 26 weeks after their arrival. There was no mention of special benefit. In 1997 the Secaras sold their apartment for considerably less than they had anticipated, leaving them with about US$2000. They contacted friends in Australia who told them they would provide assistance during the first six months if necessary. As a result the Secaras made arrangements to migrate. The Secaras arrived in Australia in May 1997 with $1400(US). The AAT found that the Secaras organised their affairs so that they could survive for six months if necessary.

In February 1997 the Secaras had been telephoned by friends in Australia and told that the law might change and the waiting period to receive social security payments might be extended. Mrs Secara rang the Australian Embassy who said they knew nothing about this proposed change to the law.

The Secaras were able to maintain themselves for the first 6 months after their arrival. They were unable to obtain employment. They were effectively destitute when they applied for a social security benefit (either newstart allowance or special benefit). They were paid family payment and rental assistance totalling $134 a fortnight which did not cover their rent.

The law

From 4 March 1997 the waiting period for new immigrants was extended to two years. Section 739A(1)(a) of the *Social Security Act 1991* (the Act) provides that in relation to a claim for special benefit, a person who enters Australia on or after 4 March 1997 is subject to the newly arrived residents' waiting period. However, according to s.739A(7) of the Act:

> '739A.(7) Neither subsection (1) nor (2) apply to a person if the person, in the Secretary's opinion, has suffered a substantial change in circumstances beyond the person's control.'

According to s.739B of the Act, the discretion exercised in s.739A(7) must be exercised in accordance with guidelines in force under s.739C(1). That section allows the Minister to set guidelines for the exercise of the Secretary's discretion. That determination is a disallowable instrument. On 21 March 1997 the Minister made a determination setting out guidelines under s.739C. The Secaras circumstances did not fit within those guidelines. On the 25 of June 1997 the Senate disallowed the guidelines.

The AAT decision

The AAT found that the current law applied to the Secaras and so the Minister's guidelines had no binding force. This finding by the AAT was not disputed by the DSS on appeal.

According to the AAT a change of circumstances took place when the Secaras arrived in Australia with resources sufficient to last them for 6 months, and then discovered that the waiting period had changed to 2 years. The circumstances were beyond the Secaras control because the Secaras had no way of knowing of the 2-year waiting period before their arrival in Australia. They had been given positively inaccurate information before leaving for Australia.

Changes in circumstances

The Secaras argued that one change in circumstances was the fact that between late 1996 and early 1997 the value of their apartment dropped to less than half they had expected. The funds available in Australia was less than they had planned. The AAT found that the Secaras' decisive commitment to migrating was when they sold their apartment in March 1997. At that time the change in their economic circumstances had already occurred, and the Secaras knew they had less money. They still decided to migrate.

The second argument relied upon by the Secaras was that the difference between a migrant's expectation of an as-

pect of life in Australia, and the reality of life in Australia could be a change of circumstances.

The AAT found that circumstances have both a subjective component (the migrant's expectation) and an objective one (the reality of life). The source of the incorrect belief by the migrant about any aspect of life, may be what is beyond the migrant's control, if it is because of misleading or inadequate information received in the country of origin.

The DSS argued that the only change in the Secaras' circumstances was that they learnt upon arrival in Australia, that the waiting period had been extended to 2 years. It was argued that a change in the Secaras' expectations could not constitute a change of circumstances because s.739A(7) requires an external change rather than an internal one to their expectations. Alternatively it was argued by the DSS that the only change was a change in the Secaras' understanding of the law. The law when the Secaras decided to migrate in March 1997 had not changed. Also, the Secaras had been aware that the waiting period might change. The finding by the AAT, as an undisputed fact, that the Secaras had no way of knowing of the 2-year waiting period before coming to Australia was incorrect. The DSS also argued that an event that occurs before a migrant arrives in Australia could not constitute a change in circumstances.

The Court agreed that if the change in circumstances occurred long before the person arrived in Australia, the less likely it would be that the person was irrevocably committed to the migration process. However:

> 'I do not see any reason in logic or in fairness why a temporal limitation by reference to the person's arrival in Australia should be specified.'

(Reasons, p. 11)

The point at which a person is irrevocably committed to migrating to Australia is one point in time from which s.739A(7) might operate. Earlier than that any financial hardship in Australia might well be attributable to the decision to migrate, not because of a change in circumstances. A change in circumstances for the purpose of s.739A(7) does not only occur after the migrant has arrived in Australia.

The Court then referred to the term 'circumstances beyond the control' as it is used in other legislation and interpreted by the Federal Court. The case of *Secretary to the DEETYA v Ferguson* (1997) 2 *SSR* 144 was referred to and in particular the observation that circumstances beyond the person's control were not confined to external factors or matters. Those factors may include going into the state of mind or physical condition of the person, but may also go to entirely external factors. However, beyond a person's control does not refer to matters which are entirely internal, such as forgetting. The Court found that to determine whether circumstances were beyond a person's control was a matter of referring to all the facts in all the circumstances.

The Federal Court accepted that when the Secaras learnt of the changes to the law this was a circumstance beyond their control. It then considered whether the change in the Secaras' expectation of how long they would need to support themselves, was a change of circumstances. The Court noted that the intention of the amendment to the Act was to introduce a newly arrived resident's waiting period.

> 'Section 739A(7) then is intended to relieve a person recently arrived into Australia from the consequences of the application of that waiting period in certain circumstances . . . It presupposes a newly arrived person in Australia is in sufficiently needy circumstances as to otherwise qualify . . . for some form of benefit under the SS Act.'

(Reasons, p. 17)

The 2 requirements the changed circumstances must satisfy, are that the events must be substantial, and the events must be beyond the person's control. To be substantial they must be of sufficient significance that the obligation of newly arrived residents to support themselves for 2 years no longer applies. It is not useful to draw a distinction between a person's expectations and objective events. Section 739A(7) may also apply where the pre-existing circumstances are not certain, and rely on something happening in the future.

In the Secaras' case there was no change in circumstances. They wrongly believed that they must support themselves for 6 months, and they were able to do so. When they learnt that their understanding of the law was incorrect, this was not a change in circumstances within s.739A(7). Section 739A(7) does not apply to a newly arrived resident who did not know the terms of the Act.

Formal decision

The Federal Court allowed the appeal by the DSS and restored the original decision that the Secaras were not eligible for special benefits under the *Social Security Act*.

[C.H.]

SSAT Decisions

Important note: *Decisions of the Social Security Appeals Tribunal, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decisions are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.*

Youth allowance: transitional provisions

CR

Decided: 21 September 1996

CR was receiving newstart allowance until 21 June 1998. On 22 June 1998 she went overseas and she returned to Australia on 9 July 1998. On 20 July 1998 she lodged a claim for newstart allowance which was rejected. Because of CR's age, if she claimed youth allowance she would be subject to the parental income test. This would preclude her from receiving any payment.

According to the transitional provisions relating to the introduction of youth allowance, a person who was receiving newstart allowance prior to 17 June 1997 (when the change to the youth allowance was announced), and was under the age of 21 could continue to receive newstart allowance following the introduction of youth allowance on 1 July 1998 (see s.115(1) of the transitional provisions). That provision also requires that the person did not cease to be, and was immediately before 1 July 1998, a recipient of newstart allowance. The problem for CR was that she was not receiving newstart allowance immediately before 1 July