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

1998. The SSAT considered the term 'receiving a benefit' in s.23(4) of the *Social Security Act 1991* (the Act), which provides that the person continues to receive a payment until the last day it is payable. CR continued to receive her payment until she failed to lodge a fortnightly form. Payments ceased to be payable from the first day in that period. CR did not return a form on 18 June 1998 so her payment ceased to be payable from that date. The SSAT also considered whether the short break should be ignored pursuant to s.38B of the Act, which provides for a notional continuous period of receipt of income support payments, where the break in payment does not exceed 6 weeks.

To decide whether s.38B overrode clause 115, the SSAT referred to the explanatory memorandum. It explained that newstart allowance could continue to be paid 'providing they are still receiving newstart allowance at 1 July 1998'. The Tribunal decided that it was mandatory that CR be receiving newstart allowance immediately prior to 1 July 1998.

Re-establishment grant: 'effective control' of farming enterprise

DL

Decided: 25 September 1998

The decision under review was to reject a claim for payment of a re-establishment grant under the Restart Re-establishment Grant Scheme 1997. DL's claim was rejected because it was decided he was not effectively in control of his farm enterprise from 4 September 1997 when he entered into a contract to sell the farm. First the SSAT had to decide whether it had jurisdiction to hear the matter. The relevant legislation was the *Farm Household Support Act 1992* and in particular ss.8B and 8C setting out the qualifications. The farm family restart scheme was introduced on 1 December 1997 to assist farmers wishing to leave the industry to qualify for a grant of up to $45,000. The farmer must satisfy the qualifying conditions for restart income support under s.8B of the *Farm Household Support Act*. Section 8C requires the person to be effectively in control of the farm that relates to the claim.

DL's evidence was that he was still trading and thus in control of the farm after 4 September 1997 until settlement date at the end of January 1998. DL decided to sell the farm when he could not get any further finance. DL described his activities following signing the contract of sale as including all the activities associated with running a farm. The SSAT noted that one of the conditions of sale was that DL retained ownership of all growing crops on the property, and that he did not sell his stock, crops or equipment associated with his farming operations.

With respect to jurisdiction the SSAT noted that the Restart Re-establishment Grant Scheme states that Chapter 6 of the *Social Security Act 1991* applies to decisions made under the Scheme. This gave the SSAT jurisdiction. The Scheme states that a person is qualified if they were eligible for restart income support. A person is not qualified for restart income support if the Secretary determines that the person is not effectively in control of their farm enterprise. The SSAT considered the term 'effective control', noting that it had not been defined under the Act. However the *Bankruptcy Act 1966* used the same term, and the Federal Court had said the term should be given its ordinary meaning and not be restricted by a requirement to show a traditional legal or equitable interest in the property. Dictionary definitions refer to exercising restraint or direction over a project or undertaking. Whilst noting that the purchaser of a property obtains an equitable interest once the contract becomes unconditional, the SSAT found that DL retained the legal interest, title and possession to the property. The purchaser's equitable interest did not mean that DL lost effective control. DL's farm enterprise was raising stock and growing crops. He maintained possession of the property and continued those activities until settlement. The Tribunal referred to the notes to s.8C, the explanatory memorandum and Centrelink's guide to assist it to come to its conclusion that DL was in effective control of the farm enterprise.

Income test: employer provided benefits

LM

Decided: 15 September 1998

LMcL received family payment. In 1997 she advised Centrelink that she had entered an agreement with her employer and she now had access to a car for private use for which she paid her employer $70 a week. Centrelink treated provision of the car as an employer provided benefit and included extra income of $3250 a year to LM's income.

LM told the SSAT that the decision was unfair because it did not take into account that she paid her employer $70 a week for the use of the car. She said she did not have to pay for petrol, maintenance or insurance, and had almost unrestricted use of the car for her private use. If someone at work needed the car for work it would be given to the other employee. As well as paying $70 a week LM gave up her right to time off in lieu of unpaid overtime.

The SSAT referred to s.1157K of the *Social Security Act 1991*, which sets out the method for valuing car fringe benefits. There was no provision in the Act to discount the maintained income figure (calculated by reference to s.1157K), by the amount LM paid to her employer for the benefit. Whilst noting that this may have been an oversight in the Act, the SSAT concluded that it had no discretion to reduce the maintained income figure.

[C.H.]