Background

Newly arrived resident's waiting period

Two-year waiting period cases after Secara

Since 4 March 1997 most[1] newly arrived Australian residents have been required to wait for two years prior to receiving social security payments other than family payment. The imposition of the waiting period has led to many migrants seen by the Welfare Rights Centre in Sydney suffering severe financial hardship, frequently leading to nutrition-related health ailments and depressive or anxiety conditions. Owing to the detrimental impact of the two-year waiting period on the health, settlement and employment opportunities of people affected, it is vital that decision makers and advocates explore all avenues for early termination of the waiting period.

The only ameliorating provision in the *Social Security Act 1991* is contained in s.739A(7) of the provisions relating to special benefit. That section permits early termination of the two-year waiting period for special benefit where 'the person, in the Secretary's opinion, has suffered a substantial change in circumstances beyond the person's control'.

In November 1998 the Full Federal Court handed down its decision in *Secretary, Department of Social Security v Secara and Secara* (reported in this issue), the first Federal Court decision to interpret the test in s.739A(7). Although the Secara family was ultimately unsuccessful, this was on a narrow point and the decision affirms many of the principles developed by the President of the AAT in the earlier cases of *Chelechkov and Secretary to the DSS*[2] and *Zoarder and Secretary to the DSS*.[3] The Court broke down the phrase 'suffered a substantial change in circumstances beyond the person's control' into the components contested in the Department's appeal in order to make its analysis.

Changes before arrival in Australia

The Court agreed with the approach taken in *Chelechkov* to changes in circumstances occurring outside Australia. That approach did not require that the change itself take place in Australia, but that the change be responsible for the migrant's state of poverty in Australia. The test was whether, at the time of the change, the person was 'irrevocably committed to the migration process'. The Federal Court added that the test might be satisfied if the person was irrevocably committed to migration at the time they became aware of the change. Put conversely, the person's state of poverty must not be due to a decision to migrate notwithstanding knowledge of the change. However, if a further event occurs that prevents the person alleviating their plight, this later event may still be a relevant change. (See below.)

Change in circumstances

The Court decided that the relevant 'circumstance' cannot be the need for special benefit itself because the waiting period amendments assume that the person is otherwise qualified. Instead:

> 'The change in circumstances must be some event or events, not necessarily "external" to the person, which creates that need where it did not previously exist or if it did previously exist where it is no longer appropriate to respond to that need by application of the newly arrived resident's waiting period.'

Consequently, even where a person has insufficient funds to survive for two years from the outset, it does not follow that a change in circumstances warranting early termination of the waiting period cannot be found in their case. Should that person suffer a change which is 'substantial', 'beyond their control' and which makes it no longer appropriate to continue to require that person to provide for themselves, the waiting period may be terminated. This was done by the President of the AAT in *Zoarder's* case. In that case the onset of an anxiety state prevented the person from being able to do anything (such as seek employment) to alleviate his plight. Other examples, given by the Court included serious accident and loss of employment.

This approach is reinforced by the Court at the end of the decision where it states that a relevant change is something that effects the capacity of the person to be self-sufficient. (Assuming, that the change is also 'substantial' and 'beyond the person's control'.)

Expectations as circumstances

The Court found it unhelpful to exclude matters that might be described as a person's expectations from the range of possible 'changes in circumstances'. A circumstance which changes might include the prospect of a thing occurring in the future. For example, a person's expectations of employment in Australia may be very well founded or a mere possibility. Again the Court said that whether or not a change based on an expectation was a 'substantial' change in circumstances would depend on the particular facts.

Beyond the person's control

The Court considered that whether something was 'beyond the person's control' was a reference to whether it was 'something which the person could have done something about'. It applied the reasoning from *Secretary to the DEETYA v Ferguson*[4] which found that the test was not so artificial as to exclude attributes of the person, such as illness or state of mind, but did not extend to an entirely internal matter such as simply forgetting to act.

The Court decided that whether a particular matter was beyond a person's control was a question of fact in each case and approved the use of a pragmatic, 'practical common sense approach' in previous cases. For example, the onset of the anxiety state in *Zoarder's* case was a change beyond the person's control.

Substantial

The Court considered that 'substantial' required the event to be 'of sufficient moment as to warrant that the primary self-support obligation imposed for a period of two years should not be insisted upon'.

The narrow question — knowledge of a change in the law

Finally the Court considered whether the particular change identified by the AAT in the *Secara* case, being a change in the Secara's knowledge of the law about the length of the waiting period, constituted a change in circumstances. The Court decided that it did not. This appears to have been founded on the transitional provisions of the amending Act containing the waiting period scheme of which s.739A(7) itself was a part. Those provisions required the application of the waiting period to people arriving after 4 March 1997. Consequently neither the application of the provision itself, nor its discovery could be characterised as a relevant change. Instead the Court said

that the circumstances in s.739A(7) related to facts, matters and events going to the person's capacity to be self sufficient and 'the reasons why that person no longer enjoys that capacity or should be relieved of the disentitling effect of those provisions'.

After Secara

Given the facts of the *Secara* case, which include the receipt of incorrect advice from the appropriate authorities about the length of the waiting period, the result of the matter was unfortunate for the people involved and those other people who received incorrect or incomprehensible advice during the initial implementation stages of the two-year waiting period policy. However, while no remedy could be found under the two-year waiting period scheme itself in the *Secara* case, one would expect the relevant government authorities to respond to detriment attributable to any erroneous representations. People in this position might consider requesting compensation for detriment caused by defective administration from the Departments that issued the incorrect information.

It is hoped that with improvements in administration and the quality of advice to intending migrants, we can expect fewer people to be disadvantaged by lack of information and that the number of people in positions similar to the Secara case will decrease.

For others, the decision requires the Department to at least ensure that its guidelines are consistent with the more generous and enabling approach to s.739A(7) which the case entails, as outlined above.

Even so, it remains possible that there will be people in circumstances for whom only an inevitable slide into illness will terminate the waiting period. As long as the potential for this situation continues, progress towards the repeal of the two-year waiting period provisions in respect of the emergency payment — special benefit — will be the measurement of fairness in our social security system.

Sandra Koller

Sandra Koller is Principal Solicitor Welfare Rights Centre, Sydney.

References

1. Migrants who fit the exception described in s.3 of the *Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures Act 1997* are not subject to the waiting period for payments affected by that Act.
2. *Chelechkov and Secretary to the DSS* (1998) 26 AAR 321; (1998) 3(3) *SSR* 28.
3. *Zoarder and Secretary to the DSS* (1998) 26 AAR 342; (1998) 3(3) *SSR* 27.
4. *Secretary, to the DEETYA v Ferguson* (1997) 76 FCR 426; (1997) 2(10) *SSR* 144.