to receive Austudy for the whole of 2002, rather than for the first semester only. This required an assessment of what was the allowable study time for the applicant's current course. This in turn depended on whether the final year subject could be considered a full year unit and, if so, whether the year-based subject must be 'in the current year' rather than in the future year for s.569H(3)(b) of the *Social Security Act 1991* (the Act) to apply.

The law

The progress rules for full time tertiary students are set out in s.569H which relevantly provides:

> **569H(1)** A person who is a full-time student in respect of a tertiary course satisfies the progress rules if:
>
> (a) in the case of a person who is enrolled in the course — on the day on which the person enrolled in the course; or
>
> (b) in the case of a person who is not yet enrolled in the course but intends to enrol in the course — on the day on which enrolments in the course are next accepted;
>
> the time already spent by the student on the course, or on one or more other tertiary courses at the same level as that course, does not exceed the allowable study time for that course.
>
> **569H(3):**
>
> The allowable study time for a course undertaken by a full time student ... is:
>
> (a) ...
>
> (b) if the minimum amount of time needed to complete the course as a full time student is more than 1 year and:
>
> (i) the student is enrolled, or intends to enrol, in a year long subject; or
>
> (ii) the student's further progress in the course depends on passing a whole year's work in the course;
>
> the minimum amount of time plus 1 year; or
>
> (c) in any other case — the minimum amount of time needed to complete the course as a full-time student plus half an academic year.

The Tribunal identified that the crucial question in this case was whether the applicant's situation on the day he enrolled fell within s.569H(3)(b) or (c). There being no dispute that the minimum amount of time needed to complete his Curtin course was four years, the allowable study time would be five years under s.569H(3)(b) or 4.5 years under s.569H(3)(c).

Findings

The Tribunal found that the proper interpretation of s.569H(3) is that the year-based subject or the years work progress test in s.569H(3)(b) must refer to the current enrolment period — not some future period of study.

With respect to s.569H(3)(b)(i), the Tribunal found that the reference to 'intends to enrol' is a reference to the situation dealt with in s.569H(1)(b) — where the person has not yet enrolled in the course but intends to do so — and concluded that it was not relevant to the applicant's current situation because he was not enrolled in a year long subject on his enrolment date.

As regards s.569H(3)(b)(ii), the Tribunal considered that the 'further progress' referred to is progress beyond the current enrolment period and therefore found that as the applicant's current enrolment was for semester-based subjects only his further progress in the course did not depend on passing a whole year's work in the course.

The Tribunal went on to consider, in the event it was wrong in its view, whether the fourth year dissertation units could be considered to be a year-based subject. The Tribunal found it could not be, for these reasons:

- the two discrete units identified in the course outline were to be undertaken in different semesters, each making their own contribution to the credit points that a student must gain to complete the course;
- within a stream, the two units are assessed separately on a semester basis, even though some of the work carried out in semester one may influence the final grade earned for the dissertation in semester two;
- a student would not be permitted to proceed to the second dissertation semester without making satisfactory progress in the first, even though this may be unlikely to occur very often;
- a student can take a 'break' between the two semesters, thus breaking the connection between the two subjects — at least in a temporal sense.

(Reasons, para. 25)

The Tribunal concluded that the applicant's situation fell within s.569H(3)(c) — which extended the minimum time for his course by half an academic year.

Formal decision

The AAT affirmed the decision under review.

[G.B.]

Special benefit: residence requirements; NZ citizens cannot claim special benefit

FILIPOVSKI and SECRETARY TO THE DFaCS
No. 2002/1148

Decided: 7 November 2002 by J. Dwyer.

Background

The Filipovskis, who are New Zealand citizens, arrived in Australia in July 2001 and claimed special benefit in August 2001. They moved to WA to assist their daughter who suffers from rheumatoid arthritis and depression. The Filipovskis expected to offer emotional help while being supported financially by the daughter, but due to her deteriorated condition she was unable to this. The daughter was unemployed. The Filopovskis were in their seventies and in extreme financial hardship with no way of supporting ourselves. Their initial claim for special benefit was refused as they did not meet the Australian residence requirements.

The issue

The issue was whether the Filipovskis were entitled to claim special benefit.

Legislation

Section 30 of the *Social Security (Administration) Act 1999* states:

> A claim for special benefit may only be made by a person who:
>
> (a) is in Australia; and
>
> (b) satisfies one of the following subparagraphs:
>
> (i) the person is an Australian resident;
>
> (ii) the person has a qualifying residence exemption for special benefit;
>
> (iii) the person holds a visa determined by the Minister to be a visa to which this subparagraph applies.

Section 729(2)(f) of the *Social Security Act 1999* (the Act) provides:

> **729(2)** The Secretary may, in his or her discretion, determine that a special benefit should be granted to a person for a period if:
>
> ...
>
> (f) the person:
>
> (i) is an Australian resident; or
>
> ...

(v) is the holder of a visa that is in a class of visas determined by the Minister for the purposes of this subparagraph.

'Australian resident' is defined in s.7(2) of the Act as follows:

7.(2) An Australian resident is a person who:

(a) resides in Australia; and

(b) is one of the following:

(i) an Australian citizen;

(ii) the holder of a permanent visa;

(iii) a special category visa holder who is a protected SCV holder.

Clarity of issues

The Tribunal noted that the precise nature of the issue altered during the review process. At the SSAT level the major issue discussed was whether the Filipovskis could rely on s.739A(7) of the Act to avoid the 104 week newly arrived resident's waiting period imposed by s.739A(1) and (5). The issue the Filipovskis expected to argue was whether there had been a substantial change in circumstances such that the waiting period would not apply. But at the hearing the Department submitted that the Filipovskis were not even entitled to claim special benefit under s.30 of the Administration Act. This had not been contained in the Department's Statement of Facts and Contentions. The Department stated that New Zealand residents can enter Australia at anytime without any visa and can stay indefinitely, but s.30 does not allow them to make a claim for special benefit. Consequently it was not appropriate for the Tribunal to consider whether a newly arrived resident's waiting period applied to the Filipovskis.

Entitlement to claim special benefit

Both s.30 of the Administration Act and s.729(2) of the Act contain a requirement that a person be an 'Australian resident' or, in the alternative, require recourse to a number of concepts which are defined in those Acts. In the definition of 'Australian resident' in s.7(2) of the Act it is not enough that a person resides in Australia. The person must also either be an Australian citizen or the holder of a specified visa. Similarly, where a person is not an 'Australian resident', the alternative means of qualification to claim (s.30 of the Administration Act) or to be granted (s.729(2) of the Act) special benefit require that the person either has a specified visa or, for s.30 of the Administration Act, have 'a qualifying residence exemption for special benefit'.

The Tribunal noted that the Filipovskis were not Australian citizens so to qualify as Australian residents under the definition in s.7(2) of the Act they would need to satisfy sub-paragraph b(ii) or b(iii). Each of the terms 'holder' and 'permanent visa' and 'special category visa holder' used in s.7(2)(b)(ii) and (iii) are defined in s.7(1) of the Act by reference to the *Migration Act 1958*. The term 'protected SCV holder' is defined in s.7(2A)–7(2D) of the Act which require that the person have entered Australia before 26 February 2001, except for s.7(2C) which requires entry before 27 May 2001. The Filipovskis did not enter Australia until 18 July 2001.

There was no evidence before the Tribunal that the Filipovskis had any class of visas determined by the Minister for the purpose of s.30(b)(iii) of the Administration Act or s.729(2)(f) of the Act.

'Special category visa' is defined in s.32 of the *Migration Act* and was a special visa for New Zealand citizens. If the Filipovskis had 'special category visas' and were each a 'protected SCV holder' they would have been Australian residents under s.7(2)(b)iii) of the Act. But because they arrived in Australia in July 2001 they could not be 'protected SCV holder[s]' (see s.7(2A) (2B) and (2C) of the Act) and thus could not meet the definition of an 'Australian resident'.

The Tribunal noted that s.729(2)(f)(v) of the Act does contain an alternative means of qualifying for a grant of special benefit, namely by being the holder of a visa determined by the Minister for the purposes of the subparagraph. But there was no evidence that the Filipovskis held any of the specified visas.

The Tribunal referred to s.30(b)(ii) of the Administration Act and noted there was no definition of the term 'qualifying residence exemption for special benefit'. The only similar definitions are of 'qualifying residence exemption' in s.7(6) and s.7(6AA) of the Act but they specifically do not cover special benefit.

> The complexity of the concept of Australian residence for social security purposes seems incomprehensible. It appears that there is no longer such a thing as a 'qualifying residence exemption for the special benefit' ... If the term has no possible application then sub-paragraph 30(b)(ii) of the Administration Act should be omitted ... Further, the concept of s.30 of the Administration Act is unusual. It restricts the making of a claim for special benefit to certain persons but ... it is basic to the training of counter officers within the department and Centrelink that any person can lodge any claim. That was the tenor of the evidence received in Baats and Secretary, Department of Social Security (1986) 10 ALD 274 ... The question is rather one of entitlement to payment on a claim. It would be difficult to see how s.30 of the Administration Act could be implemented in its present form.

(Reasons, para. 32-33)

The Tribunal noted that there was little awareness of the residence requirements of s.30 of the Administration Act and s.729(2)(f) the Act, even by Centrelink decision-makers and the SSAT. The Tribunal commented that the Filipovskis could not be expected to know that they were not entitled to lodge a claim or that counter officers would know who may or may not make a claim for special benefit, at the time when a request is made for a special benefit claim form. 'Consideration should be given to amending s.30 of the Administration Act in a number of respects' (Reasons, para. 34).

The Tribunal expressed regret for the Filipovskis for the nature of the hearing and the shift in reasoning. The Tribunal noted that the Department had been unable to explain why New Zealand citizens, who are entitled to arrive here without any requirement for visas, should have less entitlement to special benefit than new arrivals from other countries.

The Tribunal concluded that the application of s.30 of the Administration Act meant that the decision to reject Filipovskis' claim for special benefit was correct. This decision was supported by reference to s.729(2)(f) of the Act:

> The combined effect of those two provisions and the definitions of the terms they contain in s.7(2A)–7(2D) of the Act seems to be that New Zealand citizens who entered Australia after 26 February or 26 May 2001 cannot be granted special benefit in any circumstances, unless they have become Australian citizens. Thus the newly arrived resident's waiting period of 104 weeks under s.739A of the Act has no application to them. This seems harsh and it is hard to understand why other arrivals should have the possibility of avoiding s.739(A), where they have suffered a substantial change in circumstances as referred to in s.739(A)(3), but New Zealand citizens have no possibility of obtaining special benefit in any circumstances.

(Reasons, para. 45)

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]