

Waiting for a fair go...

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Newly arrived Australian residents are facing hardship under the two-year waiting period.



On 4 March 1997 the *Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Act 1997* (Cth) came into effect. That Act introduced a two-year waiting period for most newly arrived Australian residents¹ before they can access most social security payments² other than Family Payment. However, the responsible government departments failed to properly advise many people already in the migration process that they would receive no adequate income support on arrival in Australia while they looked for work or undertook English language tuition, for which pre-payment was compulsory. The result was that in mid-1997 community agencies in Sydney and Adelaide, began to see a number of newly arrived Australian residents who had no source of financial support at all.

The clients seen by the Welfare Rights Centre, Sydney, had a number of common features:

- they were skilled migrants with high level qualifications or work experience and believed that this would assist them to readily obtain employment in Australia, even if not in their field of expertise;
- they had waited for a prolonged period, usually over two years, for their migration application to be approved;
- their experience of the migration process had been that it was very expensive;
- Australian officials and reliable, authorised information about Australia had been difficult to access;
- being part of the skilled migration program, they had no sponsor or close family or friends in Australia prior to arrival;
- they were unable to bring adequate sums of money from their country of origin to last for two years because of currency restrictions or poor exchange rates in comparison to Australia which meant it would take a lifetime to save such a large sum;
- subsequent to arrival in Australia they discovered they were unable to obtain employment within a reasonable period and also unable to receive social security assistance when their funds ran out. Some then suffered a deterioration in either mental health due to anxiety or depression or physical health due to malnourishment.

Special Benefit

Unlike waiting periods imposed for social security payments in the past, such as the six-month waiting period for Newstart Allowance, the new two-year waiting period also covered Special Benefit. Special Benefit is the final layer of the social welfare safety net. It is a discretionary payment made only when no other payment is available and the claimant can demonstrate that they are 'unable to earn a sufficient livelihood for the person and the person's dependents (if any) because of age, physical or mental disability or domestic circumstances or for any other reason'.³ In short, a person must be in very difficult circumstances to receive Special Benefit. Owing to its income test, the rate payable to a

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person in receipt of special benefit is lower than the amount they might receive if eligible for another payment. A couple would receive only \$165.55 each a week in Special Benefit (including rent assistance).

Prior to the introduction of the two-year waiting period, people affected by waiting periods for other payments could claim Special Benefit but only in the event that they were suffering severe financial hardship and had followed up all avenues reasonably open to them to alleviate their plight. Any sponsor or person who had signed an assurance of support had to be approached for assistance and shown to be unable or unwilling to assist before payment would be made. A person who signed an assurance of support had an incentive to assist where they could as they were required to repay to the Commonwealth any Special Benefit received by the person covered within their first two years in Australia. Consequently, only a small proportion of Special Benefit recipients were newly arrived Australian residents.⁴

The effect of extending the two-year waiting period to Special Benefit has been that those new Australian residents who do not have sponsors, assurers or very large financial reserves and who cannot readily find employment may become destitute with no way out.

Exception — 'substantial change in circumstances beyond person's control'

There is an exception to the two-year waiting period which enables Special Benefit to be paid to a person who 'has suffered a substantial change in circumstances beyond the person's control'.⁵ However, both the wording of this exception and restrictive departmental guidelines⁶ led to decision makers initially failing to apply the exception in a manner providing the broadest benefit as befits a provision contained in beneficial legislation.⁷

The Chelechkov case

In February 1998 the President of the Administrative Appeals Tribunal (AAT) decided the first of a number of appeal cases run by the Welfare Rights Centre concerning the scope of the exception.

The facts

The case of *Chelechkov and Antipina and Secretary, Department of Social Security* (unreported, AAT, 18 February 1998) concerned a family from Russia in which the husband and wife were both qualified in the computing field. The Chelechkov family applied to migrate to Australia in 1992. The family was granted permanent residency in December 1996 and was required to enter Australia by 24 July 1997.

The Chelechkov family saved \$US2200 which was almost seven months salary and had made inquiries which led them to believe that they would obtain a loan for their air fares which would not require repayment until after they had arrived in Australia. Further, all available sources of information in Moscow, such as Australian newspapers at the Embassy and a private information service, indicated that there were jobs in the computing field in Australia. Relying on this information, the family gave up their flat in Moscow and surrendered their internal passports. This was necessary in order to obtain external passports. After doing this they discovered that the agency from which they had expected to obtain the loan for the air fares had ceased operating in Moscow and they had to use most of their remaining funds on the air fares. By the time they arrived in Australia the

Chelechkov family had \$A543. They went to the Department of Social Security and applied for Special Benefit but were only paid the Family Payment for their son. Both husband and wife looked for all types of employment but found that their English language skills needed improving before they could obtain employment. They knew no-one in Australia and, were it not for the help of the St Vincent de Paul Society, would have been completely homeless.

With their visa the Chelechkov family had received a letter which said that:

generally, newly arrived residents must wait 26 weeks before they can receive most payments from the Australian Department of Social Security. Legislation is currently being considered to extend this waiting period to two years.

The letter then gave telephone numbers for the Department of Social Security which could only be accessed from within Australia.

The letter went on:

The law introducing the two-year waiting period has not yet been passed, but if it is passed within 26 weeks of your arrival in Australia it will apply to you. In that case, you will not be able to get such payments as Job Search Allowance, Parenting Allowance or Partner Allowance until two years after your date of arrival. You will, however, be able to apply for Family Payment and have access to Medicare within the two-year period.

The Government has already introduced new rules for payment of special benefit during a waiting period (26 weeks or two years). Payment can only be made if a person's circumstances change after arrival in Australia, if the change is beyond their control and unforeseen and as a result of that change they are in severe financial hardship.

Not only was much of the above information wrong but it was unfathomable by anyone not familiar with the lexicon of social security entitlements. The letter was incorrect in that Job Search Allowance no longer existed; there was no 26-week retrospectivity for the payments named; and the law regarding special benefit was not changed as described. Further, the letter did not explain the extent of any of the entitlements referred to. It did not explain that Family Payment is not a full income support payment but just an additional amount to help with children; that the two-year waiting period extended to all relevant social security payments and that no other forms of assistance other than social security and limited emergency relief from charities was available in Australia.

Information about employment prospects simply stated that:

the visa provides no guarantee of employment in Australia, nor does acceptance of qualifications for migration purposes. Employment opportunities in some occupations are limited.

This information was little more than a disclaimer. It was adequate to indicate that a person might not initially enter the occupation for which they are qualified at the level appropriate to their experience, but it was inadequate to warn a person of the likelihood of suffering a prolonged period of complete unemployment as experienced by many newly arrived Australian residents.

The decision

In relation to the Department's guidelines, the AAT said that where a case fell within those guidelines there was a strong argument in favour of finding that a substantial change in circumstances had occurred. However, where the case fell out-

side the guidelines the decision maker must still decide on the merits of the matter whether such a change has occurred.

The Department argued that the relevant circumstances had to occur after arrival in Australia. The AAT decided that the relevant change in circumstances must be responsible for the person's state of poverty in Australia but there was no warrant to restrict this to changes occurring only after arrival in Australia. In the Chelechkov family's case the principle 'change' was the inability to obtain the loan for the air fares. Particularly relevant was the fact that this change occurred after the family was irretrievably committed to migration, having handed in their internal passports and given up their flat. It is a question of fact whether at the time the change occurs the person had a 'realistic choice as to whether to continue with the migration or not'.

The Department also argued that this change was not 'substantial'. Although it significantly reduced the family's funds, they did not have sufficient funds to manage in Australia for two years at the outset. The AAT rejected this approach taking into account the fact that the Chelechkov family had made reasonable inquiries about life in Australia; that, through no fault of their own, they held unrealistic expectations; and that they had no clear information about the two-year waiting period. The President said:

... it must be remembered that many migrants... come from countries where the cost of living is very much lower than it is here. To tell them merely that they will need to have the resources to maintain themselves for two years does nothing to prepare them for the reality of life in this country.

Given the beneficial nature of the *Social Security Act* and basic fairness, the test of what constitutes a 'substantial' change requires a subjective element. The AAT decided that, standing in the shoes of the Chelechkov family, they had made a reasonable assessment at the time that they had enough funds for the first six months in Australia and reasonably believed they would obtain employment within that period. Thus the loss of those funds was 'substantial'. It was accepted that the loss was beyond the family's control.

For the Chelechkov family it was also argued that the depletion of funds itself could be a substantial change. The AAT indicated that it was possible that depletion of funds could be a relevant change but, unless the amount involved was larger than in this matter, it could not be described as 'substantial'. The AAT also indicated that it was more likely that consideration would be given to the cause of any depletion than the depletion itself. The AAT also said that it was possible that a change in employment expectations might constitute a substantial change in circumstances, where those expectations resulted from misleading advice rather than merely failing to attempt to obtain information, but it was unnecessary to determine that issue in this case.

Other cases

Since the *Chelechkov* decision there have been seven further decisions made by the AAT, three of which were made by the President. Five of the eight decisions have been successful for the people affected by the waiting period. Another was partly successful.⁸ These subsequent decisions follow the *Chelechkov* approach. The President's second decision adds to this approach. In that case the head of the household had become so anxious about his financial position after the family's funds of \$3500 were expended that his employment prospects were detrimentally affected. The family was from Bangladesh and unable to obtain answers to inquiries about Australia from the local consulate officials. The AAT

decided that the change in health was a substantial change in circumstances beyond their control.⁹

The President's third decision concerned a family who were given misleading advice by migration authorities that the waiting period would only last six months. The President found that the discovery of the true situation upon arrival in Australia and consequent financial hardship was a 'substantial change in circumstances'. The change was 'beyond their control' because it was not the result of mere wishful thinking or a failure to make appropriate inquiries. The Department has appealed this decision to the Federal Court.¹⁰

Law reform still necessary

Other families have not been so fortunate. The requirement that a person suffer a substantial change in circumstances beyond their control does not leave much room for people who arrived poor as a result of simple ignorance, as the finding of a 'substantial' change can be difficult in these cases.¹¹ Still these are people encouraged and accepted by the skilled migration program and who therefore ought to be treated as equal to all other Australians. It is wrong to require people to suffer to the point of malnutrition or mental illness before assistance is given. It is also wrong that children suffer for a single error of judgment of their parents. Sadly, these effects have been seen by staff at the Welfare Rights Centre, Sydney. For these reasons the law should be amended so as to remove the two-year waiting period from the Special Benefit provisions of the *Social Security Act 1991*.

References

1. Those unaffected are set out in s.3 of the *Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Act 1997* (Cth), and include refugees and certain family members of refugees, Australian citizens and people who have lived in Australia as permanent residents for more than two years.
2. Payments not subject to the two-year waiting period are Age Pension, Sole Parent Pension, and Disability Support Pension. However, each of these already had residence-based limitations on qualification.
3. Section 729(2)(e) *Social Security Act 1991*.
4. Only 4.9% of Special Benefit recipients in 1996 received Special Benefit during the newly arrived resident's waiting period for Newstart Allowance before the two-year waiting period was introduced. Source: Department of Social Security 'DSS Customers - a statistical overview', 1996, Table 46.
5. Section 739A(7) *Social Security Act 1991*.
6. On 19 March 1997 the Minister introduced Guidelines in the form of a disallowable instrument for the exercise of this discretion. When these were disallowed by the Senate on 25 June 1997, the Secretary of the DSS introduced similar guidelines in the form of departmental policy.
7. See, for example, *Secretary, Department of Social Security v Cooper* (1990) 26 FCR 13 in respect of beneficial interpretation of *Social Security Act* provisions.
8. See *Shaikh and Secretary, Department of Social Security*, AAT, decided 8 April 1998, Sydney. In that case the tribunal indicated that a subsequent claim by the applicants should be considered favourably owing to the fact that the applicant had been led to believe a six-month waiting period might apply.
9. *Zoarder and Secretary, Department of Social Security*, AAT, decided 18 February 1988, Sydney.
10. *Secara and Secretary, Department of Social Security*, AAT, decided 12 March 1998, Adelaide.
11. See *Secretary, Department of Social Security and Singh and Pal Kaur*, AAT, decided 2 March 1998, Sydney.