

Unequal Treatment for Newly Arrived Migrants Under the Social Security Act

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Recent changes to social security laws have led to a degradation in the living standards of certain newly arrived Australian residents to a level below that ordinarily acceptable in the Australian community. The purpose of this article is to alert the reader to issues arising from the implementation of the two year waiting period for newly arrived residents and the extension of the waiting period policy to special benefit.

There have long been requirements relating to Australian residence which have affected qualification for social security payments. The precise requirements differ depending upon the type of payment. Generally, a person must be a permanent resident of Australia or the holder of one of a number of specified visa types in order to receive a payment. The provision of payments to persons from countries with which Australia has a reciprocal agreement governing payments will be affected by the terms of that agreement. Qualification rules for payments may also require continuing presence in Australia, certain periods of presence in Australia or presence in Australia at the time particular events occur, in order to receive the payment.

As there is a long and complex history of differentiating between Australian residents on the grounds of length and nature of residence in determining access to social security payments, it is beyond the scope of this article to adequately address issues of the origin and appropriateness of residence criteria for all payments. This article will deal with special benefit as this payment has been the payment of last resort, made to persons in need who did not qualify for other social security payments.²

Special benefit

In comparison to other payments, the residence requirements for the payment of special benefit have been the least stringent. The rationale for this can be found in the

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2 Kirkwood, *J Social Security Law and Policy*, Law Book Company, Sydney, 1986 at 96.

purpose of the payment which was intended to be a discretionary payment paid to those in need who did not fall within other designated categories of persons for assistance under the *Social Security Acts* of 1947 and 1991 (Cth).³

In addition to the residence requirements and the requirement that no other social security payment is payable to the person, s729(2)(e) of the *Social Security Act* 1991 (Cth) gives the Secretary the discretion to grant payment of special benefit if:

the Secretary is satisfied that the person is 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.⁴

Like other aspects of the *Social Security Acts* 1947 and 1991 (Cth), the residence requirements for payments have been the subject of a number of amendments in response to the government policy of the day. Over time changes have been both generous and limiting to claimants.⁵ However, in the last decade residence requirements have generally become more stringent.

From 1991 persons present in Australia awaiting determination of refugee applications could no longer receive special benefit.⁶

New migrants arriving in Australia after 1 January 1993 were subject to a waiting period of 26 weeks prior to receiving the then "Jobsearch allowance" payment while unemployed.⁷ During this period, it was possible to receive the special benefit provided the person satisfied the Secretary of the Department of Social Security of their inability to earn a sufficient livelihood. Consequently, while newly arrived migrants could not

3 *Ibid.*

4 There are other qualification requirements for special benefit directed at preventing persons disqualified from other payments for specified reasons attaining qualification for special benefit which do not concern residence. See s 792 *Social Security Act* 1991(Cth).

5 For example, pensions, but not benefits or allowances, became generally portable (payable to persons travelling or living overseas) in 1973. See Kirkwood *op cit* at 105. Subsequently, the extent of portability for pensions has been significantly curtailed and, with the exception of age pensions and severely disabled persons in receipt of disability support pension, most pensions are portable for 12 months. In 1995 administrative requirements relating to departure certificates from the Department of Social Security became less onerous.

6 Carney, and Hanks, *P Social Security in Australia*, Oxford University Press, Melbourne, 1994 at 45.

7 This payment has since been amalgamated with the "Newstart allowance".

readily access unemployment payments without establishing an inability to earn, migrants, like other persons without a sufficient livelihood, would not be left destitute.

Two year waiting period

The *Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures Act 1997* (Cth) has effectively removed the "safety net" of special benefit for migrants arriving or attaining permanent residence after 4 March 1997 and to whom the Act applies. That Act introduced a two year waiting period for all social security income support payments except the age pension, sole parent pension and disability support pension (which already had residence-based qualification criteria) and the family payment.

The Second Reading Speech provided the following rationale for the expansion of migrant waiting periods for social security payments:

The changes to the newly arrived resident's waiting periods in this Bill are modest and reasonable and will ensure that taxpayers only pay for those in need. As an adjunct to the changes, the Government is reviewing sponsorship arrangements with a view to ensuring that anyone who sponsors a migrant should provide financial support for that person before any calls are made on the taxpayer.⁸

It can be seen from s 729(2)(e) that special benefit was already targeted towards those most in need prior to the imposition of the two year waiting period. In order to establish qualification for special benefit in practice it has always been necessary that the person demonstrate that they have exhausted all other reasonable avenues of support.⁹ The extension of the waiting period policy to special benefit was unnecessary to meet the stated objective of limiting payments to those in need. Further, the affect of providing no assistance to persons in dire need is counter productive in the long term as it prevents the persons from effectively participating in and eventually contributing to Australian society.

Persons affected

Persons arriving under refugee or humanitarian programs, Australian citizens, persons who have been permanent residents of Australia any time for a continuous

⁸ Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996, Second Reading Speech, 3.

⁹ See for example *Te Velde and Director-General of Social Services* (1981) 3 ALN N111.

period of two years and the family members of persons in each of these categories, are not affected by the two year waiting period.¹⁰

However, a number of independent migrants who have been seen by the Welfare Rights Centre, Sydney, have been seriously affected by the two year waiting period.¹¹ The Centre has acted for persons suffering health problems consequent upon lack of nutrition because they have been unable to afford to purchase adequate food. Depressive illnesses are also becoming more common among the Centre's clients who are subject to the two year waiting period. Independent migrants appear to be particularly vulnerable as they frequently have no established support or information sources in the form of family and friends.

A number of cases dealt with by the Centre have the following features in common:

- The client affected applied for migration as a skilled migrant some years prior to the announcement of the policy.
- Clients affected are unable to bring adequate funds for two years from their country of origin owing to that country having a much weaker currency than the Australian dollar.
- Most clients have held a rosy but genuine view that they will obtain some kind of employment in Australia, even if not immediately in their usual field, shortly after arrival. Some clients have explained that they thought this because they had been selected for migration to Australia on the basis that they are skilled and also on the basis of information available in their country of origin regarding Australia.
- Subsequent to arrival in Australia the client was unable to obtain employment and funds brought with them were quickly expended on basic living expenses. Thereafter they experienced a gradual deterioration in their health.

Exception for substantial change in circumstances beyond the person's control

The only exception in the Act to the two year waiting period for persons affected is the payment of special benefit where, in addition to meeting the usual criterion of

10 See s 3 of the *Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Act 1997* (Cth) for persons to whom the waiting period does not apply.

11 The Welfare Rights Centre, Sydney, is a community legal centre which provides legal advice and advocacy to persons with social security problems.

inability to earn a sufficient livelihood, "the person, in the Secretary's opinion, has suffered a substantial change in circumstances beyond the person's control."¹²

The Act provides for the Minister to make guidelines concerning the exercise of this discretion. Ministerial guidelines were gazetted on 21 March 1997 and were subsequently disallowed by the Senate on 25 June 1997.¹³ In the absence of new Ministerial guidelines, the provision is administered pursuant to Departmental policy. The Departmental policy states that independent (non-sponsored) migrants are expected to have the means to support themselves for two years at the time of their arrival in Australia or attainment of permanent residence whichever is the later. The policy also sets out a number of situations in which the Secretary would be satisfied that a substantial change in circumstances has occurred including the withdrawal of pre-arranged employment or the inability of a sponsor to provide support. It is policy that the special benefit will not be paid unless the substantial change occurred subsequent to arrival in Australia.¹⁴

The need to isolate a substantial change subsequent to arrival is particularly problematic. It is cruel and futile to wait until such a degree of deterioration in health is suffered that the change in a person's situation since arrival can be said to be substantial. The failure to provide assistance until that point can prevent the person actively seeking employment. Article 25 of the *Universal Declaration of Human Rights* states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The requirement that a substantial change be found would appear to require a person to establish more than circumstances beyond the person's control and thus conflict with the Article.

12 *Social Security Act 1991* (Cth) s 739A(7).

13 *Social Security (Access to Special Benefit by Newly Arrived Residents) Guidelines 1997* dated 19 March 1997

14 Department of Social Security National Instructions No. CB970139 "Payment of Special Benefit in the two year newly arrived resident's waiting period" and No. CB 970167 "Special Benefit — Changes to policy guidelines".

Advice of change

Included in the notice of grant of a permanent residence visa there is usually a letter from the relevant Australian Embassy containing advice relating to migration to Australia. The letter includes a statement that a two year waiting period is proposed for a specified list of social security payments, specifically excepting family payment, and that, if introduced, the waiting period would affect the recipient. In respect of special benefit, the standard letter provided to clients of the Welfare Rights Centre states:

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.

Clients report that they have not understood this letter to mean that they could be in a position in which they will not have sufficient funds to purchase adequate food despite making all efforts to obtain employment and still remain ineligible for assistance of any kind. The names of the specified payments have little meaning for persons unfamiliar with the Australian social security system and clients are often unaware that family payment is not adequate to provide basic food and shelter for a whole family in Australia. Given the very serious effect of the two year waiting period, it is a matter of concern that more explicit information was not given to persons already in the migration process.

Conclusion

It is the writer's conclusion that unacceptable and considerable hardship has arisen in consequence of the application of the two year waiting period to the provision of special benefit. This is not only because the language used for the exception in s 739A(7) is unnecessarily restrictive, or because arrangements for informing persons already in the migration process were inadequate, but principally because the underlying policy behind special benefit, being the provision of a safety net for a broad range of possible circumstances in which a person cannot earn a sufficient livelihood, is incompatible with predetermined restrictions other than the requirement that the person has exhausted all other reasonable sources of support. It is inevitable that predetermined exclusions from the payment of special benefit will result in the payment being unavailable to those in need but whose need was not anticipated.

Unless a broad discretion to provide assistance such as the special benefit is restored for all Australians, we cannot expect to be protected from the sight of the malnourished. This can only diminish us all. ●