

7. Social Security - Two Year Waiting Period for Newly Arrived Migrants

Relevant Question: 16

This issue responds to question 16 of the list of issues to be taken up in connection with the consideration of the Australia's third periodic report to the CESCR.

Summary of issue

- Recent migrants to Australia face a two year waiting period before they are eligible to receive most social security payments.
- The two year waiting period also applies to the Special Benefit, a payment intended to alleviate situations of severe financial hardship, where a person is not eligible for other income support payments.
- Newly arrived permanent residents can be granted the special benefit *only* if they can demonstrate a substantial change in their circumstances that is beyond their control.

Relevance to the ICESCR

- Article 9: Right to social security and social insurance
- Article 2: Full realisation of rights under the ICESCR

The following section expands on this summary under these headings:

- The two-year waiting period;
- The two-year waiting period and domestic legislation;
- The government's response;
- Relevance to ICESCR – relevant articles of the Convention.

Social Security - Two Year Waiting Period for Newly Arrived Migrants

The two-year waiting period

Recent migrants to Australia are subject to a waiting period in relation to certain social security benefits under the Commonwealth *Social Security Act 1991*.

The Australian *Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Act 1997* amended the Social Security Act to create a two year waiting period for newly arrived residents before they are eligible to receive most social security benefits. These include Newstart, sickness, youth training, widow, partner, parenting, mature age allowances and Special Benefit payments.¹

The “special benefit” is a discretionary benefit which is available only to a person in severe financial hardship who is not able to obtain any other social security income support payment.² To be eligible, a person must also be unable to earn a sufficient livelihood for themselves and their dependants (if any) for various reasons specified in the legislation.³

Under section 732(1) of the Social Security Act, even though a person might otherwise be qualified for a special benefit, the benefit may not be payable for a number of reasons. These reasons include the case where a person is subject to a newly arrived resident's waiting period and that period has not ended.⁴

Newly arrived permanent residents can be granted the special benefit *only* if they can demonstrate a substantial change in their circumstances that is beyond their control.

In submissions to the Australian government, the Human Rights and Equal Opportunity Commission (HREOC) has stated that it shares the concerns held by migrant communities and welfare organisations about the effect that the denial of access to special benefits is having on some newly arrived residents. Some reports, and HREOC's recent consultations with members of immigrant and refugee communities, suggest that the operation of the social security two year waiting period is having a detrimental impact on the enjoyment of economic, social and cultural rights by some groups of newly arrived residents.

¹ *Third periodic report: Australia*. 23/07/98. E/1994/104/Add.22. (State Party Report), Implementation Of The International Covenant On Economic, Social And Cultural Rights, 15 June 1998.

² See sections 729(1) and (2) of the Social Security Act.

http://www.austlii.edu.au/au/legis/cth/consol_act/ssa1991186/index.html

³ *Ibid.*, section 729(2)(e).

⁴ See sections 732(1)(da), 739A(1) and (2), introduced by the Social Security Amendment Act.

The government's response

The government argues that:

Australia's social security system forms a vital part of the Government's social justice strategy. It provides income support for people who are retired, have a disability or medical condition that prevents them from working, are unemployed, have children in their care or are not in a position to care for themselves because of special circumstances.⁵

In relation to the two year waiting period, the government contends that, while new migrants to Australia must wait two years before having access to most social security payments, special benefit payments "are available to people who suffer a substantial change in circumstances for reasons beyond their control". According to the government, the two year waiting period policy "aims to ensure that migrants provide for their own support during their initial settlement period in Australia, rather than immediately relying on Commonwealth income support". The policy applies without discrimination as to race, nationality or ethnic origins to all migrants who arrive in Australia or are granted permanent residence on or after 4 March 1997.⁶

Relevance to ICESCR

Article 9: Right to social security and social insurance

Under article 9 of the ICESCR, States parties "recognize the right of everyone to social security, including social insurance".

Article 2: Full realization of rights under the ICESCR

Under ICESCR article 2(1), each State party agrees to take steps:

to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In General Comment 3, concerning the nature of States parties obligations under article 2(1), the CESCR addressed the meaning of the "progressive realization" of rights recognised in the Covenant.⁷ While the CESCR conceded that progressive realization of rights under the Covenant is a "necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights", it noted that the phrase must be read in context of the overall objective and raison d'être of the

⁵ *Third periodic report: Australia*, op. cit., paragraph 162.

⁶ *Ibid.*, paragraph 164.

⁷ CESCR General Comment 3, *The nature of States parties obligations (Art. 2, par.1)* : 14/12/90.

Covenant.⁸ That is to say, it must be read in context of the Covenant's objective "which is to establish clear obligations for States parties in respect of the full realization of the rights in question".

The CESCR noted that the Covenant:

thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.⁹

The CESCR also addressed the meaning of States parties obligations under article 2(1) to take necessary steps to realise the rights under the Covenant "to the maximum of its available resources". The CESCR noted that:

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.¹⁰

Under ICESCR article 2(2), States parties undertake to guarantee "that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, ... national or social origin, property, birth or other status".

⁸ Ibid., paragraph 9.

⁹ Ibid.

¹⁰ Ibid., paragraph 10.