children with her. After an unsettled period, they took up an offer of short term accommodation from a friend of the mother's.

The mother applied to the relevant Department (DILGEA) for refugee status. That application had not been processed by the time of the AAT hearing; but DILGEA had told her that it intended to recommend against a grant of refugee status.

The children applied for special benefit under s.729 of the *Social Security Act* 1991. The DSS rejected these applications; but, on their appeal, the SSAT decided that they should be granted special benefit at the rate applicable to a young person in receipt of job search allowance at the maximum non-independent rate. The DSS appealed to the AAT.

The legislation

The provisions of the *Social Security Act* 1991 dealing with eligibility for special benefit (s.729) are described in *Underwood*, which is noted in this issue of the *Reporter* — above.

However, other provisions of the Act were relevant in the present case, because the 2 Kumar children were attending primary school full-time.

Section 737(1)(b) disqualifies a full-time student who is not an 'SPB homeless person' from receiving special benefit.

Section 739 defines an 'SPB homeless person' as one who is not a member of a couple, does not have a dependent child, is not receiving continuous support from a parent or guardian or from a government agency and is not living at a home of a parent because neither parent will allow the person to live there or because of domestic violence, incestuous harassment or other such exceptional circumstances.

SPB homeless persons

The two children had been taken from their father's home because of his violence. They now lived, with their mother, in a flat rented and occupied by a family friend and the friend's husband. The children's mother paid no rent for this accommodation, although she cleaned the flat for them, and the occupants of the flat were not prepared to give her a key to the flat. They had made it clear to her that they regarded her stay there as temporary.

The AAT said that a 'home' imparted a sense of permanency and choice, and a place with which a person had some affinity. The flat was not the permanent place of residence for the children's mother; she had no real tenure and, accordingly, it could not be said that the flat was her home. It followed that the children did not live at the home of their mother or their father.

The AAT said that, although the children's mother carried out housework in return for accommodation in the flat, she was not providing 'continuous support' to her children because their survival depended on the charity of the occupants of the flat.

It followed that the 2 children were SPB homeless persons and so were not prevented from getting benefit by s.737(1)(b) of the 1991 Act.

Qualified for special benefit

As in *Underwood*, the AAT agreed with the SSAT that 2 children (who were Australian citizens) were qualified for special benefit, rejecting the DSS argument that they were not persons to whom a social security pension or benefit was not 'payable' (as required by s.729(2)(a) and (b) of the *Social Security Act* 1991). The AAT said that, in the context of s 729, 'payable' was equivalent to 'qualified'.

Discretion

The AAT also decided, for much the same reasons as in *Underwood*, that this was a proper case to exercise the discretion in favour of the children.

Rate of benefit

Again as in *Underwood*, the AAT agreed with the SSAT that the children should be paid special benefit at the rate applicable to a young person in receipt of the maximum rate of non-independent job search allowance.

Formal decision

The AAT affirmed the SSAT's decision.

[P.H.]

Overpayment: jurisdiction to consider waiver

SECRETARY TO DSS and POMERSBACH
(No. W89/287)

Decided: 19 December 1991 by P.W. Johnston.

Gaye Pomersbach received social security payments between November 1978 and October 1987. In January 1988 a delegate of the Secretary decided that these payments should not have been paid and that an overpayment of $55 285 should be recovered from Pomersbach.

Pomersbach phoned the DSS to arrange to repay by instalments and to query the amount of the overpayment.

In February 1988, Pomersbach's file was referred to the Director of Public Prosecutions, who instituted a prosecution against her. In July 1988 she was convicted of 11 charges under s.29B of the *Crimes Act* 1914 (Cth) of imposing on the Commonwealth. She was sentenced to 2 years' imprisonment and an order was made that she make reparation to the Commonwealth of $53 135.

After Pomersbach's release from prison, the DSS wrote to her demanding payment of the full amount of $53 135. She challenged the amount of the overpayment and offered to pay $50 a month. The DSS rejected that offer and told her that it would recover $40 a fortnight.

Pomersbach then appealed to the SSAT, which decided that part of the overpayment which had been received between November 1978 and November 1984 should be waived because she had been subjected to considerable domestic violence in that period.

The DSS appealed to the AAT, seeking to have the SSAT decision set aside on the basis that the SSAT lacked jurisdiction to consider the issue of waiver — because the decision under review had not involved that issue. The DSS also argued that the AAT could not consider the merits of the question of waiver.

The AAT dealt with these jurisdictional issues in the present case.

The legislation

Section 246(1) of the *Social Security Act* provided that an overpayment made to a person in consequence of the person's false statement or breach of the Act was a debt due to the Commonwealth.

Section 246(2) allowed the recovery of any overpayment by withholdings from any current payment being made by the DSS.

Section 251 gave the Secretary a discretion to write off or waive recovery of debts arising under the Act, or to allow repayment of such a debt by instalments.

Section 177 allowed a person affected by a decision of an officer under the Act to apply to the SSAT for review of the decision. According to s.179(1), an

appeal to the SSAT could be made in writing, orally in person or orally over the telephone.

Section 205(1) provided that, where a decision had been reviewed by the SSAT, application could be made to the AAT for review of that decision.

Section 43(1) of the *AAT Act* 1975 gave the AAT, for the purposes of reviewing a decision, 'all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'.

The decision under review

The DSS argued that, as the delegate had not addressed the decision of waiver when deciding to recover the overpayment, the SSAT and the AAT could not deal with that issue. The decision under review, which defined the jurisdiction of the SSAT and the AAT, was merely the decision to recover the overpayment.

However, the AAT found that, in deciding that the overpayment should be recovered, the delegate had implicitly decided not to waive recovery: '[I]nstitution of recovery action effectively involved a decision not to waive', the AAT said: Reasons, p.14.

The AAT also rejected a DSS argument that the delegate had lacked authority to decide on the issue of waiver (because of the limited terms of the relevant delegation), and that this lack of authority limited the powers of the SSAT and the Tribunal on review.

The AAT referred to *Re Watt and Secretary, Department of Transport* (1978) 1 ALD 242, where the Tribunal had said that a Department's division of the decision-making process into components ('for reasons of departmental convenience and efficiency') did not limit the powers of the AAT 'to reviewing only that component of decision-making processes exercised by the delegate of the Secretary who had the final power of decision'.

The AAT also referred to *Ibarra* (1991) 60 *SSR* 822, where the Tribunal had said that a defect in a delegation of power to an official would not prevent the Tribunal substituting a decision the Secretary could make.

Citing sub-s.43(1) of the *AAT Act*, the AAT said that, once it had assumed jurisdiction in a matter, it had the 'full panoply of the Secretary's powers' and could exercise those powers notwithstanding any limits imposed on the delegate who made the decision under review. The AAT concluded:

> 'The applicant's failure to take appropriate action within the Department cannot shield the "non-decision" from review. It amounted to a constructive refusal to decide and should be found to be such having regard to s.3(3) of the AAT Act . . .'

(Reasons, p.19)

Section 33 of the *AAT Act* provides:

> 'A reference in this Act to a decision includes a reference to —
>
> . . .
>
> (g) doing or refusing to do any act or thing.'

The AAT also observed that the Secretary had taken action which brought the overpayment within the ambit of the relevant statutory provision, s.251(1) of the *Social Security Act* 1947, by deciding to recover the overpayment through deductions of $40 a fortnight from Pomersbach's family allowance payments; and Pomersbach had raised the question of waiver in her dealings with the DSS and in her appeal to the SSAT.

It was not appropriate, the AAT said, to require people appealing to the SSAT 'to make their application in terms appropriate to pleadings in a judicial proceeding':

> 'Such a view is incompatible with the tenor of the Act, particularly in relation to appeals. Section 179(1) of the Act, for example, allows an appeal to the SSAT to be instituted in a number of informal ways including by phone. Parliament must be taken to have understood that many of the persons who would be applying to the SSAT, and in turn to the AAT, will be representing themselves, be unassisted by legal advice or representation, and in many instances may well be illiterate or inarticulate.'

(Reasons, p. 18)

In any event, the AAT said, there was —

> 'an intimate link between (i) the exercise of the power to decide to raise and recover an overpayment under sub-ss. 246(1) and (2) and (ii) the power to exercise waiver under s 251.'

(Reasons p. 19)

That link was so close that, when the AAT was reviewing a decision to recover an overpayment, it could exercise the power to waive conferred on the Secretary by s. 251 — as the AAT had decided in *Smitherman* (1991) 60 *SSR* 818. This broad view of the elements which made up the decision under review was supported, the AAT said, by the Federal Court decisions in *Hangan* (1982) 11 *SSR* 115; 45 ALR 23 and *Hales* (1983) 13 *SSR* 136; 47 ALR 281.

Jurisdiction following a reparation order

The AAT noted that, in the present case, the District Court of WA had exercised the power conferred by s. 21B(1)(c) of the *Crimes Act* 1914 (Cth), and ordered Pomersbach to make reparation to the Commonwealth following her conviction. A certificate embodying such an order is, by s.21B(3) of the *Crimes Act*, enforceable as a final judgment of the court.

The DSS argued that the SSAT and the AAT were precluded from making a decision to waive the respondent's debt which would deny the efficacy of the reparation order or amount to a collateral attack on the order, or which could interfere with the statutory responsibility of the Director of Public Prosecutions to co-ordinate and supervise civil recovery of debts arising under reparation orders.

The AAT rejected these arguments: any decision to waive would apply to the debt which arose under s.246(1) of the *Social Security Act* 1947 and would not diminish the force of the reparation order.

The common basis of fact on which the debt arising under s.246(1) and the reparation order rested might lead to the result that any waiver of the former would provide Pomersbach with a means of resisting enforcement of the reparation order. But that did not constitute an attack on the reparation order.

Although the exercise of the waiver power by the SSAT or the AAT might cause problems of co-ordination between different methods of recovery and between different government agencies, the AAT could not refuse a person's statutory right to have the exercise of that discretion determined.

Ruling

The AAT ruled that it had authority to proceed to consider the issues including, if appropriate, waiver, for the purpose of deciding whether or not to exercise the s.251 discretion.

[P.H.]