According to Jenkinson J, the AAT made a further error of law when it decided that the relationship between the children and their father would be interfered with if Parsons' income was taken into account. The legislative scheme in the Act did not contemplate either fostering or impairing the development of, or the maintenance of, an emotional or economic relationship between the children and their parent. However, there may be circumstances where it would be appropriate to exercise the discretion pursuant to s.24(2)(d), where such a relationship would be impaired. In this case there was no evidence of that occurring, either at the time of the AAT's decision or in the immediate future. Therefore, there was no justification for the AAT's findings.

> 'There must be in the circumstances of the particular case some harm, or risk of harm, to the welfare of the children, or, perhaps, of the person having their care and control, attendant upon abstention from exercise of the power conferred by sub-section 24(2) before special reasons can be found, in my opinion.'

(Reasons, p.18)

Finally, the Court noted that the AAT's finding of a special reason in the particular case involved exercising a wide discretion in order to effect its view of the justice of the case. It was the Court's opinion that

> '"The scope and purpose" of sub-section 24(2) is to enable the welfare of dependent children by family payment subvention to be advanced in circumstances where the application of (the income test) would not advance, but would impair their welfare.'

(Reasons, p.19)

Formal decision

The Court ordered that the appeal be allowed and the decision of the Administrative Appeals Tribunal and the Social Security Appeals Tribunal be set aside, and that the decision of the authorised review officer be affirmed.

[C.H.]

SSAT decisions

Important note: Decisions of the Social Security Appeals Tribunal, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decision are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.

Newstart allowance: failure to enter case management activity agreement, link between failure and cancellation

AA and SECRETARY TO DSS

Decided: 26 July 1996

AA was in receipt of newstart allowance and had entered into a case management activity agreement. A term of the agreement required him to attend interviews with his case manager when asked.

A letter was sent to him requiring him to attend an interview with his case manager to discuss his progress and 'if necessary' to review his agreement. He did not attend the interview or a further such interview specified in a second letter. He was notified that he was taken to have failed to enter a new case management activity agreement when required, and his newstart allowance was cancelled.

AA had been absent from his home when the letters were sent and the interviews were to take place. This absence was indefinite but ultimately extended over several weeks. He arranged for a friend to keep mail safe for him but not to forward it to him. He argued that his efforts to find work over the same period (which were ultimately successful) should be weighed against his failure to attend the interviews.

Was there a requirement to enter a new case management activity agreement?

Under s.45(5)(c) of the *Employment Services Act,* to qualify for newstart allowance a recipient must be prepared to enter a further case management activity agreement when required. Section 44 provides that a person may be taken to have failed to enter such an agreement by reason of a failure to attend interviews or to respond to correspondence. These provisions applied to AA. However, the SSAT held that the letter requiring him to review his agreement 'if necessary' was not sufficiently clear to require him to definitely enter a new agreement. Therefore, he could not be taken to be unprepared to enter a new agreement when required or to have failed to enter an agreement.

Did AA take reasonable steps to comply with the terms of his current agreement?

Although the letters may not have required AA to enter a new agreement, they did require him to attend interviews with his case manager. Under a term of his current agreement, he had to attend such interviews when required. His failure to attend the interviews was a failure to comply with that term.

Under s.45(5)(b), to qualify for newstart allowance a recipient must take reasonable steps to comply with the terms of their case management activity agreement. Under s.45(6), a person is taking reasonable steps to comply unless the main reason for non-compliance was not within their control, and the circumstances of their failure were not reasonably foreseeable by them. The SSAT held that the main reason for AA's failure to comply was his failure to ensure that mail was forwarded to him promptly, or to alert his case manager to his temporary change of address. As both of these matters were within his control, he had failed to take reasonable steps to comply with the agreement.

The link between failure to take reasonable steps to comply and cancellation

The SSAT held that failure to take reasonable steps to comply with the agreement did not of itself justify cancellation; a number of procedural steps needed to take place first.

Under s.601(5) and (6) of the *Social Security Act* (which apply to case management activity agreements by virtue of s.45 of the *Employment Services Act)*, failure to take reasonable steps to comply with a term is a failure to satisfy the activity test. Section 624 of the *Social Security Act* provides that a failure to satisfy the activity test will mean new-

start allowance is not payable for the 'activity test deferment period'. Section 630B provides that the activity test deferment period will commence when written notice of its commencement is given to the recipient.

The SSAT concluded that no such notice had been given to AA. The statement (in the letter telling him he had failed to enter a new case management activity agreement) that newstart allowance 'will not be paid for a period' was not sufficient. Therefore, the deferment period had not yet commenced and newstart allowance had not yet ceased to be payable.

The SSAT noted the provisions of s.41 of the *Social Security Act* (which states that before a payment is payable to a person, that person must be qualified), but considered that it only operated in connection with initial grants, not possible cancellations. As the failure to comply only results in a loss of qualification at that moment, rather than for a defined period, retrospective cancellation would be difficult given the limits imposed by the provisions governing date of effect of adverse decisions. Cancellation for (in effect) loss of qualification would also render meaningless the provisions of the Act governing continuing effect of decisions, and the imposition of deferment periods (during which the allowance was not payable); this could not have been intended.

The SSAT, therefore, concluded that as payability had not yet ceased, newstart allowance could not yet be cancelled. It set aside the decision to cancel newstart allowance. However, it noted that the DSS could in the future cancel the allowance for the same breach, provided that an activity test deferment period was first imposed.

AUSTUDY: actual means test and when it applies

BB and SECRETARY TO THE DEETYA

The actual means test was introduced in 1996, as regs 12F-12U of the AUSTUDY Regulations. It was intended to deny AUSTUDY to students whose parents' or spouses' taxable incomes were artificially low compared to their actual financial position. If a student's parents or spouse were 'designated parents' or a 'designated spouse', then the actual means test applied. Under the actual means test, AUSTUDY was not payable if the combined expenditure and savings of the family exceeded a threshold calculated under a formula in the Regulations.

A parent becomes a 'designated parent' under reg.12L if, among other possibilities, they are self-employed. BB's mother became self-employed at the beginning of April 1996; previously she had been an employee of a real estate agent. BB had applied for and received AUSTUDY in 1996. When the DEETYA became aware of BB's mother's self-employment, it applied the actual means test. On the basis of information provided, it concluded that BB's family's expenditure exceeded the relevant threshold, and BB was not entitled to AUSTUDY. A debt was raised in respect of AUSTUDY that had already been paid.

On appeal, the SSAT held that BB's mother was only a 'designated parent' for the period that she was self-employed (from the beginning of April onwards). From January to March 1996, BB's AUSTUDY entitlement should be determined without reference to the actual means test. From April to December 1996, entitlement should be determined subject to the actual means test and the level of expenditure and savings of BB's family.

The SSAT sent the matter back to the DEETYA for recalculation of BB's entitlement to AUSTUDY for each of the 2 periods.

Job search allowance: arrears

CC and SECRETARY TO THE DSS

Decided: 6 June 1996

CC received AUSTUDY in 1994. He applied for AUSTUDY to continue in 1995 as he would be a full time student. He was enrolled for a full time workload originally but reduced this workload to part time by 20 February 1995. He did not notify DEETYA. Subsequently, DEETYA discovered his reduced enrolment and raised a debt as CC had not been entitled to AUSTUDY. After this, CC registered with the CES as unemployed on 4 August 1995, and claimed job search allowance on 18 August 1995.

Job search allowance was granted from 11 August 1995 (applying the one week ordinary waiting period rather than the longer education leavers waiting period). CC appealed against a refusal to backdate payments to when he ceased to be entitled to AUSTUDY, on the basis that he had not known what benefit to claim and had been looking for (part-time) work earlier in the year.

The SSAT held that CC was not qualified for job search allowance before 4 August 1995. To qualify for job search allowance under s.513(1)(c)(iv) of the *Social Security Act*, CC had to be registered with the CES. Section 520 allows a failure to register with the CES only if the failure relates to circumstances beyond the person's control. CC may not at the time have been aware what benefit he should have been receiving but his failure to advise AUSTUDY of his enrolment changes was in his control. Therefore, job search allowance could only be paid from 11 August 1995, following the ordinary waiting period

[M.D'A.]