said that a declaration or a statement which had a real and practical effect could be reviewed, even though it did not alter rights or impose penalties. The definition of decision in the Act and in the *Administrative Appeals Tribunal Act* 1975 included doing or refusing to do any act or thing. There was no reason to think that definition excluded the exercise of powers under s.1234 and 1236 of the Act. These are expressed statutory powers which have a significant effect upon a pensioner.

It was also submitted that the write off provisions could not apply to a person who is currently receiving a pension, as was Lee. This ignored the effect of s.1231(2) which provided that a debt could be recovered by deductions unless the debt was written off or waived. That is, the section envisaged write off and waiver applying to a person who is currently receiving a pension.

It was also submitted that the AAT took into account matters it should not have considered when exercising the power to write off the debt. Davies J disagreed with that submission saying that there is a distinction between the waiver and write off powers. The AAT had considered Lee's psychiatric problems and the need to reduce the financial pressure on her. Davies J stated that the consideration of write off is not restricted to cases where the debtor cannot be found or has no funds. There is no limit to the range of matters the AAT may take into account. If the person's circumstances change, then the debt may be recovered.

Formal decision

The Court allowed the appeal and set aside the AAT's decision not to waive the debt. The matter was remitted to the AAT to determine the matter again. The cross-appeal by the DSS was dismissed.

[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.

Social Security

Full-time study; reliance on DSS advice

A and SECRETARY TO DSS

Decided: 28 June 1996

A enrolled in a course that was regarded by the institution concerned as full time. The course involved only 9 contact hours a week. She claimed job search allowance on 1 May 1995. Before doing so, she discussed her course with an officer of the DSS. She was advised that as the course involved less than 15 contact hours a week, it was 'part time' and she could claim job search allowance.

On this basis, A claimed job search allowance and described her course as 'part-time' on her claim and on subsequent forms. She received payments until August, when an overpayment was raised on the basis that she was a full-time student.

The SSAT held that the course was full-time since it was considered to be full-time by the educational institution concerned. Therefore, in describing the course as 'part-time' on her forms, A had made a false statement, even though she had believed it to be true at the time. Job search allowance was paid because of that false statement; therefore a debt arose under s.1224(1) of the *Social Security Act*.

However, the SSAT was satisfied that A had relied completely on the advice of the DSS officer in describing her course as 'part time'. It distinguished the AAT decision of *McKnight*, as A was far less experienced and therefore her reliance on DSS advice did not demonstrate the 'wilful blindness' demonstrated by Ms McKnight. It concluded that the debt arose solely as a result of DSS error (the incorrect advice), and A received the payments in good faith. Accordingly, the SSAT waived recovery of the debt under s.1237(2) of the Act.

(This decision has been appealed to the AAT.)

Rate of special benefit

B and SECRETARY TO DSS

Decided: 9 September 1996

B arrived in Australia on 9 April 1996 and married on 21 April. She was granted permanent residence on 5 June. Her husband was in full-time education and receiving a combination of AUSTUDY and financial supplement at the rate of $406 a fortnight. This was not enough to support the couple. B applied for special benefit on 24 June and job search allowance on 26 June. Her claim for job search allowance was rejected because she was still subject to the 26-week newly arrived residents waiting period. Her claim for special benefit was rejected, primarily because she had been aware (according to the DSS) that she would not be entitled to social security payments for 26 weeks.

The SSAT did not accept that B and her husband were aware of the 26-week waiting period. It noted that B's husband had told the immigration authorities that his wife would be dependent on government support on her arrival, and concluded that when a visa was issued, B and her husband not unnaturally assumed that this had been taken into account and that government support would be available.

The SSAT held that B was not entitled to job search allowance or any other payment, and that as a holder of a permanent visa she met the residence requirements for special benefit. It accepted that her husband's income was not sufficient to support the couple, and concluded that B's limited English prevented her from obtaining employment, and therefore earning a sufficient livelihood. It determined that it was appropriate to exercise the discretion to pay B special benefit.

The Tribunal held that the appropriate rate of special benefit would be the equivalent of the maximum rate of job search or newstart allowance that would have been payable to B and her husband as a couple, less the $406 a fortnight AUSTUDY received by B's husband. While this amount included the financial

supplement which was a loan rather than a grant, the Tribunal concluded that that money was available for the support of B and her husband and should be taken into account.

AUSTUDY

Coverage of the actual means test: debt, administrative error and receipt in good faith

D & E and SECRETARY TO DEETYA

Decided: 16 August 1996

D and E were tertiary students. Their father was director of a family company, and both parents were shareholders of another family company until April 1996. They stated this on their 1996 AUSTUDY applications. AUSTUDY was granted in early February. The Actual means test was applied to D and her AUSTUDY was cancelled in late February 1996. A debt was raised in respect of AUSTUDY already paid that year. E continued to receive AUSTUDY until May. Her AUSTUDY was then also cancelled and a debt was raised against her.

It was argued for D and E that from the time (in 1996) their mother was in receipt of parenting allowance, the parental income test under the AUSTUDY Regulations would not apply. Therefore, the actual means test should not be applied, and D and E were entitled to AUSTUDY from that date at least. The SSAT rejected this argument. It concluded that the actual means test was a separate requirement from the parental income test, and exemptions from the parental income test did not exempt D and E from the actual means test.

The SSAT found that the Actual means test applied to D and E, and that their family's actual means (expenditure and savings) for 1996 would preclude payment of AUSTUDY. As AUSTUDY was paid to which D and E were not entitled, the debts were properly raised against them. However, it noted that D and E had correctly advised the DEETYA of matters which should have invoked the actual means test, yet the DEETYA granted AUSTUDY unconditionally, only applying the actual means test later in the year. The SSAT concluded that this error was the sole cause of the debt.

The SSAT was satisfied that D and E both genuinely believed that they were entitled to AUSTUDY, and therefore received the money in good faith, until D had received the letter from the DEETYA cancelling her AUSTUDY and raising a debt. The SSAT found that E would have become aware of the letter to her sister on about 29 February 1996. On the basis of her evidence, it concluded that after that date she doubted her entitlement to AUSTUDY, and did not receive subsequent payments in good faith.

The Tribunal waived the whole of D's debt, and the part of E's debt that related to pre-February 1996 payments, under s. 289(1) of the *Student and Youth Assistance Act*. It did not waive the remainder of E's debt, and also concluded that there were no special circumstances justifying waiver under s. 290C of the Act.

Actual means test: calculation of the threshold and the meaning of 'T'

E and SECRETARY TO DEETYA

Decided: 19 September 1996

F's parents were in partnership operating a farm. Therefore, F could only receive AUSTUDY subject to the operation of the actual means test, that is, if total expenditure and savings of his parents and their family for 1996 did not exceed the threshold calculated under the AUSTUDY Regulations (the 'after tax income of the notional parent').

The DEETYA rejected F's application for AUSTUDY on the basis that his parents' actual means was $35,399 and exceeded the after tax income of the notional parent (which in F's case was $33,239.01). This was based on the estimates provided by F's parents early in the year. The Tribunal revised a number of these estimates after hearing from F and his mother, and concluded that the Fs' combined expenditure and savings would be $36,813.

The SSAT proceeded to calculate the after tax income of the notional parent according to the formula in Regulation 12M. One of the components of this formula, T, is defined as 'the amount of income tax . . . that would notionally be assessable on (PI + DC).' (PI and DC are other components of the formula.) The SSAT concluded that, although the Fs in reality might be able to legitimately minimise tax by splitting income, under Regulation 12M, 'T' would have to be calculated as the amount of tax payable on (PI + DC) as a single person's income. The SSAT also found that 'T' did not include the Medicare levy.

The SSAT held that the after tax income of the notional family would in this case be $33,284. As the Fs' combined expenditure and savings exceeded this amount, F was not entitled to AUSTUDY.

[M.D'A.]

Opinion continued from front page

What does it mean?

The majority found that the power to waive a debt is a right in terms of s.8 of the *Acts Interpretation Act*, and it is an accrued right if the decision on waiver is made before 24 December 1993. All judges found that the AAT has the power to write off a debt even if a person is receiving a pension, and the matters to be taken into account when considering write off are not restricted to financial considerations. All judges agreed that there was no general discretion to waive a debt retained in the amendments after 24 December 1993.

The waiver provisions were subsequently amended from 1 January 1996. It would appear that this decision of the Federal Court means that there may be an accrued right to have any debt at 1 January 1996 considered under the pre-1 January 1996 provisions, if a decision on waiver had been made.

[C.H.]