Having considered Blakeney's personal circumstances the AAT decided that it was not able to exercise the discretion to find special circumstances to justify the waiving of the debt.

Formal decision

The decision under review was affirmed.

[A.A.]

Student Assistance Decisions

AUSTUDY: waiver; administrative error/special circumstances

GERHARDT and SECRETARY TO THE DEETYA

(No. 10941)

Decided: 17 May 1996, by S.A. Forgie.

Background

Mr S. and Miss K. Gerhardt (brother and sister) sought review of decisions of the SSAT which had affirmed the DEETYA's decisions that the level of their parent's income made each of them ineligible for AUSTUDY in 1993, and made Miss Gerhardt ineligible from 1 October 1994 to 31 December 1994. As a result of their ineligibility, Mr Gerhardt had been overpaid of $6178.93 during 1993 and Miss Gerhardt had been overpaid $2929.77 during 1993 and $768.50 during 1994.

The facts

On their 1993 AUSTUDY applications, the Gerhardt children had shown parental income for the 1991-92 financial year of $605 for their father and a loss of $42,577 for their mother. Copies of their parents' Notices of Assessment from the Australian Taxation Office (ATO) were attached to their applications. The Notice of Assessment for their father stated his taxable income was $605 and that $82,523 Exempt Foreign Salary and Wages had been taken into account to calculate the tax payable on his taxable income.

On Miss Gerhardt's Continuing Application Form for AUSTUDY for 1994, in relation to the 1992-93 financial year she had shown 'Australian and overseas taxable income' $610 and 'loss nil' for her father, and a loss of $48,749 for her mother. Copies of her parents' Notices of Assessment were attached which confirmed that her father's taxable income was in the amount stated in her application, and also stated that $69,149 Exempt Foreign Salary and Wages had been taken into account to calculate the tax payable on his taxable income.

The issue

The issue in relation to both Mr Gerhardt and Miss Gerhardt was whether the DEETYA should waive its right to recover the whole or part of the amount of AUSTUDY overpaid to them.

The evidence

The applicants' mother, Mrs Gerhardt, had completed the AUSTUDY forms in each year in accordance with instructions in the 1990 Application Guide and Information Booklet. In the notes to parents and guardians it was stated that the total taxable income should be given for the relevant financial year, and that original Notices of Assessment from the ATO should be attached. It was also stated that income earned overseas or in an external territory, whether taxed or not, should be included, and that if it was not taxed in Australia, a statement showing the total amount in the local currency less allowable deductions for local taxation purposes should be attached and 'we will convert the amount to Australian currency'. Mrs Gerhardt believed she had completed the applications in accordance with these instructions.

In 1993, at her request, Mrs Gerhardt had been provided with a 1993 Application Guide. The notes in relation to parental income, which she said she would have read, differed somewhat from the 1990 Guide. A further guide accompanied the AUSTUDY application form. At page 13 of this guide was a statement in relation to income earned overseas or in an external territory which was similar to the relevant note in the 1990 Guide and Information Booklet.

In relation to her children's 1993 AUSTUDY applications, Mrs Gerhardt said she had not provided a separate statement about her husband's overseas income, because she believed the necessary information was contained in his Notice of Assessment from the ATO, a copy of which (for the relevant financial year) was attached to each of her children's AUSTUDY applications. She had not been specifically asked to provide a separate statement, and expected the assessor would take the overseas income into account from the Notices of Assessment.

In 1994, Miss Gerhardt applied for Continuing AUSTUDY. Under the heading 'How do I calculate my parent's income?' in the 1994 Information Booklet it was stated that details of the student's parents' taxable income as well as any income earned and taxed overseas should be given. A section indicating how to calculate 'adjusted family income' provided four specified items which had to be added together before relevant deductions could be applied. Two of the items included were 'taxable income of your parents' and 'any overseas income'. The notes to the application form contained a statement in relation to income earned overseas which was similar to the relevant note in the 1990 and 1993 application guides, and set out the requirement of an attached statement in relation to such income if it had not been taxed in Australia. Proof of income in the form of an Australian or overseas Taxation Notice of Assessment or tax return for the 1992-93 financial year was also required to be attached to the application.

It was argued that Mrs Gerhardt had provided details of her and her husband's income in accordance with relevant instructions in the Guides, and had not tried to hide her husband's overseas income. That information appeared in his Notices of Assessment, copies of which were provided to the DEETYA. Although Mrs Gerhardt conceded that she had made an error in failing to attach a statement regarding the overseas income, she argued the assessor had also made an error in failing to take the overseas income shown on her husband's Notice of Assessment into account. It was submitted that her contribution to the error would have been very small.

The legislation

The AAT noted that provisions relating to waiver were first included in the *Student and Youth Assistance Act 1973* by the *Student and Youth Assistance (Youth Training Allowance) Amendment Act 1994*. The waiver provisions, operative from 1 January 1995, were in ss.288-290. As a result of s.43, when read with the definition of student assistance overpay-

ment in s.3(1), these provisions applied to the recovery of an amount paid under the AUSTUDY scheme that should not have been paid. Sections 288-290 were repealed and new sections substituted by the *Student and Youth Assistance Amendment (Youth Training Allowance) (No. 2) Act 1995* with effect from 1 January 1996. Clause 5 of Schedule 5 of that Act provided that the substituted sections apply to debts arising on or after 1 January 1996, and to the outstanding amount of debts arising before that day. Clause 5 indicated that Parliament intended that waiver no longer be considered in terms of the repealed provisions. Accordingly, it was the substituted provisions which were applicable in the Gerhardts' appeals. Section 288(1) provides that the Secretary may waive the Commonwealth's right to recover a debt only in the circumstances described in ss.289, 290, 290A, 290B and 290C. In relation to the Gerhardts' appeals, only s.289(1) and s.290C were relevant.

Section 289(1) provides that the Secretary must waive recovery of the proportion of the debt which is attributable solely to an administrative error by the Commonwealth, if the debtor received the payment/s giving rise to the debt in good faith.

Section 290C provides that the Secretary may waive recovery of all or part of a debt if he or she is satisfied that the debt did not result wholly or partly from the debtor or another person knowingly making a false statement or representation or failing or omitting to comply with a provision of the Act, and there are special circumstances, other than financial hardship alone, which make it desirable to waive and if it is more appropriate to waive than to write off the debt or part of the debt.

'Solely' attributable to administrative error made by the Commonwealth

The AAT considered the meaning of the word 'solely' in the context of s.289(1) and decided that its ordinary meaning is 'only' or 'to the exclusion of all else'. This interpretation had been given to 'solely' in other contexts, for example by the High Court in *Ryde Municipal Council v Macquarie University* (1978) 23 ALR 41. The AAT decided that, under s.289(1), the Secretary must waive the right to recover the proportion of the debt attributable only to the Commonwealth's administrative error. The Secretary's duty to waive does not extend to debts attributable to errors or other factors which are independent of the Commonwealth's error, regardless of whether those errors or factors are minor. The AAT opined that if other errors or factors follow as a result of the Commonwealth's error, and are therefore incidental to the Commonwealth's error, the debt may be attributable solely to the Commonwealth's administrative error. That is a question of fact in each particular situation.

In the present cases, the AAT noted that if regard was had only to the AUSTUDY application forms, it was understandable that Mrs Gerhardt had not included her husband's overseas income. The boxes on the forms were very small and refer only to 'taxable income'. However, on the basis of Mrs Gerhardt's evidence, the AAT found that she had read the passages from the relevant booklets and guides, which stated quite clearly both that overseas income was to be included, and that a separate statement should be attached if overseas income had been earned. It was reasonable to expect that the statement required was separate from the Notice of Assessment from the ATO. The AAT stated that these clear instructions had to be balanced against the AUSTUDY application forms which were less clear. The AAT was not satisfied that Mrs Gerhardt's error in completing the forms arose from any error of the Commonwealth in the manner in which it sought the information. The AAT found error on the part of the Commonwealth as a result of the assessor overlooking the amount of overseas income when calculating the AUSTUDY entitlements of Mr Gerhardt and Miss Gerhardt. The assessor's error followed from Mrs Gerhardt's error in completing the form and failing to provide the information requested. As Mrs Gerhardt's error and the Commonwealth's oversight of the amount of overseas income in the Notices of Assessment both contributed to the overpayments of AUSTUDY, the debts did not arise solely because of administrative error on the part of the Commonwealth and could not be waived under sub-section 289(1).

Special circumstances waiver

The AAT noted that the words 'special circumstance' had been considered in different contexts in a number of cases (including, among others *Beadle v Director-General of DSS* (1985) 60 ALR, and *Secretary, DSS v Hulls* (1991) 22 ALD 570). The relevant cases clearly indicate that a consideration of whether or not there are special circumstances must be undertaken in the context in which the discretion is given. The purpose of the relevant section of the *Student and Youth Assistance Act 1973* is to ensure that payments incorrectly made are recovered, and the meaning of special circumstances must be considered against that background. Accordingly, there will be special circumstances if it would be unreasonable, unjust or inappropriate to recover. The AAT quoted von Doussa J in *Secretary, DSS v Smith* (1991) 13 AAR 454, at 460:

> 'the circumstances of a particular case will give rise relevantly to an unreasonable or unjust result only if the operation of . . . [the relevant provisions] apart from the ameliorating provisions . . . produces that result.'

The AAT found no circumstances in the present cases that lead to a conclusion that it is unreasonable, unjust or inappropriate to receive the amount. The fact that Mrs Gerhardt misread or misunderstood the material provided by the DEETYA, which itself was clear, does not support a conclusion that it is unreasonable to recover an amount that would not have been paid had the material been properly read and the instructions correctly followed. Accordingly there were no special circumstances justifying waiver under s.290C.

Formal decision

The AAT affirmed the decision under review.

[S.L.]

AUSTUDY: rent assistance; students over 22 years

TAIT and SECRETARY TO THE DEETYA
(No. 11274)

Decided: 3 October 1996 by K.L. Beddoe.

Tait sought review of a decision of the SSAT that he was not eligible for rent assistance under the Austudy Regulations.

The applicant

Tait was born on 2 January 1969 and was enrolled full time at James Cook University undertaking a Batchelor of Science course. He received the independent living allowance under the Austudy Regulations. He argued he should also be entitled to rent assistance.

The AUSTUDY Regulations

Regulation 102A(1) provides that a student is eligible for rent assistance if he or she

- pays rent;
- is under 22 years of age;