The AAT did, however, express the view that Walker's application had no merit and came close to being frivolous.

The Court accepted that the AAT had fallen into error, being the same error which the Court had identified in the related decision of Walker decided on the same date (see above), but again concluded that the matter would not be remitted back to the AAT, as this would be an exercise in futility.

Formal decision

The application was dismissed with no order as to costs.

[A.T.]

[Editor's note: the above cases would appear to be the last in a long running dispute, involving a number of appeals, between Walker and the DSS.]

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.

Unreasonable delay entering CMAA — breach of the existing agreement?

C and Secretary to the DEETYA

Decided: 26 September 1996

C signed a Case Management Activity Agreement (CMAA) on 15 February 1996. A term of this Agreement required him to contact or attend his case manager when required to do so.

On 14 June 1996, his case manager wrote to him requiring him to attend an interview on 28 June to discuss his progress, and if necessary enter a new CMAA. He did not do so. On 4 and 17 July 1996, his case manager wrote to him requiring him to attend an interview on 24 July to review his CMAA, and enter a new CMAA. He did not attend this interview either. On 26 July, an officer of DEETYA issued C with a 'Notice of Failure to Enter into Activity Agreement — Unreasonable Delay' and cancelled his newstart allowance.

The SSAT noted that C's failure to attend interviews was originally dealt with as an unreasonable delay in negotiating a new CMAA. However, on internal review, the authorised review officer had instead treated it as a failure to take reasonable steps to comply with a term of the existing Agreement (the term requiring C to attend upon his case manager when required to do so). Since the letter required C to attend an interview with his case manager in order to enter a new Agreement, failure to comply could be argued to fall within both categories.

The SSAT noted that unreasonable delay in entering a CMAA led to loss of qualification under ss.45(5)(a) [or 45(5)(c)], 44 and 38 of the *Employment Services Act.* In contrast, failure to take reasonable steps to comply with a term of the current Agreement, led to loss of qualification under ss.45(5)(b) and 45(6) of the Act. While these requirements exist side by side, they are separate requirements, with different tests for compliance.

The procedural steps leading up to re-negotiation of an agreement — which would inevitably require a meeting with the case manager at some stage — should not be seen as involving a term of the existing Agreement. Since the requirement to attend on the Case Manager when required is a standard term of all Agreements, to do so would render the statutory provisions irrelevant. Therefore, a requirement to attend can either operate as a requirement to enter a new Agreement, or a requirement imposed under a term of the existing Agreement, but not both. If attendance was required to negotiate a new Agreement, it could not be treated as having been required under a term of the existing Agreement.

In this case, since the purpose of the interview was to enter into a new CMAA, C's actions should be considered in the light of whether he had 'unreasonably delayed entering into a CMAA, rather than whether he had 'failed to take reasonable steps to comply' with the terms of his current Agreement. The SSAT accepted that the letters sent to C required him to enter into a new Agreement.

The SSAT spoke to a treating doctor whom C had seen (in August and September 1996) with regard to his heroin abuse. The doctor was satisfied that he had been using heroin for the past several months, and that the level of his habit would be enough to adversely affect his memory. The SSAT accepted (on the basis of this evidence and C's presentation before the Tribunal), that he was 'unwell' during the period concerned, and as a result was unaware of his obligations. It concluded that the effect of C's heroin use was sufficient to leave him unaware of his obligation to attend the interviews. Given this, his delay in entering a new agreement was not 'unreasonable', and newstart allowance should not have been cancelled.

Job search allowance — newly arrived resident's waiting period

D and Secretary to the DSS

Decided: 4 September 1996

D was granted an independent (Migrant) (Class AT) Sub Class 126 visa on 2 November 1995. However, due to the death of his father, he delayed coming to Australia and only arrived on 25 June 1996. He applied for job search allowance the following day.

The DSS refused to grant the allowance, arguing that D was subject to the newly arrived resident's waiting period, and was not entitled to job search allowance for 26 weeks from the date of his arrival in Australia. D appealed to the SSAT.

The SSAT held that under s.541 B(1) of the *Social Security Act,* D (having entered Australia after 1 January 1993 and holding a permanent visa) was subject to a newly arrived resident's waiting period. Under s.541C(1) and (3), this period started when D's permanent visa came into effect and ended 26 weeks after the day on which D was granted the visa.

Under s.68 of the *Migration Act,* a visa has effect as soon as it is granted, unless it specifies another date or event from which it is to have effect. D's visa did not specify any other date. Therefore, it came into effect on 2 November 1995. D's 'newly arrived resident's waiting period' started on that date. It expired 26 weeks after the visa was granted, that is on 2 May 1996. Therefore, D was no longer subject to the newly arrived resident's waiting period when he applied for job search allowance.

[M. D'A.]

Background

AUSTUDY 1997

The AAT in the decision of *Secretary to DEETYA and Marchant* (see p.115 this issue), commented on the difficulties facing decision makers in interpreting, in a meaningful, coherent and consistent way, the AUSTUDY Regulations relating to the actual means test. The fact that the Regulations do not give clear meaning to key terms such as 'total expenditure' has forced decision makers to infer meaning from alternative provisions not directly relating to the actual means test, in order to give effect to Parliament's intentions and to departmental policies on the administration of the test.

In grappling with these new Regulations in 1996, the first year of their introduction, outcomes at review level have not always been consistent. In 1996, these difficulties were compounded by certain departmental practices, such as the discounting of certain expenditures, for example, expenditure relating to education where those expenses, up to a $6000 limit, were met by non-assessable family members, such as grandparents. These policies were put into effect despite the fact that the Regulations required such expenditure to be taken into account. Therefore, in circumstances where expenditure of this type first became apparent at the tribunal level, it could not be excluded from assessment, and the applicant was thereby disadvantaged.

Changes to the Regulations in 1997 have meant that the actual means test now applies to a wider group of people and will now also determine an applicant's rate of AUSTUDY, not just their eligibility. In 1997, the Regulations have resolved some of the ambiguities which plagued the administration of the test in 1996. These include:

- The determination of the benchmark against which an applicant's actual means are assessed in determining his or her entitlement. The benchmark is derived by reference to the maximum income a notional parent, being one who receives income solely from a salary or wage, could earn where, on a notional application of the parental income test, the student's eligibility for AUSTUDY would reduce to an annual rate of $1000, at which point AUSTUDY is no longer payable. Allowances are made for tax and notional entitlement to family payment. The 1997 Regulations have resolved some of the difficulties which arose in 1996 by specifying that the Medicare levy is also to be deducted and clarifying the rate of family payment to be taken into account.
- Expenditure funded from income earned by a dependent student over 16 years of age from employment outside family companies or business structures, up to a specified amount, is deducted from the determination of a family's actual means. This was not the case under the 1996 Regulations which required expenditure funded from the student's or other dependent child's earnings to be taken into account.
- A discount is also available, up to $5274, for primary and secondary students from isolated families who board away from home. This provides the legislative basis for the departmental policy adopted in 1996.

The 1997 Regulations have not, however, given any greater guidance on the many problematic issues relating to the determination of the actual means by reference to 'the total expenditure and savings made . . . by the parent and his or her family'. Recently the administration of the test came in for public criticism, and changes to the DEETYA's practices were announced by the Minister for Education, Senator Vanstone. These changes were announced by media release on 20 February 1997 as follows:

- An applicant's estimate of expenditure will be accepted at first instance rather than, as occurred in 1996, the DEETYA substituting values, drawn from an Australian Bureau of Statistics Household Survey, for items of expenditure considered to be underestimated. However, it was indicated that estimates would then be subject to a 'rigorous compliance process'.
- The application form for AUSTUDY was to be amended to make it clear that anticipated AUSTUDY payments should not be included in estimated expenditure.
- The assessment of loans was to be clarified so that:
  - in relation to loans for the principal family home, other real estate expenditure and motor vehicles, the purchase price will not be included as expenditure in the current year, but repayments of principal and interest in that year are assessed; and
  - in relation to loans for other items, the actual outlay will be included as expenditure in the current year, rather than the repayment of principal and interest.

These latter changes give some further clarity to the administration of the actual means test, but it must be noted that they have no legislative basis. While the test is in itself, inherently imprecise, the need for certainty in administration and decision making calls for greater clarity in the drafting of the Regulations themselves.

[A.T.]