head and behind her eyes. Tlonan said that she also suffered from shaking, fever and vomiting as a result of the headaches. Tlonan's evidence was that the only way to treat the headaches was to keep still, not talk and stay away from food and drink in a dark room. She also takes regular baths. Tlonan complained that she suffered from pains in her leg, and had done so for the past 17 years. She said that she is so very, very sick that she sometimes wonders if God should take her. In relation to ability to work, Tlonan gave evidence that she cannot work as she is very disabled.

Tlonan's husband gave evidence that his wife suffered very badly from headaches, and that the attacks were continuous. He did everything for his wife including cooking, washing and caring for her when she was ill. He said if the headaches could be controlled, Tlonan would not be able to work, but conceded that she could do a job which allowed her to sit down.

The medical evidence

The AAT heard evidence from a medical practitioner who had treated Tlonan. Dr Chong Wah had been Tlonan's treating doctor for 6 years. He said that his diagnosis of migraines had been based on the symptoms Tlonan described, and he had not been able to find a cause. Dr Chong Wah said that there was no formal diagnostic test for migraines. In the Doctor's opinion the migraines were a permanent condition, and he could not foresee Tlonan recovering within 2 years. Dr Chong Wah had prescribed a wide range of drugs to try to alleviate Tlonan's condition. Under cross-examination, Dr Chong Wah conceded that there had not been a reasonable trial of medication which had been prescribed by another medical practitioner, Dr Burrow. In relation to Tlonan's leg pains, Dr Chong Wah reported that they were a bit bizarre.

Dr Burrow wrote two reports which were tendered to the AAT. In these reports, he commented on Tlonan's visits to Royal Darwin Hospital outpatients clinic. Dr Burrow noted that Tlonan was suffering from migraine headaches and made several recommendations for treatment, including recommendations to Dr Chong Wah. In his most recent correspondence, Dr Burrow said that he was not aware if his most recent suggestions for treatment had been carried out.

Dr McLaren was the author of a report which was also tendered to the AAT. Dr McLaren, a Senior Psychiatrist with Mental Health Services in Darwin in 1994, advised that in his opinion, there was no psychiatric component to Tlonan's headaches.

Consideration of the evidence

The AAT found that Tlonan suffered from migraine headaches. It then considered the meaning of 'treatment' as it appeared in paragraphs 3 and 4 of the introduction to the Impairment Tables at Schedule 1B to the Act. The AAT referred to several dictionary meanings of 'treatment', including specialist medical dictionaries, and decided that the meaning given to the word 'treatment' should depend on the context, namely, within Schedule 1B of the Act. The AAT decided that this meant that it should not be given too restrictive a meaning and 'should not be limited to medical treatment in the sense of surgery or the prescription of medication': Reasons, para. 51.

According to the AAT:

> 'In its context, the word 'treatment' refers to a broad range of therapeutic measures which are reasonable to adopt in the particular case and may include passive measures such as rest as well as active measures including, but not limited to, such diverse measures as the prescription of medication, physiotherapy, exercise generally and counselling. What amounts to treatment in any particular case will depend on the individual circumstances of that case.'

(Reasons, para. 51)

The AAT discussed the modification of treatment to adapt to the needs and reactions of a patient to treatment, and decided that while modifications are being made to treatment, the condition is still being treated despite that modification. In applying this reasoning to Tlonan's case, the AAT decided that Tlonan had taken a wide range of medication over a long period of time, and had tried other things like massage and creams. The AAT also found that Tlonan had not taken the course of medication as recommended by Dr Burrow, nor had she undertaken physiotherapy as recommended by Dr Burrow. In light of this, the AAT found that Tlonan had not undergone the treatment for her migraines as recommended by Dr Burrow, and that there was nothing to suggest that Dr Burrow's suggestions were inappropriate or unreasonable. On this basis, the AAT found that there was no evidence on which to regard Tlonan's condition as treated and stabilised for the purpose of the Impairment Tables. Thus an impairment rating could not be assigned for her condition. The AAT found that Tlonan's leg pain could not be rated under the Tables either, as it had not been diagnosed, treated and stabilised.

Formal decision

The decision under review was affirmed. Tlonan was not eligible for the DSP.

[W.M.]

DSP: capable of working a 30-hour week

GARNER and SECRETARY TO DSS
(No. 11719)

Decided: 24 March 1997 by M.T. Lewis and J.R. Valentine.

Garner sought a review of a decision of the SSAT which cancelled his entitlement to a disability support pension (DSP).

The issue

The issue before the AAT was whether Garner was qualified for DSP, and in particular, whether Garner had a continuing inability to work under s.94(2) of the *Social Security Act 1991*.

The evidence

The AAT heard evidence from Garner that he had been in receipt of an invalid pension from October 1989 till September 1994, when the DSS had reviewed his entitlement and decided that he was no longer eligible. The primary medical condition for which the invalid pension had been granted was a back injury which Garner had sustained in 1981 whilst lifting heavy metal plates. Since the injury, Garner had worked as a clerical assistant and with the Royal Australian Air Force, but had been unable to continue with either employer because of his back injury.

Garner gave evidence to the AAT that he was working for 20 hours a week, and that this level of work had slowly been achieved over several months. Garner's work consisted of clerical work for the Australian Performing Arts Association, providing guitar lessons and guitar performances at hotels and clubs. Garner also gave evidence that he was seeking courier work, carrying small packages only, for approximately 8 hours a week. He had not been able to find such work. Garner said that he could play music in hotels and clubs, and teach guitar lessons for up to 3 hours with regular breaks of half an hour at least. He said that sitting down was easier than work which required standing and for this reason, the guitar performance and teaching work was easier to undertake than clerical work.

In relation to his back injury, Garner advised that he suffered constant pain, and took analgesic medication and used ointment. His back injury caused difficulty sleeping, and an inability to sit for prolonged periods. Garner stated that he

suffered from asthma and had to use Ventolin and Becotide daily. He also had a muscular problem with his left eye, which hindered his ability to do clerical work because it affected his reading ability. He suffered from diabetes and stomach ulcers, both of which were treated adequately by medication, although his diabetes made it difficult to control his weight.

Continuing inability to work

The AAT considered Garner's medical conditions in relation to whether he was able to work for 30 hours or more a week. The DSS conceded that Garner had a 20% impairment rating, and agreed that 'continuing inability to work' was the only issue in contention. The AAT found that Garner suffered from back pain which prevented him from carrying heavy weights, sitting or standing for long periods and repetitive bending. The AAT noted that Garner agreed that he could work for 20 hours a week in guitar playing, and a further 8 hours as a courier. He had lead no evidence to suggest that he could not work 30 hours a week. In the light of this, the AAT found that Garner did not have a continuing inability to work

Formal decision

The decision under review was affirmed. Garner was not eligible for the DSP.

[W.M.]

Student Assistance Decisions

Waiver: administrative error and special circumstances

SECRETARY TO THE DEETYA and O'ROURKE (No. 11413)

Decided: 1 November 1996 by T.E. Barnett.

The DEETYA sought to recover an overpayment of AUSTUDY of $6965.50 from O'Rourke. This was on the basis that he was a New Zealand citizen and he had been absent from Australia for more than 2 months in the previous 12 months.

Background

O'Rourke arrived in Australia from New Zealand as a permanent resident in December 1990. He commenced university in 1994. Later that year he learned that his father in New Zealand was seriously ill. He enquired with the DEETYA about whether his departure for New Zealand would affect his AUSTUDY entitlement and was told that it would not. He then spent 4 months in New Zealand.

The overpayment

Regulation 4(1) of the AUSTUDY Regulations relates to citizenship. It allows a New Zealand citizen who has permanently settled in Australia to retain entitlement to AUSTUDY as long as the person is not absent from Australia for more than 2 months in the preceding 12 months.

As O'Rourke was absent for 4 months during 1994 he was wrongly paid AUSTUDY in 1995.

Waiver — administrative error and good faith

The AAT accepted that O'Rourke had been given the wrong advice by the DEETYA. However, it was not satisfied that the debt was attributable solely to administrative error because O'Rourke could have made his own inquiries from the AUSTUDY Handbook.

As a result the AAT did not waive the debt under s.289 of the *Student and Youth Assistance Act 1973*.

Waiver — special circumstances

In considering whether the debt should be waived pursuant to s.290C of the *Student and Youth Assistance Act 1973* the AAT was satisfied that O'Rourke did not make any false representations and did not fail to comply with any provisions of that Act.

The AAT listed the special circumstances which it felt existed in O'Rourke's case. These included:

- his extreme financial circumstances;
- the inquiries he made with the DEETYA before leaving Australia;
- the wrong advice he received and followed to his detriment;
- his reasons for going to New Zealand, namely, his father's illness;
- his success in carrying out the study requirement of an AUSTUDY recipient so that the AUSTUDY scheme had not been thwarted;
- the stress which he had suffered, because of Commonwealth error, which had an effect on his studies;
- his long period of financial hardship following the breakdown of his AUSTUDY entitlements.

In considering whether it was more appropriate to waive than to write-off the debt the AAT was of the view that write-off is most appropriate where an overpayment has occurred because of a fault on the part of the recipient. It said that O'Rourke was not significantly at fault, he did not receive money which he did not deserve under the AUSTUDY scheme and the Commonwealth had not been financially disadvantaged in any substantive sense.

The AAT concluded that it was appropriate to waive the debt in these circumstances.

Formal decision

The AAT affirmed the decision of the SSAT dated 31 May 1996.

[A.A.]

AUSTUDY: isolated student

R.A. BARRETT and SECRETARY TO THE DEETYA

S. BARRETT and SECRETARY TO THE DEETYA (No. 11590)

Decided: 5 February 1997 by M.D. Allen and I.R. Way.

The two applications for review were heard together.

R.A. Barrett sought review of a decision of the SSAT which affirmed a decision of the DEETYA to cancel payment of the Away From Home Living Allowance, and to raise an overpayment of $1088.74, being AUSTUDY paid in 1995.

S. Barrett sought review of a decision to raise and recover an overpayment of $2203.04, being AUSTUDY paid to her at the Away From Home rate in 1993.

The issue

Both cases, which concerned a brother and sister, turned on whether the principal home of their parents was isolated