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

within the meaning of regulation 78(1)(a) of the AUSTUDY Regulations.

The law

The AAT stated the relevant regulations as 77(1)(a) and 78(1) of the AUSTUDY Regulations. According to regulation 77(1)(a)

> 'A secondary student qualifies for the away from home living allowance if the student is living with a parent and is an isolated student of one of the following kinds:
>
> (a) isolated home, as decided in regulation 78 ...'

Regulation 78(1) provides that an isolated home is a home which is permanently 16 km on more from the nearest appropriate school, or 4.5 km or more from public transport between the home and school. A home may also be isolated if it is likely that the student would be unable to travel to school for 20 or more school term days in the year because of special weather conditions.

The background

AUSTUDY payments had been made to both Barretts on the basis that the distance between the family home and public transport exceeded 4.5km. At the AAT hearing it was accepted that the distance was less than 4.5 km, and therefore the provisions contained in regulation 78(1)(a) did not apply.

The case for the Barretts as put to the AAT by their mother, was that they would be unable to travel to school for 20 or more days in the year because of special weather conditions.

The decision

The AAT found that the Barrett's family home was linked to the Newell Highway, where a school bus would pick up and set down pupils, by a gravel road of 3.1 km. It was not in dispute that the road in question became impassable for normal vehicles, following 12.5 mm of rain. The AAT accepted that it was impracticable for the children to cover the distance on foot or by horse.

The AAT also stated from the outset that the test of regulation 78(1) was met if weather conditions cause a road to become impassable, and it found that the SSAT had ignored causation when it said that the problem was the access road and not the weather.

On the evidence presented which consisted of rainfall records for the years from 1983 to 1994 and for the year 1996, the AAT found that it was likely that in any one year the Barretts would have been unable to travel to school for 20 or more days in the year, because of special weather conditions which made the access road from the parents' house to the main road impassable due to rain.

Formal decision

The decisions under review were set aside and the matter remitted to the DEETYA with the direction that the Barretts were at all relevant times entitled to a Living Away From Home Allowance pursuant to regulation 77 of the AUSTUDY Regulations.

[G.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.

Age pension: whether a reciprocal agreement can be waived

C and Secretary to DSS

Decided: 29 July 1996

The applicant was a recipient of Australian age pension who was granted age pension from the UK and paid arrears. Consequently the DSS raised an overpayment pursuant to Article 19 of the UK Reciprocal Agreement (Schedule 2 of the *Social Security Act 1991).* The agreement provides (among other things) that where the UK pays a benefit directly to a person then the amount overpaid 'is a debt due by that person to Australia', that is the amount of Australian pension paid over and above that which would have been due had the UK pension been paid on a periodical basis throughout the same period. The SSAT considered whether or not any of the waiver or write-off provisions under the Act applied to a debt under the Agreement.

After an examination of Chapter 5 of the Act, which provides for the raising and recovery of debts and non-recovery in specific circumstances, the SSAT found that none of those specified circumstances for non-recovery included debts arising under international agreements. The SSAT noted the discretion in the wording of Article 19 which provides that a debt under the Article *may* be recovered from a future entitlement to an Australian pension. The SSAT concluded that the debt could be appropriately recovered from future entitlement to Australian pension.

Newstart allowance: 'main reason' for non-compliance with CMAA

R and Secretary to DSS

Decided: 29 February 1997

The issues for consideration concerned whether or not the applicant had failed to take reasonable steps to comply with his CMAA and consequently whether his newstart allowance should be cancelled and a nonpayment period imposed. The SSAT found that an offer of placement pursuant to a New Work Opportunities Program had been made and that R had not accepted it as required by the terms of the agreement. However in applying s.45(6) of the *Employment Services Act 1994* the SSAT examined the reasons for failing to comply.

The Department argued that R rejected the offer because it would conflict with his sporting activities. Conversely the SSAT accepted the applicant's evidence that the 'main reason' for his non-acceptance of the offer was due to the failure to explain to him what the job involved and his concerns that his medical needs would not be met (he was a diabetic). The SSAT decided this was outside the applicant's control and was not reasonably forseeable by him. Thus the SSAT considered R did take reasonable steps to comply with his CMAA and accordingly he remained qualified for newstart allowance.

[M.A.C.]