Department nor make the taxation details available until June 1997. Accordingly, the amounts of PA paid during February 1996 to May 1997 were an overpayment and recoverable.

As to FA the Tribunal concluded that as Bruneau ceased (due to the family income level) to be entitled to PA after February 1996, she also ceased to be eligible for FA from this date and entitlement thereafter was subject to the income test. The FA paid to Bruneau from February 1996 to May 1997 was thus also a debt.

Waiver

The AAT considered whether the amounts of PA and FA paid to Bruneau between February 1996 and May 1997 should be waived. The Tribunal concluded there was no evidence of any administrative error by the Department, there had been a failure or omission to comply with a provision of the Act by Bruneau in not advising of changes in income and, in addition, there were no special circumstances sufficient to warrant the application of the waiver provisions contained in s.1237AAD.

The formal decision

The Tribunal waived recovery of the debt of HCCA, but confirmed the decisions to raise and recover debts in relation to PA and FA.

[P.A.S.]

Family payment: form not a request for payment on estimate

SECRETARY TO THE DFaCS and FLORES
(No. 19990069)

Decided: 5 February 1999 by H.E. Hallowes.

Background

Flores was in receipt of sole parent pension and family payment. She reconciled with her husband on 25 June 1996 and notified the Department of this event as she was required to do. Mr and Mrs Flores' combined taxable income for the 1994/95 tax year was $27,598 and for the 1995/96 tax year was $29,511. On 24 July 1996 Flores lodged a form with the Department in which she estimated that her and her husband's combined taxable income for the 1996/97 tax year would be $28,000. The Department calculated Flores's rate of family payment from 1 August 1996 on the basis of that estimate. From 1 January 1997 the Department continued to assess Flores's family payment rate having regard to the same estimate. On 1 May 1997 Flores commenced work and notified the Department of this. On 29 May 1997 Flores lodged a form with the Department in which she estimated that her and her husband's combined taxable income for the 1996/97 tax year would be $29,500. Flores was paid family payment on the basis of that estimate from payday 19 June 1997. Flores's actual combined taxable income for the 1996/97 tax year was $39,010. In January 1998, Centrelink sought to raise and recover a family payment debt of $5059.60 for the period 1 August 1996 to 16 June 1997.

The issues

Did Flores make requests to the Secretary to use her estimate to calculate a rate of family payment and were the forms used approved by the Secretary?

The legislation

Section 861 provides that the rate of family payment is worked out using the Family Payment Rate Calculator at the end of s.1069. The relevant parts of s.1069 are H18, H21 and H22.

'**1069-H18**. If:

(a) a notifiable event occurs in relation to a person; and

(b) the person's income for the tax year in which the notifiable event occurs exceeds:

(i) 110% of the person's income for the base tax year; and

(ii) 110% of the person's income free area;

the appropriate tax year, for the purpose of applying this Module to the person for the remainder of the family payment period, is the tax year in which the notifiable event occurs.

1069-H21. If:

(a) family payment:

(i) is not payable to a person because of this Module; or

(ii) is payable at a reduced rate because of this Module; and

(b) the person gives the Secretary an estimate of the person's income for a tax year; and

(c) the person requests the Secretary to make a determination under this point; and

(d) the person agrees that the person's rate of family payment for that tax year is to be recalculated if the person's actual income for that tax year exceeds 110% of the amount estimated by the person;

the Secretary must determine that the appropriate tax year, for the purpose of applying this Module to the person for a family payment payday on or after the day on which the request is made, is the tax year in which the request is made.

1069-H22. A request under point 1069-H21 must be made in writing in accordance with a form approved by the Secretary.'

Forms approved

The Tribunal found that the forms completed by Flores, SC162/9603 were forms approved by the Secretary under s.1069-H22 as the documentation provided by the Department satisfied the Tribunal on that point.

Forms not a request for estimate

Flores argued that completion of the forms was not a request to the Secretary to use her estimate to calculate a rate of family payment. Flores noted the requirement that a client complete one of the boxes under Question 6 on the form with respect to changes in circumstances which included a box to tick if no changes had occurred. If no change had occurred, clients were advised on the form that they did not need to complete any more questions. However, if there had been a change of circumstances, Question 8 asked for more recent details about estimated taxable income for the current financial year, the form covering both the financial years ending 30 June 1996 and 30 June 1997. Flores argued that the wording on the form suggested it was compulsory to answer the questions rather than the wording being a request under s.1069-H22. Flores put to the Tribunal that the questions on the form were directed towards notifiable events rather than the form being a request that an estimate be used to calculate her rate.

Flores relied on the decision of *Stuart and Secretary, Department of Social Security* (1998) 3(4) *SSR* 42. In that matter the AAT found that the questions on the form had been approved by the Secretary but that they did not constitute a request that the appropriate tax year be changed.

The Department referred to the decision of *Secretary, Department of Social Security and Jones* (1998) 50 ALD 248. In that case the AAT decided that although there was not a form specifically designed for the purpose of allowing a recipient of family payment to request that the family payment be calculated by reference to an estimate of income, it was appropriate for the Secretary to treat the information supplied by a client as such a request as the client was sufficiently conversant with the system of social security to realise when she filled in relevant forms that she would be paid on the basis of her estimate.

The Tribunal adopted the reasoning of *Stuart*. It found that in the circum-

stances of Flores's application she did not request the Secretary to make a determination under this point.

> 'No request is made by her in response to the questions she answered at the end of the form. She agreed that she would "tell Social Security" if her estimate changed and if her actual income was more than 110% of her estimate that she would repay any overpayment resulting. However, she made no request on the form for the estimate she provided on the form (T8) to be used to calculate her rate of payment at that time.'

(Reasons, para. 13)

The Tribunal adopted the reasoning of the SSAT. In particular it found in Flores's case:

> 'the notifiable event occurred on 25 June 1996, that is, close to the end of the 1995/96 tax year. Her taxable income for 1995/96 was $29,511. This was not more than 110% of her taxable income for the base tax year, 1994/95, which was $27, 598. Her taxable income would have needed to be at least $30,357 ($27,589 + $2,759) in order to be 110% of her taxable income of the base tax year. As Mrs Flores' situation did not meet the conditions in section 1969-H18, her appropriate tax year remained the base tax year.'

(Reasons, para. 14)

The Tribunal agreed that section 1069-H19 did not apply to Flores's situation and that:

> 'the decision to change her appropriate tax year and to calculate her rate of family payment on the basis of her estimated income for 1996/97 of $28,000, was not authorised by the legislation.'

(Reasons, para. 15)

The Tribunal found that until the end of 1996, Flores's base tax year (ending 30 June 1995) remained the tax year for calculating her rate of family payment.

The Tribunal considered that a rate of family payment is struck for a calendar year unless a notifiable event occurs or a person requests that an estimate be used to calculate a rate (s.860). The Tribunal accepted the Department's submission that the rate of family payment payable should have been calculated at the beginning of the calendar year 1997 using the new base tax year ending 30 June 1996 (s.1069-H13 and H14) until the further notifiable event that Flores had commenced work on 1 May 1997 when a further rate was required to be struck under s.860.

In relation to the payment of 19 June, the Tribunal again adopted the reasons of the SSAT, which held that s.1069-H18 did apply to the second notifiable event. As Flores's actual taxable income for 1996/97 — $39,010 — was more than 110% of the estimate, s.885(1) and s.981 applied and her rate had to be recalculated on the basis of her actual taxable income from the date she was paid on the estimate, 19 June 1997. Under s.1223(3) of the Act, the difference between the amount paid and the amount which would have been paid taking into account her actual taxable income, was a debt to the Commonwealth.

But the debt raised ended with the payment made on 19 June 1997 as that was the final payment in the 1996/97 tax year. Under s.1223(4), any debt in respect of payments made in the 1997/98 tax year were precluded from being raised until after the tax year has finished.

Formal decision

The decision under review was set aside. The matter was remitted to the Secretary for reconsideration in accordance with a direction that the rate of family payment payable to Mrs Flores during the relevant period be re-calculated in accordance with the AAT's reasons. Liberty to apply was reserved should there be any dispute with respect to the calculations.

[M.A.N.]

Pension rate: discretion to treat as not a member of a couple

KADDOUS and SECRETARY TO THE DFaCS (No. 19990183)

Decided: 25 March 1999 by L.S. Rodopoulos.

The issue to be decided by the AAT was whether Kaddous should receive disability support pension (DSP) at the single or married rate. A decision to reduce his DSP from the married to single rate was affirmed by both the authorised review officer and the SSAT.

Background

Kaddous had received DSP at the single rate since 1988. He was completely blind in one eye, half the retina was missing in the other, and he had a significant hearing impairment. He also had severe learning disabilities. The AAT was unable to establish whether he had an intellectual disability.

In January 1997, he travelled to Egypt to marry. In March 1997, he returned to Australia without his new wife as she could not obtain an entry permit or residency due to her disabilities. His wife, Mikhail, wore hearing aids and had asthma, in addition to a lung dysfunction which required medication and physiotherapy. The DSS exercised its discretion to continue to pay Kaddous at the single rate. As Mikhail was unemployed and overseas, the DSS determined that Kaddous and Mikhail were not able to pool their resources.

Mikhail arrived in Australia on 22 June 1998. An assurance of support had been signed by Dr Ramzy, a cousin of Kaddous. In the assurance of support, Ramzy undertook to repay to the Commonwealth any social security payments to Mikhail during her first two years in Australia.

On 28 July 1998, the Department reduced Kaddous' rate of DSP from the single to the married rate. Kaddous, through his father, Mr Farid Kaddous, submitted that the reduction of DSP rate had caused great financial strain to Kaddous and his family. He submitted that his son had suffered depression and frustration following the long separation from his wife and he was still under psychiatric care.

Kaddous and his wife lived with his father and mother. His father told the AAT that they were in considerable debt due to their support of Kaddous and his wife. His evidence was that they were reluctant and embarrassed to ask the man who had signed the assurance of support for money to support the family. To date, the family owed Ramzy about $2000 for loans and $1000 for the purchase of a sewing machine for Mikhail. Although she had been granted permanent residency for five years, she was still subject to the assurance of support until she could be naturalised in two years time.

The legislation and the policy guidelines

Section 4(2)(a) of the *Social Security Act* provides that a person is a member of a couple for the purposes of the Act if he or she is legally married to another and is not living separately and apart from that person on a permanent or indefinite basis. Section 24(1) provides the Secretary with a discretion to decide that a person be treated as not a member of a couple for the purposes of the Act.

The policy guidelines about s.24(1) stated that the discretion should only be exercised in 'strictly limited situations'. Guideline 36.501 indicated that the discretion was intended to be exercised where the couple could not enjoy the pooling of resources that normally occurred in a marital relationship. Guideline 36.502 indicated that whilst it was not possible to list all the situations in which it would be necessary to exercise