Summary

- Did Hazim (or another) make a false statement or representation, or did Hazim (or another) fail to comply with a provision of the Act. If so, the AAT must determine whether the false statement etc. caused (that is, contributed to) no decision being made to cancel the social security payments. The AAT must also decide the date any such decision would have been made. Then the AAT must consider whether s.4(4) and/or 24(2) applied. If the AAT does decide that a decision would have been made to cancel payment of the benefits from a certain date, it is then obliged to calculate the amount of the debt.
- The AAT must decide if a false statement etc. was made knowingly. If not, the AAT can then consider if there were special circumstances that would justify waiving all or part of the debt.

Formal decision

The Federal Court set aside the decision under review and remitted the matter back to the AAT to be reheard by a differently constituted panel.

[C. H.]

[**Contributor's Note**: Sections 288 and 289 of the Act set out the date of effect of any decision to cancel payment of sole parent pension if a person complies with a notice (s.288) or fails to comply with a notice (s.289). The Court refers to the difficulty the AAT would have deciding the date of a decision to cancel payment of the pension if a person made a false statement or representation that resulted in the pension continuing to be paid. Sections 288 and 289 set out the dates of effect of any decision to cancel the pension.

The Court did not address the issue raised in the SSAT decision that where a person loses qualification for the sole person pension that qualification can only be restored if the person claims the pension again. So if a person were to lose qualification for the pension by becoming a member of a couple, the person would only qualify for the pension again if they claimed it again. In Hazim's case if she became a member of a couple in 1994 she could not have been qualified for the pension after that date unless she reclaimed it.]

SSAT Decisions

Family tax benefit: reasonable action to obtain maintenance

HM

Decided: 22 November 2001

HM had four children for whom she received family tax benefit at above the minimum rate. A fifth child was born on 28 May 2001, and HM lodged a claim for family tax benefit in respect of this child on 4 June 2001. The claim was accepted and she was paid family tax benefit from the date of the child's birth, but only at the minimum rate, on the grounds that she had not taken reasonable action to obtain maintenance from the father of the child. HM subsequently lodged an application for a Child Support Assessment on 2 August 2001, and was paid the higher rate of family tax benefit. The issue to be determined was whether HM was entitled to be paid the higher rate of family tax benefit from 28 May 2001 until 1 August 2001.

The law

The rate of family tax benefit payable is determined in accordance with the provisions set out in Schedule 1 of the *Family Assistance Act 1999*. In particular clause 10 provides:

> **10.** The FTB child rate for an FTB child of an individual is the base FTB child rate (see clause 8) if:
>
> (a) the individual or the individual's partner is entitled to claim or apply for maintenance for the child; and
>
> (b) the Secretary considers that it is reasonable for the individual or partner to take action to obtain maintenance; and
>
> (c) the individual or partner does not take action that the Secretary considers reasonable to obtain maintenance.

The policy

In reaching its decision, Centrelink relied on the departmental policy guidelines which specified that reasonable action to obtain maintenance required that a claimant apply for a Child Support Assessment within 28 days of their claim for family tax benefit.

What constitutes 'reasonable action'?

The Tribunal noted that the Departmental guidelines were inconsistent with the legislation to the extent that they fettered the discretion contained in clause 10. While lodgement of a Child Support Assessment within a reasonable time frame was considered to be a legitimate criteria on which 'reasonable action' could be considered, it was not legitimate to limit consideration solely to that factor.

The Tribunal stated that whether HM had taken reasonable action to obtain maintenance depended on her behaviour and circumstances at the relevant time. The Tribunal took into account that HM was suffering ill health after the birth, and that the child needed to remain in hospital for some weeks. This impacted on her ability to fully read and understand documentation which notified her of the need to lodge a claim for Child Support Assessment within 28 days of her claim. As soon as she became aware of the requirement in August 2002 to lodge such an application, she did so.

It was also noted that the application for Child Support in respect of the fifth child made no practical difference, as HM was already in receipt of child support at the minimum rate of $5 a week for her other four children, her ex-partner being unemployed. That assessment did not change.

The Tribunal determined that HM had not failed to take reasonable action to obtain maintenance and that she was entitled to family tax benefit at above the minimum rate for her fifth child from 28 May 2001 until 1 August 2001.

[A.T.]

Family tax benefit and maternity allowance: child's residence; whether in adult's care

YL

Decided: 5 November 2001

YL lodged a claim on 15 August 2001 for family tax benefit and maternity allowance in respect of his daughter, J, born on 7 March 2001. The claims were rejected on the basis that J was born in China, was not an Australian resident and was not in YL's care.

The law

Section 21 of the *Family Assistance Act 1999* (the FA Act) requires that a claimant have an FTB child in their care to be eligible for family tax benefit. An FTB child is defined in s.22 to mean:

22.(1) An individual is an ***FTB child*** of another individual (the ***adult***) in any of the cases set out in this section.

Individual aged under 18

22.(2) The individual is an FTB child of the adult if:

(a) the individual is aged under 18; and

(b) the adult is legally responsible (whether alone or jointly with someone else) for the day-to-day care, welfare and development of the individual; and

(c) the individual is in the adult's care; and

(d) the individual is an Australian resident, is a special category visa holder residing in Australia or is living with the adult.

Section 36 of the FA Act says that to be qualified for maternity allowance, the claimant must be eligible for family tax benefit at some time within 13 weeks of the birth of the child.

The facts

YL gave evidence that his wife had travelled to China three to four months before the child's birth so that she had family support before and after the birth. She returned to Australia on 3 November 2001. Prior to the child's birth YL was a student close to graduating and the family had financial difficulties, which meant that Mrs YL's stay in China was prolonged. YL obtained work after graduating but lost the job after a few months. Nevertheless he continued to support his wife and child whilst they were in China. He and his daughter were Australian citizens and his wife was expected to be granted permanent residency soon.

Could J be regarded as being in YL's care?

In relation to the issue of care, the Tribunal noted that Centrelink's own Departmental policy provided:

> FTB can be paid for a child who is living away from home as long as the adult continues to have responsibility for the care of the child. This situation usually occurs with children living away from home to attend school. Although the adult does not have day-to-day contact with the child, care may continue to be provided. Evidence of care includes:
>
> - Providing for the child financially;
> - Continuing responsibility for the long term welfare of the child;
> - The child usually returns home in school holidays.

The Tribunal also considered a number of decisions of the AAT and Federal Court, which examined the issue of delegated care in the context of qualification for social security payment. In *A and Director-General of Social Security* (1984) 5 ALN N489; 19 *SSR* 199, the AAT, in dealing with a requirement that the adult have 'custody, care and control' said:

> In the great majority of cases, young children live with their parents and are cared for and controlled by them. But a parent does not cease to have care or control of the child during any absence from the family home. Children go to day school, to boarding school and to stay with friends and relatives during weekends and school holidays. In such cases, the parents not only continue to reserve for a child the accommodation and amenities the child enjoys at home and as a member of the family, but having the joint custody of the child they could require that the child be returned forthwith to their care and control. In effect they have delegated the immediate care and control of the child to the school, friend or relative with whom the child is, and they can at any time revoke that delegation.
>
> Furthermore, the care and control which has been delegated is limited in time and scope when compared to the care and control exercised by the parents. Clearly it is limited to the period of the agreed absence and limited also to only those matters affecting the child's well-being which arise for resolution during the agreed period of the child's absence from home. In all other respects, the care and control of the child remains with the parents.

In *Hung Manh Ta and Director General of Social Security*, (1984) 6 ALD 633 *Department of Social Security and Van Luc Ho*, unreported 27 October 1987, and *Le and Secretary to the Department of Social Security* 11 ALN N46; 32 *SSR* 403, the issue under consideration was whether Vietnamese refugees, whose children remained in Vietnam, were qualified for family allowance in respect of those children. Each of these decisions recognised the possibility that delegated care may occur and that the adult does not necessarily cease to have 'custody, care and control'. In *Le* the AAT said:

> Clearly, a parent may delegate part of his or her responsibility. A child does not cease to be in the custody, care and control of a parent by reason that the child is placed in a boarding school. Nor does a parent necessarily lose custody, care and control if the child should go overseas, even for an extended time, for a holiday or for study or for the like.

In *Van Cong Huynh and Secretary to the Department of Social Security* (1988) 18 FCR 402 the Federal Court took the view that 'physical separation has not destroyed the mutual acceptance of ties and responsibilities between members of the appellant's family.' It concluded that 'on the evidence ... the link between the appellant and his children is sustained by communication, sacrifice and the determined provision of support'. Where the applicants in those cases failed was their inability to retain control of their children's lives, being unable to bring them to Australia or return to Vietnam to be with them.

A further relevant decision was that of *Leahy and Secretary to the Department of Social Security* (1988) 15 ALD 626; 45 SSR 578, which examined the abovementioned authorities and concluded that a delegation of responsibility could be open and for an indefinite period:

> It may be implicit in a delegation of care and control that it is to continue until circumstances require a review. If the delegation is successful, depending on the reasons for making it, it may continue to a date to be fixed. Likewise the purposes may expand or contract. The parent who makes the delegation may decide to authorize the person who has accepted day to day responsibility to move the child to a boarding school or even take him or her to another country for a period ... In my opinion there is an implied term that any such delegation is limited by the ultimate right of the parent making it to vary the terms unilaterally or to terminate the arrangement altogether.

In *Seng Pang Ho and Secretary to the Department of Social Security* (1992) 68 *SSR* 967, the AAT considered the meaning of 'dependent child' and 'care and control' in s.5 of the *Social Security Act 1991* (the 1991 Act). Again it was said that:

> The concept 'care and control' is not in our view, limited to a physical presence to enable it be said that the child is in the care and control of an adult. The circumstances under which children are cared for involves a variety of circumstances.

Taking into account the effect of this caselaw, the SSAT determined that YL had continued to provide financial and emotional support to his wife and newborn child during their absence overseas. While he necessarily delegated the day-to-day care of J to his wife, he had control over decisions affecting the child, together with his wife, and both the right and the ability to resume more immediate and direct care. Therefore he could be regarded as having J in his care from the time of her birth, although she was born in China and remained there until November 2001.

Was J an Australian resident?

Section 3 of the FA Act specifies that the term 'Australian resident' has the same meaning as under the Social Security Act 1991 Act (the 1991 Act). Section 7 of the 1991 Act defines an Australian resident as an Australian citizen who resides in Australia. J held Australian citizenship. The issue to be determined was whether she could be said to have resided in Aus-

tralia, before her return on 3 November 2001. Section 7(3) of the 1991 Act sets out the factors which must be looked at to determine whether a person can be regarded as residing in Australia:

> **7.(3)** In deciding for the purposes of this Act whether or not a person is residing in Australia, regard must be had to:
>
> a. the nature of the accommodation used by the person in Australia; and
>
> b. the nature and extent of the family relationships the person has in Australia; and
>
> c. the nature and extent of the person's employment, business or financial ties with Australia; and
>
> d. the nature and extent of the person's assets located in Australia; and
>
> e. the frequency and duration of the person's travel outside Australia; and
>
> f. any other matter relevant to determining whether the person intends to remain permanently in Australia.

The SSAT noted that many of these criteria were inapplicable to a newborn child, but the circumstances of her parents suggested that the family resided in Australia. YL had obtained Australian citizenship and maintained the family home in Australia. He was seeking permanent employment. His wife went to China for a temporary period, extended somewhat due to lack of funds. Mrs YL always intended to return to Australia. She was soon to become a permanent resident. Mr and Mrs YL regarded Australia as their permanent home, and intended to raise J here. In those circumstances, despite the fact that she was born overseas, J should be regarded as residing in Australia, and an Australian resident.

The SSAT took into account that the scheme of the FA Act was such that a person could gain qualification for, and be paid family tax benefit, in respect of a child who was living overseas or who was born overseas. Section 24, for example, enables qualification for family tax benefit to be retained for three years if a child is absent overseas, and specifically refers to the situation where a child, who is otherwise an FTB child, is born overseas. The Act therefore clearly contemplates that a child born overseas can still meet residency requirements.

Decision

As J could be regarded as being an FTB child in the care of her father, the SSAT determined that YL was qualified for family tax benefit, and hence also maternity allowance from the date of J's birth.

[A.T.]

Mobility allowance: substantial assistance needed to use public transport

HL

Decided: 17 December 2001

HL was in receipt of disability support pension because she suffered from bipolar disorder. In August 2001 she was undertaking a vocational training course and lodged a claim for mobility allowance. This was rejected on the basis that she did not require substantial assistance to use public transport.

The law

Section 1035 of the *Social Security Act 1991* sets out the requirements for mobility allowance. One of the criteria is if:

> (iii) the Secretary is of the opinion that:
>
> (A) the person is unable to use public transport without substantial assistance, either permanently or for an extended period; and
>
> (B) the person's inability to use public transport without substantial assistance is because of the person's physical or mental disability;

Centrelink's decision was based on a treating doctor's report, in which the doctor indicated that HL did not require a lot of extra help to use public transport. However, this report related to a stress incontinence condition, and the view was taken that HL should be able to manage public transport with incontinence protection pads to assist her.

However, the SSAT also took into account HL's evidence that she suffered from panic attacks when using public transport. At these times she became disoriented and as a result needed to be accompanied by her daughter when using public transport. In the SSAT's view this amounted to a need for 'substantial assistance' within the meaning of s.1035, and HL was qualified for mobility allowance.

[A.T.]

Thank you to Agnes Borsody who is retiring as editor of the SSR for all her hard work and commitment.