himself to be a full-time student throughout 2001.

The Tribunal distinguished Zhang's situation from *Machan* because of the character of the thesis subject Machan had undertaken, and because in that case 'results were annual and the emphasis was on yearly enrolment' (Reasons, para. 37). The Tribunal concluded that *Coleman* should be followed.

> In the Tribunal's view the bachelor degree in which Mr Zhang enrolled ... was, at least in the first year of the program, organised around semester based or sessional subjects. The particular study period was one semester or session. The fact that students enrolled for both autumn and spring sessions at the beginning of the academic year was a matter of administrative convenience...

(Reasons, para. 39)

The AAT stressed that:

> Clarification is required as to the Social Security benefits payable where a student undertakes subjects in a third or summer semester/session during the course of the academic year. Neither the legislation nor departmental policy appears to address this issue adequately.

(Reasons, para. 46)

The circumstances leading to the overpayment were, in the AAT's view, sufficiently unusual to be considered 'special' such that recovery of the debt would be unfair or unjust. Zhang had completed his spring session workload by spreading it over two sessions; he was totally reliant on social security benefits, and was without assets beyond his car, computer and household goods. Interestingly the AAT appears also to allude to a 'notional entitlement' to a different payment:

> He has not enriched himself by these events — indeed, quite to the contrary, and the Commonwealth has not suffered financially given that had Centrelink been aware at the relevant time of his part time status he would merely have been transferred to newstart allowance.

(Reasons, para. 44)

Formal decision

The AAT varied the decision under review by finding that there was a debt of $4686.04 and that recovery of the debt should be waived because of the special circumstances of the case.

[H.M.]

Youth allowance: 'particular study period'

MATHESON and SECRETARY TO THE DFaCS (No. 2003/542)

Decided: 10 June 2003 by S. Forgie

Background

Matheson started a Bachelor of Arts at the University of South Australia (UniSA) in 1997. She did not study in 1999, and in 2000 resumed, enrolling in 27 units. A full-time workload at UniSA is represented by 36 units per year. In February 2000 and March 2000 Matheson varied her enrolment, resulting in completion of 22.5 units over the year.

Matheson was granted youth allowance from 20 October 2000. In late 2000 she enrolled in 27 units for 2001: three subjects of 4.5 units in each semester. In March 2001, due to the restricted availability of subjects, she amended her enrolment so as to undertake two subjects in semester one and four in semester two.

On 25 January 2002 Centrelink determined that Matheson had not been undertaking full-time study in semester two 2000, or semester one 2001. A debt of $2628.91 was raised, being youth allowance overpaid between 20 October 2000 and 26 July 2001.

On appeal the SSAT set the decision aside.

The law

Section 540 of the *Social Security Act 1991* (the Act) establishes that a person qualifies for youth allowance if, amongst other things, they satisfy the activity test. Sections 541 and 541A provide that one means of satisfying the activity test is 'undertaking full-time study', which is defined by s.541B(1) as follows (emphasis added):

> 541B.(1) For the purposes of, a person is if:
>
> (a) the person:
>
> (i) is enrolled in a course of education at an; or
>
> (ii) was enrolled in the course and satisfies the that he or she intends, and has (since no longer being enrolled) always intended, to re-enrol in the course when re-enrolments in the course are next accepted; or
>
> (iii) was enrolled in the course and satisfies the Secretary that he or she intends, and has (since no longer being enrolled) always intended, to enrol in another course of education (at the same or a different educational institution) when enrolments in the other course are next accepted; and
>
> (b) the person:
>
> (i) is undertaking in the **particular period** (such as, for example, a semester) for which he or she is enrolled for the course; or
>
> (ii) intends to undertake in the next study period for which he or she intends to enrol for the course;
>
> either:
>
> (iii) in a case to which does not apply-at least three-quarters of the normal amount of full-time study in respect of the course for that period (see to); or
>
> (iv) in a case to which applies-at least two-thirds of the normal amount of full-time study in respect of the course for that period ...

Section 541B(2) provides that one definition of 'normal amount of full-time study' is the standard student load determined by the institution for that course, under s.39(2) of the *Higher Education Funding Act 1988.*

The issue

The issue to be determined was whether the 'particular study period' was an academic year, or a semester.

Submissions

The Department argued that the reference to a semester in the words of s.541B(1)(b)(i) above is a strong indicator that the particular study period is a semester. Although students enrolled for a year at a time this was a matter of administrative convenience. It would only be appropriate to define the study period as an academic year if the subjects being taken occupied the whole year. Extrinsic materials including explanatory memoranda were cited in support.

Matheson's representative submitted that an uneven study load should be assigned a yearly value, noting that UniSA had considered Matheson a full-time student: charging full-time student fees and issuing a full-time student card.

Conflicting authorities were cited with the Department preferring *Coleman and Secretary to the DFaCS* [2002] AATA 772, while Matheson relied on the general approach of the Federal Court in *Secretary, DFaCS and Gray* (1999) 57 ALD 67 and, more particularly on the AAT's reasoning in *Secretary, DFaCS and Machan* [2001] AATA 434.

Discussion

The AAT considered *Gray*, *Machan*, *Coleman* and the recent decision of

Zhang, reported in this issue. The approach in *Gray* was to 'dissect the requirements' of the relevant legislation and then apply the facts. Employing that approach the AAT established the various requirements under consideration in this matter, concluding that the emphasis in s.541B is on enrolment:

> It is upon enrolment in the course. It then moves to the study period for which the person is enrolled and then to the normal amount of full-time study for the period for which he or she is enrolled for that study period. The study period for which a person is enrolled then becomes a question to be ascertained on the facts of the case.

(Reasons, para. 26)

The AAT concluded that ascertainment of the relevant 'study period' remains a question of fact to be decided in each case.

The reference to a semester in s.541B(1)(b)(i) was seen as an example only, consistent with s.15AD(a) of the *Acts Interpretation Act 1901* which provides that an example of the operation of an Act is not be taken as exhaustive.

Conclusions

Four factors were identified as pointing to the study period being a full academic year in this case. These included that enrolment on each occasion was for an academic year, and that the enrolment form is headed 'enrolment — 2001' suggesting a full-year rather than part-year enrolment. Also, Matheson was able to change subjects from one semester to another within the year's enrolment in the course. The Program Information for her course also supported this view. It was determined that in this case the 'study period' was an academic year.

The AAT determined that as Matheson's enrolment of 22.5 points in 2000 was less than 75% of the normal full-time student load, there was a debt from 20 October 2000 until the end of the 2000 academic year. However, with a workload of 27 points (75%) in the 2001 year no debt arose between the end of the 2000 academic year and 26 July 2001.

Formal decision

The AAT set aside part of the decision, determining that a debt was to be recovered from Matheson for the period from 20 October 2000 to the end of the 2000 academic year, and affirming that there was no debt for the remaining period.

[H.M.]

[**Contributor's note:** This decision was followed in *Secretary to the DFaCS and Ung* No 2003/748, decided 4 August 2003. The Department has lodged an appeal to the Federal Court in the matter of *Matheson.*]

Widow allowance: residential qualification

SECRETARY TO THE DFaCS and KAELLO
(No. 2003/490)

Decided: 30 May 2003 by R.G. Kenny.

Background

Kaello divorced her husband in Russia in January 1995, and came to Australia in March 1995, staying with her daughter until her return to Russia in June that year. After her mother's death in September 1996, Kaello travelled to Australia on a visitor's visa and applied for a permanent visa. She was granted a bridging visa in 1997, which allowed her to travel to Russia on 1 September 1997 to resolve matters relating to her mother's will.

Kaello's mother bequeathed to her one room in a two-room unit in Russia. Her step-brother inherited the other room. During this period in Russia, Kaello lived in another unit that she owned, while she sold some of her mother's possessions. Kaello returned to Australia on 23 July 1998, on which date she was also granted a permanent residence visa.

On 23 March 1999, Kaello returned to Russia to sell the unit she inherited from her mother. The sale of the unit was complicated by the fact that she was legally required to offer her step-brother an opportunity to purchase the property, and that opportunity was to be left open for 12 months. Her ownership of the property needed to be resolved before the courts. Even after an extension of the required 12 months, Kaello's brother was not in a position to purchase the unit, and it was put up for sale. A purchaser was found, but there was some dispute regarding payment that also required resolution. As a result of these difficulties, Kaello did not return to Australia until 18 July 2002.

During this period, Kaello lived in the unit she owned independently of her step-brother, and lived off her Russian pension and earnings from part-time employment.

On 2 August 2002 Kaello lodged a claim for widow allowance, which was rejected by the delegate on 5 August 2002 on the basis that she was not residentially qualified for that payment. The decision was affirmed by the Authorised Review Officer, but overturned by the SSAT.

Legislation

The only area of dispute regarding Kaello's qualification for widow allowance, related to subparagraph 408BA(2)(d)(ia) of the *Social Security Act 1991* (the Act), which provides that:

> the woman entered Australia on or after 1 April 1996 and before the commencement day — the woman has been an Australian resident for a period of, or periods totalling, 104 weeks before the day she lodged the claim for the allowance.

An Australian resident is defined in s.7(2) of the Act as a person who:

> (a) resides in Australia; and
>
> (b) is one of the following:
>
> (i) an Australian citizen;
>
> (ii) the holder of a permanent visa;
>
> (iii) a special category visa holders who is a protected SCV holder.

Subsection 7(3) of the Act provides guidance for determining whether or not a person can be considered to be residing in Australia:

> 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.

Australian residence

The AAT considered the categories outlined in s.7(3) of the Act but noted that this was not an exhaustive list of considerations, and that the intention of the respondent will also be relevant: *Hafza v Director-General of Social Security* (1985) 6 FCR 444. The AAT calculated that Kaello had spent only 35 weeks in Australia between the date she was granted a permanent visa and the date she lodged a claim for widow allowance. However, the AAT