ated. She never kept a follow up appointment with Dr Connors because she believed he had endangered her son's life.

Bennett's evidence was that her relationship with her husband was extremely strained as he smoked and gambled and only lived with the family intermittently. She told the AAT she had become sleep deprived and at times had difficulty coping with the care of Joseph. In July 1996, the family moved to Mittagong where her husband had obtained work. On 20 July and 20 August 1996, Bennett presented with Joseph at the emergency section of the Bowral Hospital.

The provision of extra care and attention

Bennett told the AAT that Dr Cook and Dr Seedat recommended a high level of cleaning and housework to prevent exacerbations of Joseph's asthma. As a result, she undertook a daily routine of dusting, vacuuming, washing and changing bed linen. She vacuumed twice a day with a special dust-mite bag and dusted twice daily with a damp cloth. The floor was mopped daily with undiluted disinfectant, and curtains were washed every second day. The cleaning routine varied according to the level of dirt and dust in their current home.

Extracts from Bennett's diary detailed her daily cleaning and the administration of medication. She administered medication 3 or 4 times daily, and each dose took between 7 and 10 minutes. Shopping for Joseph took an extra 20 to 30 minutes as she had to refer to a written sheet to ensure that each food was suitable. She watched her son carefully to ensure he did not get over-excited as this might trigger an asthma attack. Although her cleaning regime was slightly reduced as the current home did not get as dirty as previous houses, she still vacuumed daily. Perhaps twice a day she would stop Joseph from an activity because he was becoming too excited. At the time of the hearing, Bennett did not let Joseph play with other children for fear of him getting over-excited. She indicated that she would continue her extra vigilance and cleaning until someone suggested a better mode of caring for her son.

Bennett told the AAT that her first child had not required anywhere near the same level of care and attention. She did not have to administer medication or adopt the same extra cleaning. There was no need for vigilance against things which may trigger an asthma attack.

Medical evidence

A Commonwealth Medical Officer, who assessed Joseph in January 1996 was not satisfied that extra care and attention was needed for an extended period. He recommended a review in one month. A report by Dr Fogg, a government medical officer described Joseph's asthma as mild and Bennett's cleaning regime as 'totally unnecessary'. Dr Fogg did not believe Joseph was a disabled child as defined by the Act. Dr Connors agreed, as did the Director of Paediatrics at Logan Hospital.

A report from Dr Cook described the severity of the condition as 'moderate', and indicated that Joseph did require substantially more daily care and attention than a child without a disability. In December 1995, Dr Seedat provided a medical certificate indicating that Joseph was likely to have asthma for more than 12 months.

Dr Khoo, a general prectitioner, provided a letter diagnosing infantile asthma and recommending that the house be kept as dust free as possible. Dr Hanson, a paediatrician recommended a possible reduction of Joseph's level of inhaled steroids and that he not be exposed to cigarette smoke. Dr Hanson's report indicated that the level of care provided by Bennett was necessary, noting that it was substantially more than was needed by a healthy child.

Dr Marian, a general practitioner, noted that Joseph required substantially more care than a healthy child, and that 'the boy does have fragile health and his asthmatic episodes have been far better controlled since his mother... has taken a number of steps suggested to her by myself ... These steps involved regular washing of linen, more than usual vacuuming and cleaning of the house to ensure a dust-free environment': Reasons: para. 56. He predicted that this extra care was needed for at least 3 or 4 years.

Other evidence

The AAT referred to an extract from the Guidelines for Australian Government Health Service Officers on Asthma to assess the severity of Joseph's condition. Other people gave evidence which corroborated Bennett's account of her son's illness and his need for extra care. Bennett also referred the AAT to a sheet entitled 'Home Asthma Avoidance Measures' from the South Eastern New South Wales Public Health Unit. Bennett particularly referred the AAT to the sections about dust mites, food allergies and moulds.

Findings

The AAT found Bennett to be a co-operative and reliable witness. Joseph was found to suffer from moderate asthma with severe episodes. It said it took a broad approach, considering all the evidence, not just the medical reports, and indicated a preference for the evidence of the most recent treating doctors, Dr Hanson and Dr Marian. The AAT did not agree with the DSS submission that the level of care provided by Bennett was far in excess of that required. It quoted from the case of *Monaghan* (1990) 55 *SSR* 736 indicating that an objective test was required to assess whether the level of care required was substantially more than that needed by a healthy child.

It found that Joseph did require substantially more daily care and attention than a healthy child of that age. The AAT was satisfied that the need for extra care and attention would continue for at least 3 or 4 years.

Formal decision

The AAT set aside the decision under review and substiuted its decision that Bennett was entitled to be paid CDA for Joseph from the date of the claim.

[H.B.]

Procedure: stay order

SECRETARY TO THE DSS and VESNAVER
(No. 12291)

Decided: 5 May 1997 by J. A. Kiosoglous.

The DSS sought a stay of the SSAT's decision that the Italian survivor's pension not be maintained in the assessment of Vesnaver's age pension.

The DSS argued that it had proof that the Italian survivor's pension had been granted to Vesnaver. If a stay order was not granted the DSS would not be able to maintain the Italian pension as income, and would have to increase the rate of age pension paid to Vesnaver. It was also argued that if a stay order was not granted, the DSS would be prejudiced and there would be a burden on the taxpayer. Vesnaver is paid $303.70 a fortnight age pension, and $8966.51 a year Italian age pension. Further documents revealed that Vesnaver is entitled to $7094.38 a year Italian survivor's pension. Vesnaver was paid arrears of survivor pension in November 1994 for the period September 1988 to January 1992, but she has not received a payment since.

It could not be argued that Vesnaver is in extreme financial hardship. She receives a part age pension and the Italian age pension, and as well has $2010 in the

bank. The DSS submitted that if it was successful on review at the AAT, it would be difficult to recover any money paid to Vesnaver, and administratively inefficient. It had not been tested whether the DSS could recover moneys paid as a result of the AAT's refusal to grant a stay order.

Vesnaver argued that the survivor's pension had not been granted past January 1992. Documents supporting this contention were submitted to the AAT.

The AAT found that 'the Tribunal cannot base a decision whether to grant a stay order or not on the basis of an untested theory which was not the subject of full argument': Reasons, para. 11. The AAT considered *Dart and Director-General of Social Services* (1982) 8 *SSR* 80, and decided that a stay order was not necessary in this case to secure the effectiveness of the hearing. Even though no financial hardship would be suffered by Vesnaver, the AAT considered the totality of the circumstances. Vesnaver intended fighting the case, and the DSS's submission about recoverability of benefits paid, was unconvincing.

Formal decision

The AAT ordered the stay of the SSAT decision as it related to arrears of benefits, but refused to stay that part of the decision relating to current payments.

[C.H.]

Student Assistance Decisions

AUSTUDY: time spent in full-time study

BAKER and SECRETARY TO THE DEETYA
CAMERON-TAYLOR and SECRETARY TO THE DEETYA
CLEVERLEY and SECRETARY TO THE DEETYA
(No. 12119)

Decided: 14 August 1997 by Mathews J.

Baker, Cameron-Taylor and Cleverley (the applicants) sought review of the DEETYA's decisions not to pay them AUSTUDY for 1996. The decisions had been reviewed by the SSAT and affirmed.

The facts

Baker

Between 1987 and 1992 Baker had been a full-time student at the ANU enrolled in a Bachelor of Arts/Laws course. In 1995 Baker enrolled in the Bachelor of Medicine course at Newcastle University. The requirements for admission to this course were that 32 of the places went to the highest results of the Personal Qualities Assessment (test), and 32 places were allocated according to academic merit. This group included school leavers and students who had undertaken tertiary studies. Baker gained admission on the basis of academic achievement at tertiary level. She applied for AUSTUDY for 1996.

Cameron-Taylor

Between 1985 and 1988 Cameron-Taylor studied full-time a Bachelor of Visual Arts course at the Canberra Institute of the Arts. In 1990 and 1991 she was enrolled at the National Institute of Dramatic Art in a Diploma of Design. In 1995 Cameron-Taylor enrolled in the Bachelor of Medicine course at Newcastle University, and in 1996 she applied for AUSTUDY.

Cleverley

Between 1985 and 1987 Cleverley was a full-time student at the University of Wollongong in a Bachelor of Arts course. In 1988 he studied part-time for the first semester, and in 1990 he studied full-time and completed his course. Cleverley was a full-time student between 1993 and 1995 at Macquarie University in the BA/LLB course. He continued his full-time studies in 1996, and applied for AUSTUDY.

The issue

The AAT noted that the same issue had to be addressed in each case. According to regulation 41 of the Austudy Regulations, a student can only be paid AUSTUDY for a particular year if the time already spent by the student in full-time study at the level of tertiary study, is less than the minimum time for the course, plus one year if it is necessary to pass the whole year to progress in the course. Regulation 38 defines what is meant by 'the level of tertiary study' referring to Group A, B, C and D courses. Group B courses include bachelor degree courses.

The AAT decided that regulation 47 was central to these cases. It provides:

> 'For the purposes of subregulation 41 (1), no account is taken of a course completed by a student if completion of the course is the normal requirement for admission to the student's current course (unless the current course is the Master's qualifying course).'

The facts were not in dispute. It was agreed that each applicant had completed the equivalent of the minimum time required to complete her/his current course plus one year, and that if the applicants did not fit into the exception in regulation 47, they would not be eligible for AUSTUDY.

Previous cases

The AAT referred to previous AAT cases which had dealt with this issue in different ways. In *Gray and Secretary to the DEETYA* (1996) Vol. 2(3) *SSR* 40 the AAT had decided that 'normal requirement' meant what was the usual or typical obligation that must be complied with to be admitted to the course. In *Secretary to the DEETYA and Wilkinson* (decided 2 August 1996) the AAT had decided that it meant a normal requirement set by the University to enable the student to be admitted to the course. In *Rose and Secretary to the DEETYA* (decided 30 August 1996) the AAT decided that 'the normal requirement' included the completion of a tertiary degree if that is a prerequisite for entry to the course. The AAT decided in *Peterkin and Secretary to the DEETYA* (1997) Vol 2(8) *SSR* 113 that the word 'the' in the phrase 'the normal requirement' was significant, as was the fact that 'requirement' was used in the singular.

The AAT found that the phrase 'normal requirement' was plain English with no ambiguity. Many courses provide for two or more ways of being admitted to a particular course. That is, there may be more than one 'normal requirement', and frequently there is provision for graduate entry. So, 'the applicants case is dependent on the proposition that under regulation 47 there can be more than one 'normal requirement' for admission to a course': Reasons, para. 37.

In 1992 the AUSTUDY Regulation was amended so that 'a normal requirement' was changed to 'the normal requirement'. The AAT found that this change was intended to alter the meaning or scope of the phrase. 'A normal requirement' admitted the possibility of one or more entry requirements.

> 'The amendment to the regulation is clearly intended to produce a situation in which there can be only one requirement that fits the