Consent Orders were filed in the Family Court in March 1999. The terms of settlement apportion residency of the children in approximately equal shares to each parent. In June 1999 Willocks applied for and was granted PP. In February 2000 PP was cancelled following an application by Dean for PP. Dean had been living with another partner at the time Willocks had been granted PP in March 1999. She applied for PP after the end of that relationship.

Willocks claimed that the children were in his care 45.8% of the time, that he provided them with requirements for football, and spent additional time with them at football training, even when the children were not resident with him. It was agreed that Dean provided the children with necessities for school and paid for their haircuts.

It was submitted for Willocks that the Act gives little guidance as to which parent should receive PP. It was submitted that the fact Willocks was unable to undertake full-time employment indicated that he had a greater financial need in respect of the children, and that this was relevant pursuant to s.500E

For Dean it was submitted that she took the children fishing and bicycle riding, and that they spent some 56% of their time with her. She met a greater share of their costs, and hence it was appropriate that the children be regarded as her PP children.

The law

Qualification for PP is set out in s.500 of the Act. Among other things, the person must have at least one PP child. According to s.500D(2), which relates to a person who is not a member of a couple:

> A 'PP' child in relation to a person who is not a member of a couple, is a child who:
>
> (a) is a dependent child of the person (the 'adult') and
>
> (b) either:
>
> (i) has not turned 16; or
>
> (ii) is a child for whom the adult is qualified for child disability allowance; and
>
> (c) any of the following paragraphs apply:
>
> (i) the child is a natural or adopted child of the adult; or ...

'Dependent child' is defined in s.5(2) of the Act. It states:

> A young person who has not turned 16 is a dependent child of another person (in this subsection called the adult) if:
>
> (a) the adult is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person, and the young person is in the adult's care ...

The AAT found, based on the evidence of the parties and the family court orders that the children were PP children of both Willocks and Dean, in that both parents met the criteria as set out. However s.500(E)(1) states that a child can be a PP child of only one person at a time. Regard must then be had to s.500(E)(2), which reads as follows:

> If the Secretary is satisfied that, but for this section, a child would be a PP child of 2 or more persons, (adults), the Secretary must:
>
> (a) make a written determination specifying one of them as the person in relation to whom the child is to be a PP child; and
>
> (b) give each adult who has claimed parenting payment a copy of the determination.
>
> When both parents fulfil the definition of having a PP child, as I have found, then I am faced with the unenviable duty of making a choice in favour of one of them. It was submitted by Mr Hall that the children should be designated PP children of the applicant on the basis that his financial need is greatest. Of course, consideration of each parent's financial circumstances is not the only factor to which I can have regard, but it seems to me to be the only manner, in the present circumstances, in which I can make some differentiation between the rival claims of the applicant and the 2nd respondent for PP.

(Reasons, para. 54).

This was in the context that it was agreed by both parties that the care of the children was very equally divided as to time. The AAT found that Dean had the greater financial responsibility for the children, declining to accept the argument that Willocks' involvement in the boys' football activities was enough to change the balance in his favour. 'I make a determination pursuant to section 500E of the Act specifying the 2nd respondent as the person in relation to whom the children, Stephen and Shaun Willocks, are to be PP children' (Reasons, para. 57).

Formal decision

The decision of the SSAT was affirmed.

[A.B.]

Disability support pension: 'course of rehabilitation'

SECRETARY TO THE DFaCS and DE ALWIS-EDRISINHA (No. 20010760)

Decided: 5 September 2001 by J Cowdroy.

De Alwis-Edrisinha was charged with murder and remanded in the Arthur Gorrie Correction Centre. On 18 October 2000 he was transferred to John Oxley Memorial Hospital, and subsequently diagnosed as suffering from schizophrenia. On 13 December 2000 the Mental Health Tribunal found he was suffering from unsoundness of mind at the time of the alleged offence, and ordered he be detained as a restricted patient at the hospital under the *Mental Health Act 1974*. As a result the criminal proceedings were suspended as he was unfit to stand trial.

Legislation

Section 1158 of the *Social Security Act 1991* provides that a pension is not payable to a person in gaol or undergoing psychiatric confinement because the person has been charged with an offence. However, s.23(9) provides that the confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.

A claim by De Alwis-Edrisinha for disability support pension was refused as he was not considered to be undertaking a course of rehabilitation whilst at the hospital. That decision was set aside by the SSAT, and the Secretary applied for a review by the AAT.

Evidence

The AAT heard evidence from Liam Duncan, a social worker on De Alwis-Edrisinha's treating team at the hospital, who had assisted in identifying the units of rehabilitation appropriate to De Alwis-Edrisinha's needs. He said that rehabilitation is the primary method of treatment at the hospital. The aim is to stimulate interest in leisure and social activities, develop time management and stress management skills, recognise and adopt acceptable social behaviour as well as vocational and life skills such as cooking, washing, money management, etc. For all patients the overriding objective is to facilitate reintegration into the community, and individual programs are tailored to suit each patient because of the complexities of mental illness.

Duncan also said that the mental state of some individuals prevents any involvement in rehabilitation, or it is minimal either because they are not receptive or they reach the stage where the optimal degree of progress has been made. De Alwis-Edrisinha initially refused to participate in any program and the only treatment given was medication. His mental state gradually improved and he commenced 'early intervention activities' such as arts, crafts and gym.

Hospital documents indicated that a rehabilitative program setting out short, medium and long terms goals was implemented on 2 January 2001. A re-evaluation of those goals on 3 August 2001 documented the outcomes achieved. Duncan pointed out there had been progress in several areas, acknowledging that De Alwis-Edrisinha spent a considerable amount of time writing a book which was autobiographical in nature. Once that activity was finalised there might be greater focus on other components.

Duncan also acknowledged that De Alwis-Edrisinha's rate of progress could not be predicted, and that ultimately the Patient Review Tribunal would make the decision when he should be released into the community. Setting a time frame for completion of rehabilitation or for a likely release date was never undertaken as to do so would be counter-productive.

Duncan informed the AAT that while items needed for arts/crafts and cooking activities were provided by the hospital, others activities such as TAFE courses had to be funded by the patient. In his view the denial of income in the form of a pension can affect rehabilitative progress. Additionally there were tensions created within the hospital by the income disparities between patients.

Contentions

For the Secretary it was submitted that while De Alwis-Edrisinha was involved in rehabilitation-like activities, it could not be said he was undertaking a course of rehabilitation. In *Secretary, DFaCS & Fairbrother* (1999) 56 ALD 784 the AAT held that in interpreting the words 'course of rehabilitation', there must be evidence of a formal course of rehabilitation with a finite duration, a structure, a beginning and an end. In that matter it found that while the treatment undertaken involved planned rehabilitation, it did not have any of the temporal or structural characteristics of a course of rehabilitation.

In this matter, it was contended, there was uncertainty both as to the commencement and the end date of the program. It followed that because its duration was unknown, it could not be structured and was best described as merely a collection of activities De Alwis-Edrisinha undertook. It was an ongoing and open-ended program. Further, the use of the word 'course' indicated a systemised, prescribed series of events. To give it a wide meaning would render its presence redundant.

Decision

In reaching its decision the AAT noted dictionary extracts defining the term 'course' as 'advance in a particular direction: onward movement, the path, route or channel along which anything moves', 'the continuous passage or progress through time or a succession of stages'. From the evidence it was satisfied that the activities De Alwis-Edrisinha undertook were structured, that he was moving through the various components of the course, and as he did so he gained skills required for successful community reintegration. In its view the structured nature of his activities, rather than being activities with a general concept of rehabilitation, were sufficient for them to constitute a course of rehabilitation.

The AAT was of the view that if one accepts that rehabilitation is a holistic process and multi-faceted, then a course of rehabilitation commences at the point when structured and varied programs are implemented. This is a matter able to be determined as a question of fact. It found, on balance, that this point was 2 January 2001, the recorded date that the program was first implemented.

It also held that the end of the course of rehabilitation was able to be determined retrospectively. There was no suggestion that De Alwis-Edrisinha's course would last indefinitely. Although the term was commonly used to connote 'a specified time' or 'a portion of time', there was no requirement that this be done in advance. When a course of rehabilitation comes to an end is, again, a question of fact.

The Tribunal was satisfied that De Alwis-Edrisinha had been taking a 'course of rehabilitation' so that s.1158 did not preclude payment of pension.

Formal decision

The decision under review was varied to the extent that the respondent was not disqualified for disability support pension from 2 January 2001.

[K.deH.]

Refugee: New Zealand citizen; special benefit waiting period; circumstances beyond the person's control

SUU VAN HUYNH and SECRETARY TO THE DFaCS (No. 2001/0765)

Decided: 6 September 2001 by J.D. Campbell.

The issue

The issues to be determined were whether Van Huynh was qualified for special benefit (SB), whether a newly-arrived resident's waiting period of 104 weeks should be applied, and whether there had been a change in circumstances beyond Van Huynh's control sufficient to waive the waiting period.

Background

Van Huynh was a Vietnamese refugee who arrived in New Zealand in February 1996, and became a New Zealand citizen in May 1999. He arrived in Australia in March 2000 and was advised by Centrelink in April 2000 of the two-year newly arrived resident waiting period, but in June 2000 applied for SB. That claim was rejected, a decision affirmed by the SSAT in November 2000.

Van Huynh was born in 1928, and had worked as a rice farmer before serving in the Vietnamese army, and finally fled Vietnam in 1990. He spent time in Cambodia and Thailand, and after arrival in New Zealand had been given a six-week course on life in New Zealand, but no English courses. He lived in various places. His health was poor and he was under medical treatment, and he found the climate cold. He came to Australia to connect with the larger Vietnamese community in Australia, arriving with only $100. He had been married in Vietnam, but had divorced and had lost contact with all of his children.

After arrival in Australia he was assisted by the Mercy Refugee Service and St Vincent De Paul Society, who helped with some money, food and short-term accommodation, and by the local Vietnamese community, and attended weekly English classes. He considered he was unable to do any work because of his age of 73 years, and poor