

Commissioners file no: CDLA 2748 2002

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The claimant and appellant is appealing with my permission against the decision of the Nottingham appeal tribunal on 5 November 2001 under reference U 42 249 2001 00523.

3 For the reasons below, the decision of the tribunal is erroneous in law. I set it aside. I refer the appeal to a differently constituted tribunal for determination in accordance with the directions given in this decision (Social Security Act 1998, section 14(8)(b) and (9)). **I draw the attention of the listing clerk to the problems of translation in this case. The interpreter used at the previous hearing is not to be allocated to the rehearing.**

4 This appeal is brought by a claimant who is an illiterate Somali lady who spoke no English. Through her representatives, she claimed the higher rate of the mobility component and highest rate of the care component of disability living allowance. The Secretary of State did not make any award of disability living allowance. The matter was appealed to a tribunal with the assistance of a member of the Free Representation Unit (FRU). The tribunal awarded the lowest rate of the care component and the lower rate of the mobility component from and including 7 August 2000 (the date of her claim) for two years.

### *Grounds of appeal*

5 There have been a number of further proceedings following the tribunal decision. The secretary of state's representative asked for a formal correction of the tribunal's decision. This was refused by the regional chairman. Separately, the FRU representative applied on behalf of his client for permission to appeal, and also made a formal complaint to the regional chairman about the conduct of the case. The application to appeal was made late.

### *Interpreting to and from the claimant*

6 Central to both the grounds of appeal and the complaint was the issue of the competence of the interpreter at the tribunal hearing. He was appointed by the tribunal. Despite the lateness of the application, I granted permission to appeal to consider this point, and I invited a submission from the secretary of state's representative. That submission has been supplied, and it supports the appeal.

7 The relevant question is whether the claimant was given a fair hearing. The problem, I am told, was that the tribunal-appointed interpreter spoke one dialect of Somali and the claimant spoke another. According to a formal letter of complaint written by the representative two days after the tribunal hearing, the claimant's daughter and, through her, the representative became aware of problems with the

interpretation to and from the claimant. The representative drew this to the attention of the chairman. According to the representative: "The Chair was not happy to adjourn and decided that if the Appellant could get the general meaning then we should continue."

8 The record of proceedings notes that there was an interpreter present, but I can see no note anywhere in it about difficulties of interpretation. Similarly, there is no comment at all in the statement of reasons for the decision. I therefore asked the chairman for comments. The chairman commented:

"The interpreter showed signs of indifference throughout the whole procedure. There was an awareness of problems with dialect. However, as will be seen from the record of proceedings, much evidence was gathered through the use of the interpreter and it was generally considered that there was sufficient understanding to enable the matter to proceed."

#### *Appointing an interpreter*

9 I asked the secretary of state's representative to advise me about the general approach of the Appeals Service to the appointment of interpreters. The response drew my attention to the guidance given, in considerable detail, in the chapter 4 of the CHAP guide (the Appeals Service Clerk's Handbook of Appeals Procedures). I do not need to deal with any specific aspect of what is clearly a thoroughly thought out system for selecting qualified interpreters to a panel and appointing interpreters from that panel to individual hearings. The general approach is summarised in the following passage:

The Appeals Service will attempt to provide a qualified interpreter in all cases. If the appellant wishes to bring their own interpreter, they may attend as an observer, but will not be expected to participate, and expenses will not be paid. The only exception to this would be where the clerk is unable to arrange an interpreter having followed the [guidance]. In these instances, approval to use the appellant's interpreter should be sought from the district chairman."

#### *The standard of interpretation*

10 The secretary of state's representative also made a submission on the relevance of the European Convention on Human Rights Article 6 to the issue of interpretation. The representative rightly draws attention to the specific provision in Article 6(3)(e) that there should be "the free assistance of an interpreter if he cannot understand or speak the language used in court." I agree with the secretary of state's representative that this relates specifically to criminal proceedings, but the general principles are, as the representative says, also applicable to all hearings within the scope of Article 6(1). The main authority on Article 6 (3) is that of *Kamasinski v Austria* Series A No 168, 19 December 1989, [1991] 13 EHRR 36. At paragraph 74, the Court ruled:

... paragraph 6(3)(e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretative assistance provided should be such as to enable the defendant

to understand the case against him and to defend himself, notably by being able to put before the court his version of the events.

In view of the need for the right guaranteed by paragraph (3)(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of the interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided."

That is a statement made in the context of the express application of Article 6(3)(e) to criminal proceedings. The Court also went on to apply this approach to the facts of the case and to find that there was no breach of the obligations by the Austrian court. But it noted in particular no objection being made to the interpretation at the time.

11 I agree with the secretary of state's representative that the general approach to interpretation at tribunal hearings should be guided by the ruling of the European Court of Human Rights, even if it does not apply directly. The interpreter in this case was a tribunal-appointed interpreter, and not to be considered as associated with either party to the appeal in any way. The interpreter is neutral and, in effect, part of the tribunal as is the clerk. A failure of interpretation must therefore affect the fairness of the tribunal hearing. This is the first case where I have heard of a specific challenge to an interpreter's competence. But as it was made it should have been dealt with expressly and the decision of the chairman recorded.

12 The record of the hearing is silent on the issue. There is no record of the complaint. Nor is there any indication that the interpreter was asked about the problem or whether there was any factual exploration of the differences between the dialect spoken by the claimant and that spoken by the interpreter. Having once had to "interpret" the spoken English of a Queensland colleague from Australian English to British English over several days, so that it could be further interpreted by a professional interpreter into Czech, I do not underestimate that problem.

13 I do not accept that it is adequate to establish a fair hearing that the tribunal concluded that it had "sufficient understanding". Where the Appeals Service has appointed an interpreter, the claimant is entitled to expect the questions to her, and her evidence in reply, will be interpreted professionally. If the interpreter is showing signs of "indifference" (to quote the chairman) then it is the chairman's task to deal with that. In this case the representative did what should have been done, namely to draw the problem to the attention of the chairman during the hearing. The issue should then have been investigated and appropriate decisions made. Perhaps, for example, the daughter could have helped or an agreement reached about proceeding. The chairman took no action. I must set aside the decision as a result.

#### *My decision*

14 The appeal must go for rehearing, with proper provisions for interpretation made. This should not involve the previous interpreter any more than it should involve the previous tribunal members.

15 As the case is being reheard in any event, I do not take further the other aspects of the complaint by the representative about the chairman or the comments of the chairman about the representative. The appeal will go to a new tribunal who will no doubt note the history of the case.

16 The claimant is warned that the new tribunal will make its own decision about the award of both components of disability living allowance. It is not bound to accept the award of the lower rate of the mobility component or lowest rate of the care component of disability living allowance made by the previous tribunal.

David Williams  
Commissioner

10 October 2002

[Signed on the original on the date shown]