<u>**SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS**</u>

Commissioner's File No.: CS/1753/2000

Starred Decision No: 23/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 4th June 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

1. This appeal by the claimant succeeds. In accordance with the provisions of section 14(8)(b) of the Social Security Act 1998 I set aside the decision of the Newcastle Appeal Tribunal of 15th November 1999. I refer the case to a completely differently constituted tribunal for a fresh hearing and decision. The tribunal is not to include any person who has previously sat on a tribunal considering an appeal from this claimant. The parties should regard themselves as being on notice to send to the clerk to the tribunal as soon as is practicable any further relevant written medical or other evidence. The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course. I am not impressed by most of the points raised by or on behalf of the claimant. I allow this appeal because of a significant procedural error made by the tribunal, and it is not necessary for me to comment on all the matters that have been raised.

2. The claimant was born on 12th November 1957. She has various medical problems and on 27th November 1996 she made a claim for severe disablement allowance. On 13th March 1997 the Adjudicating Medical Authority (AMA) assessed the degree of disablement as 55% for the period 1st May 1995 to 1st May 2000. This was below the 80% threshold required before the allowance can be awarded and the claimant appealed to the medical appeal tribunal against the decision of the AMA.

3. On 10th September 1997 the tribunal substituted an assessment of 45% for the period 1st May 1995 to 30th April 2000. On 25th February 1998 a differently constituted tribunal refused to set aside the decision. On 29th June 1998 leave to appeal to the Social Security Commissioner was refused by the chairman of the original tribunal. Meanwhile on 22nd January 1998 the disability appeal tribunal considered an appeal by the claimant and on 1st April 1998 a differently constituted tribunal refused to set aside that decision. The chairman of the tribunal of 1st April 1998 had also chaired the tribunal on 10th September 1997.

4. In CS/3111/1998 (decided on 30th March 1999), acting in accordance with the provisions of paragraph 4 of schedule 6 to the Social Security Act 1998, the Social Security Commissioner set aside the decision of the tribunal made on 10th September 1997. He gave no reasons, both parties having agreed that the decision had been made in error of law. He referred the matter to a differently constituted tribunal which "must not include any members who sat as one of the earlier tribunal".

5. On 15th November 1999 the new tribunal assessed the degree of disablement as 65% for the period 1st May 1995 to 1st May 2001. This was still below the 80% threshold. This is the decision with which the appeal to me is concerned. The claimant attended the hearing together with another person (see below). The claimant applied for leave to appeal to the Social Security Commissioner against the decision of that tribunal. On 20th February 2000 leave was refused, not by the chairman of the tribunal of 15th November 1999 but by the chairman who had chaired the tribunals on 10th September 1997 and 1st April 1998 and who had refused leave to appeal against the decision of the former. The claimant objects to the fact that it was this chairman who considered her application for leave. She refers to the fact that in CS/3111/1998 the Commissioner had directed that the matter be considered by a tribunal which "must not include any members who sat as one of the earlier tribunal".

6. It is not necessary to my decision that I decide whether this was a breach of the Commissioner's Direction or, indeed, of the tribunal's own procedural regulations, and I have not sought detailed legal argument on these points. However, it is clearly undesirable as a matter of good practice that the chairman of a tribunal whose decision has been set aside be asked to consider an application for leave to appeal against the decision of the tribunal which rehears the appeal. I draw the attention of those concerned with these matters to the recent decision by the Court of Appeal in the case of In re Medicaments and Related Classes of Goods (no 2) *The Times 2nd February 2001.* The Court decided that where there is any suggestion that a judge is biased the question is whether the circumstances would lead a fair-minded and informed observer to conclude that there is a real possibility, or a real danger (the two being the same) that the tribunal is biased. The issue is not whether there is a likelihood that the tribunal is in fact biased.

7. I would add that, so far as this claimant is concerned, any defect in the tribunal procedure has been cured by the exercise of her right to apply directly to the Commissioner for leave to appeal. In fact, I granted leave on 6th September 2000. The Secretary of State opposes the appeal and supports the decision of the tribunal.

8. In a letter of 14th December 1999 (page 200) the claimant makes a number of criticisms of the conduct of the appeal by the tribunal. Some of these are disputed but it is not necessary for me to resolve those disputes. It is certainly clear that there was some tension and bad feeling during the hearing. In the letter to which I refer below the chairman complains of being called a "fascist bastard" and he in turn (in what is obviously intended to be a derogatory way) refers to the claimant and her friend as "these two "ladies" ".

9. The claimant states that she attended the hearing with a friend, to whom I shall refer as Elsie. She continues:

> " [The Chairman] asked if she was my 'representative', and it was decided that she should be a 'McKenzie friend'. I do not understand why the Chairman asked this question as the appeal information sheet ... clearly shows that [Elsie] was to be a representative. ... The Chairman was asking [Elsie] questions – yet it appeared on the day, and in his notes – that he objected to her making comments – he claims that she was 'putting my case as a representative'. Why did he ask her questions if he objected to her replying?? As far as we are aware, a McKenzie friend is to is to advise a person on law – in a court – but this was supposed to be an informal tribunal – not a court case!!! Friends etc are allowed to attend, and had the Chairman been unhappy with [Elsie]'s comments, he could have asked her to keep quiet".

10. In a letter of 17th July (page 204) the chairman of the tribunal writes:

> " The appellant was not represented. She was accompanied by a McKenzie Friend. This point was specifically canvassed during the course of the hearing. The McKenzie Friend was quite specific in advising the tribunal that she was a McKenzie Friend, having been described by the clerk on the appeal record as a "friend". For that reason I pointed out to her that she should not be addressing

> the tribunal if her capacity was McKenzie Friend. She also tried to explain to me what a McKenzie Friend was and I did advise her that I was well aware of what a McKenzie Friend was, having acted as such on occasions in private practice".

The chairman was, to say the least, unwise to accept the label that Elsie herself gave to her role (I assume that Elsie did not have relevant legal training or expertise) and to adopt the approach that he did. However, the point for me to decide is whether there was such procedural impropriety as to render the decision of the tribunal erroneous in law.

11. Section 16 of the Social Security Act 1998 provides for the making of procedure regulations and section 16(3) states:

> 16(3) It is hereby declared –
>
> (a) that the power to prescribe procedure includes power to make provision as to the representation of one person, at any hearing of a case, by another person whether having professional qualifications or not; and
>
> (b) [not relevant]

12. The main procedure regulations are the Social Security and Child Support (Decisions and Appeals) Regulations 1999. The relevant parts of regulation 49 provide as follows:

> 49(1) Subject to the following provisions of this Part, the procedure for an oral hearing shall be such as the chairman ... shall determine.
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> 49(7) Any party to the proceedings shall be entitled to be present and be heard at an oral hearing.
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> 49(8) A person who has the right to be heard at a hearing may be accompanied and may be represented by another person whether having professional qualifications or not and, for the purpose of the proceedings at the hearing, any such representative shall have all the rights and powers to which the person whom he represents is entitled.
>
> 49(11) Any person entitled to be heard at an oral hearing may address the tribunal, may give evidence, may call witnesses and may put questions directly to any other person called as a witness.

13. McKenzie v McKenzie [1971] P 33; [1970] 3 All ER 1034 concerned a divorce petition in which the husband had had his legal aid terminated. He was accompanied to the hearing by an Australian barrister who was at the time working in the firm of solicitors who had been acting for the husband at the time that his legal aid was terminated. The solicitors were no longer on the record. Presumably the Australian barrister would not have had a right of audience even if the solicitors had been on the record, but he was there to assist the husband, not to represent him. The Court of Appeal approved the following statement of Lord Chief Justice Tenterden in Collier v Hicks (1831) 2 B & Ad 663 at page 669; 109 ER 1290 at page 1292:

> "Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court...".

14. In the aftermath of this decision, which coincided with the growth of Law Centres and similar agencies and the increasing use of what are now referred to as para-legals, so-called "Mckenzie friends" came to play a significant role in advising and assisting parties. In my experience their main use was in cases where unqualified people had no right of audience, or where the legal aid regulations did not allow payment for representation. In R v Secretary of State for the Home Department and others, ex parte Tarrant and Another and R v Wormwood Scrubs Prison Board of Visitors, ex parte Anderson and others [1984] 1 All ER 799 the Divisional Court seemed to take the view that where a body had a discretion to allow legal representation it also had discretion to allow a friend or adviser. Such a friend or adviser could be allowed, with permission, to participate in the proceedings (and presumably this could include representation).

15. In R v Leicester City Justices, ex parte Barrow and another [1991] 3 All ER the Court of Appeal clarified the position as it applies in civil court proceedings to which the public have a right of access. However, Lord Donaldson, the Master of the Rolls concluded his judgment as follows (at page 947):

> "May I end by expressing a fervent hope? It is that we shall hear no more of 'McKenzie friends' as if they were a form of unqualified legal assistant known to the law. Such terminology obscures the real issue, which is fairness or unfairness. Let the 'McKenzie friend' join the 'Piltdown Man' in decent obscurity".

16. In the appeal before me it seems unlikely that the chairman of the tribunal was familiar with what Lord Donaldson had said, otherwise he could hardly have adopted the approach that he did adopt. However, the main point is that the effect of regulation 49 is that (subject to proper behaviour and the proper conduct of the proceedings) a party has an unfettered right to be assisted or to be represented by any other person. This assistance or representation may take any form agreed between the party and the other person and I see no reason why the nature or extent of the assistance cannot change during the course of the proceedings. It was an error of law to insist that the claimant specify at the beginning whether Elsie was going to act as a representative in the conventional sense, and to refuse to allow Elsie to address the tribunal.

17. For the above reasons this appeal by the claimant succeeds.

H. Levenson
Commissioner

5th February 2001