CS DLA 43/97.

IN THE COURT OF SESSION

C O P Y I N T E R L O C U T O R

in appeal under

Section 24 of the Social Security Adminstration Act 1992

by

JOHN HAMILTON, 2 Burns Place, Kilwinning (Assisted Person)

APPELLANT

against

A decision of a Social Security Commissioner
dated 20 August 1997 where leave to appeal was granted
by the Court on 18 June 1998

23 April 1999

The Lords having heard Counsel on the now unopposed motion of the appellant of consent, allow the appeal; quosh the decision of the Social Security Commissioner dated 4th June 1997 and of the Disability Appeal Tribunal dated 14th May 1996; remit to a differently constituted Disability Appeal Tribunal to proceed as accords; finds the respondent liable to the appellant in the expenses of the appeal and remit an account thereof when lodged to the Auditor of Court to tax.

23 April 1999

The Lords Decerns against the respondent for payment to the appellant of the expenses as the same be taxed by the Auditor of court.

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/43/97

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM THE DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

ORAL HEARING

Appellant: John Hamilton

Respondent: Adjudication Officer

Tribunal: Irvine

Tribunal Case No: D/51/171/96/0029

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This case came before me as a directed oral hearing in respect of the claimant's application for leave to appeal against the decision of the disability appeal tribunal given at Irvine on 14 May 1996. The claimant was represented by Mr Hornell of the North Ayrshire Council Social Work Directorate. The adjudication officer was represented by Mr Neilson of the Office of the Solicitor to the Secretary of State for Scotland. Having heard parties I decided to grant leave to appeal. The parties indicated to me their consent that in the event that I granted leave to appeal I could treat the application as an appeal. I do so. My decision is that the decision of the disability appeal tribunal given at Irvine on 14 May 1996 is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. In this case the claimant made a claim for disability living allowance on 28 September 1995. The claim was not successful. The decision of the adjudication officer upon the claim was reviewed by another adjudication officer but he did not revise it so as to award benefit. That decision is set out on pages 55 to 57 of the bundle.

3. The claimant appealed to a disability appeal tribunal. His appeal was heard on 14 May 1996. The decision of the tribunal was as follows:-

> "Appeal refused. The Appellant is not entitled to either component of Disability Living Allowance."

The tribunal made the following findings in fact:-

> "2. The Appellant is profoundly deaf without speech. He is mentally competent. He can read and write.
>
> 3. The Appellant reasonably requires the use of an interpreter on occasions to ensure the proper understanding of information. Such occasions occur when he takes his wife to hospital. There have been 4 such visits to hospital in 1996 up to the date of the Tribunal.
>
> 4. The Appellant can communicate with other people by use of the written word as his wife is severely disabled he goes shopping on a daily basis and goes to such places as the bank and the post office for himself and his wife where he encounters people who are not skilled in the use of sign language, he communicates by use of the written word.
>
> 5. The Appellant undertakes various social activities such as bowling and going out for meals. Again on these occasions he communicates by use of the written word."

4. The tribunal in their reasons for their decision accepted that where an interpreter was used to enable the claimant to communicate that would involve "attention" in connection with the claimant's impaired bodily function. This appeal before the Commissioner however relates to a submission made to the tribunal that when the claimant communicates by use of

the written word any writing on the part of the person with whom the claimant is communicating amounts to attention in connection with the claimant's bodily functions in the context of section 72(1) of the Social Security Contributions and Benefits Act 1992.

5. The tribunal said in response to that submission:-

> "It was also submitted on [the claimant's] behalf that in circumstances where he communicates by use of the written word that of itself is a substitute method of providing the bodily function of communication. It amounted to attention from the other person in connection with communication. The Tribunal disagreed with this submission. They consider that in the light of the comments in the aforementioned Commissioner's decision wherein they draw a distinction between communication through an interpreter and communication directly with another person reasonably skilled in the use of sign language it is appropriate in this Appeal to draw the distinction where the communication directly with the other person is by use of the written word. As is discussed in these decisions the word attention connotes an element of service which would in the Tribunal's view be lacking in the two way conversations as described both by [the claimant] and his representative, notwithstanding that these conversations are carried out by use of the written word."

6. It was that issue which I have indicated, was the basis of the argument presented to me at the hearing. In the written grounds of appeal where the claimant sought leave it was said:-

> "My grounds for this request are that I believe the tribunal have erred in law in coming to their decision as they have failed to apply the principles of the Mallinson case in page 3 paragraph 2 of their decision. In particular Lord Woolf's comments on page 12 of the "Mallinson" decision "The attention is in connection with the bodily function if it provides a substitute method of providing what the bodily function would provide if it were not totally or partially impaired." (Rowland Page 22)
>
> Given I am profoundly deaf without speech my normal communication method is sign language. However where people are unable to sign I need to communicate through the written word. This I believe provides a substitute method of my bodily functions of hearing and communicating.
>
> I therefore believe the tribunal have erred in law by not accepting this."

The reference to Mallinson is a reference to Mallinson v The Secretary of State for Social Security [1994] 2 All ER 295. The passage referred to in the written grounds of appeal is to be found at page 306.

7. It was accepted by Mr Hornell that the writing of notes by the claimant himself with a person with whom he wished to communicate would not amount to attention. It was the response which he concentrated on. He reiterated the argument set out in the written grounds of appeal with particular emphasis on the passage quoted from Lord Woolf's speech in Mallinson.

8. Mr Neilson in his submission, referred me to what was said by Lord Justice Glidewell in the Court of Appeal in the case of the Secretary of State for Social Security v Rebecca Fairey a decision of the Court of Appeal issued on 15 June 1995. There it was said:-

> "It is therefore strictly unnecessary for me to consider the argument advanced in the Respondent's cross-notice. This either challenges or seeks clarification of a single sentence in paragraph 10 of the Commissioner's decision, namely:
>
> > "But where the person with whom the claimant is in communication is reasonably skilled in the use of sign language, I would not think it right to conclude that any extra effort involved in that method of communication would necessarily go towards satisfying the attendance condition."
>
> It is accepted by Mr Drabble, for Rebecca Fairey, that fluent communication between her and (for example) her mother by sign language and/or lip reading is not "attention" for the purposes of the section. He submits, however, that some of the actions associated with such communication - physical contact to attract Rebecca's attention, deliberately articulating lip movements - can properly be held to be attention."
>
> I agree with the Commissioner on this issue. It may be that, in a particular case, the effort required of another person to initiate two-way conversation with a deaf person could constitute "attention" within section 72(1). Whether it did so or not, however, would be a question of fact. In this paragraph of his decision, the Commissioner has not ruled out the possibility of such a finding of fact."

9. That case was appealed to the House of Lords. The House issued its decision on 21 May 1997. It was said by Lord Slynn in his speech:-

> "The respondents served a counter notice contending that the latter's decision was wrong insofar as it failed to include a direction that the extra effort incurred by a hearing person to enable a profoundly deaf person to communicate was capable of constituting attention within the meaning of section 72(1)(b)(i) of the Act of 1992. The point, which was argued in the Court of Appeal, was rejected by all members of the Court of Appeal and was expressly abandoned in your Lordships' House."

10. Mr Neilson also referred me to two cases of the Commissioner CDLA/204/1994 where in paragraph 6 it was said:-

> "Mr Perlic argued that, whenever a person assists a deaf claimant by using sign language, that person is providing attention in connection with a bodily function, whether he or she is acting as an interpreter or whether he or she is merely the other party to a two-way conversation. I do not accept that submission. The word "attention" connotes an element of service which is usually lacking in a two-way conversation when the parties are merely using signing rather than speech as the medium for communication. On the other hand, an interpreter is providing a service."

He also referred me to CA/249/92 where in paragraph 9 the Commissioner said:-

> "There can I think be no doubt that a need for help from a third person to act as interpreter for a person with difficulties hearing or speaking can count as "attention" in connection with those functions. I think there is considerable doubt whether the other party to a two-way conversation can be described as giving such attention simply by having to speak loudly or more clearly, use sign language or listen more attentively for the reply."

11. It was Mr Neilson's submission in the light of these authorities that written communications by another person to the claimant in a direct two-way conversation did not amount to attention. He thus submitted that in these circumstances that the tribunal did not err in law and the appeal should be dismissed.

12. I accept Mr Neilson's submission. I accept that the writing of a note by another person for the claimant to read operates as a substitute method of providing communication by speech to someone who had the ability to hear. However attention for the purposes of section 72(1) of the Social Security Contributions and Benefits Act has been judicially accepted to connote the element of service of a close and intimate nature. In his speech in Fairey Lord Slynn said:-

> "Lord Woolf had approved the distinction drawn by Nicholls L J in Moran v The Secretary of State for Social Services [Unreported] 13 March 1987 that "attention" donates concept of some personal service of an active nature....."

13. In this case it seems to me that the element of service is missing when the substitute for speech by the person who is communicating with the claimant is a written message from that person to the claimant. It is nothing more than a method of communication. It is not a service to the claimant. The situation is of course entirely different when an interpreter facilitates the communication between the claimant and another person. It follows standing the view I have taken that the appeal in this case must fail.

14. I should perhaps add that the tribunal in this case directed their attention to the question as to whether or not the claimant reasonably required an interpreter in respect of his impaired bodily function for the purpose of a social activity, daily shopping and business transactions and hospital visits. It is apparent that they considered that as a matter of fact he reasonably required an interpreter in respect of hospital visits but not the other activities. This was a matter which was in their province. They have made appropriate findings and explained the basis upon which they reached that conclusion. In these circumstances their decision properly addressed an issue which was before them and came to a conclusion thereon. Their decision cannot be faulted on these grounds.

15. The appeal fails.

(signed)
D J MAY QC
Commissioner
Date: 4 June 1997