Billetts 150
CSHC/729/03

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSHC/729/03

SOCIAL SECURITY ACT 1998

CHILD SUPPORT, PENSIONS AND SOCIAL SECURITY ACT 2000

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

Appellant:

1st Respondent: South Ayrshire Council
2nd Respondent: The Secretary of State

Tribunal: Ayr

Tribunal Case No:

DETERMINATION AND DECISION OF SOCIAL SECURITY COMMISSIONER

1. This is an application to a Commissioner for leave to appeal on a question of law from the decision of an appeal tribunal dated 19 August 2003. The parties consented that, in the event I granted leave to appeal, the application could be treated as the appeal. This, having granted leave to appeal, I do. My decision is that the decisions of the appeal tribunal recorded at pages 163 and 164 given at Ayr on 19 August 2003 are not erroneous upon a point of law. The appeal fails. I dismiss it.

2. This application and appeal came before me for an oral hearing on 11 March 2004 along with an appeal by the City of Edinburgh Council in CSHC/344/03. The claimant was represented by Mrs Gibson, a welfare rights officer of the South Ayrshire Council. The South Ayrshire Council were represented by Mrs Platt and Mrs Thomson. The Secretary of State was party to the appeal and he was represented by Mr Bartos, Advocate, instructed by Mr Brown, Solicitor, of the Office of the Solicitor to the Advocate General.

3. The appeals raised an interesting point of principle in relation to the representation of claimants in housing benefit appeals both before appeal tribunals and Commissioners by officers of the same local authority who are, in their capacity as housing authority, also parties to the appeal. In the City of Edinburgh case, having heard argument, the council sought leave to withdraw the appeal and this I granted which left the instant case to be decided.

4. In the instant case there were three decisions of the tribunal on 19 August 2003. They are recorded at pages 163, 164 and 165. The decision at page 165 was not a matter of issue between the parties. It related to an overpayment of benefit. The tribunal found that there was no recoverable overpayment. This is not contested by the South Ayrshire Council. It is clear from the other two decisions at pages 163 and 164 that the claimant was successful before the tribunal. The basis for that success was that the tribunal was not satisfied that the original award of benefit had been superseded and accordingly the claimant remained entitled to benefit under that award and did not require to make a subsequent claim for what was already awarded to her. South Ayrshire Council did not seek to appeal against these decisions. The claimant's appeal was advanced simply because the tribunal had made findings in relation to her transferring capital to secure entitlement to benefit. I refer to finding in fact 4 which follows upon findings in respect of the receipt of capital in finding in fact 2 and the deprivation of it in finding in fact 3. In the event, Mrs Gibson did not seek to persuade me that the tribunal erred in law in respect of the basis upon which they determined the appeal. Her concern was simply related to the findings in respect of deprivation of capital to secure benefit. She indicated that she did not wish to withdraw the appeal although she accepted on reflection that there was no error in law in the decisions made. She also indicated that setting aside the decisions would not be in her client's interest. She would, she indicated, be content if I was to make it clear that the basis upon which the decision was made by the tribunal was the absence of supersession of the awarding decision. Mrs Thomson did not object to that. I am accordingly content in determining that the tribunal did not err in law to make it clear that the tribunal's findings in respect of deprivation of capital were not material to the basis upon which the decision was made.

5. In relation to the issue in respect of which I directed the oral hearing, I am satisfied that there is no basis for interference by me in regard to the representation by the claimant by

the local authority who are also parties to the appeal in their capacity as a housing authority. There was also no basis for such interference by the tribunal and no error in law on their part for having heard the appeal with the claimant being represented by the local authority.

6. Mr Bartos referred me to regulation 49(8) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This provides:-

> "(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 purposes 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."

He also directed me to regulation 17 of the Social Security Commissioners (Procedure) Regulations 1999. This provides:-

> 17. A party may conduct his case himself (with assistance from any person if he wishes) or be represented by any person whom he may appoint for the purpose."

It was Mr Bartos' submission that in these circumstances, both before the tribunal and before the Commissioner, a claimant could appoint whom he wishes and that could, in the case relating to housing benefit and council tax benefit include a social work department representative from the local authority who are also parties to the appeal. It was Mr Bartos' submission that the Court could, in certain circumstances, intervene in respect of representation before it, but that these were inherent powers vested in the courts of both Scotland and England. Tribunals and the Commissioner have no such inherent powers.

7. Mr Bartos referred me to *Geveran v. Skjevesland Trading Company Limited* [2003] ALL ER 1, *Re L (Minors) (Care Proceedings: Cohabiting Solicitors)* [2000] All ER (D) 1087 and *Robert Broatch, Petitioner* 5 R 702.

8. It was clear that the Court in England has power to intervene in respect of the representation of parties before it. In *Skjevesland* I was directed to what was said by Lady Justice Arden at paragraph 42 where she said:-

> ".....However, the court is concerned with the duty of the advocate to the court and the integrity of the proceedings before it. The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal. The judge has to consider the facts of the particular case with care (see the words of Lord Steyn in the *Man o'War Station* case cited at [32], above). However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result. We accept Mr Jones' submission that it may be difficult for the party objecting so to do. In many cases it will be sufficient that there is a reasonable lay apprehension that this is the case because as Lord Hewart CJ memorably said in *R v Sussex JJ ex p McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233, it is important that justice should not only be done, but seen to be done. Accordingly, if the judge considers that the basis of objection is such as to lead to any order of the trial being set aside on an appeal, as in *R v Smith (Winston)*, he should accede to an order restraining an advocate from acting. But we stress that the judge must consider all the circumstances carefully. A connection, for instance, between counsel for one party and a witness on the other side may be an important factor where the evidence is of fact but, depending on the nature of the connection, it may be less important where the evidence is of an expert nature and the cross-examination is likely to

> be on questions of technical expertise. The judge should also take into account the type of case and the length of the hearing, and any special factor affecting the role of the advocate, for instance, if he is prosecuting counsel, counsel for a local authority in care proceedings or as a friend of the court."

She also went on to say:-

> "[43] A judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by the counsel in question. ....."

In that case the court did not intervene for the reasons set out by it. *Re L (Minors) (Care Proceedings: Cohabiting Solicitors)* was a case in which the court did intervene and did so by indicating that it intended after seven days from the day of the judgement to make declaration that Medway's Head of Legal Administration was no longer representing Medway in the proceedings. It did so in the particular circumstances of that case into which it is not necessary to go for the purposes of this decision. The case of *Broatch* did not assist in respect that it was an old case relating to the disciplining of a solicitor by the Sheriff for remarks made in relation to the impartiality of the Sheriff substitute. It was not concerned with representation in a particular case.

9. Mr Bartos' submission was that unlike the courts, the Commissioners and tribunals have no such inherent powers and are bound, by the regulations to which I have referred above, to accept the representative appointed by the claimant. It was his submission that neither I nor the tribunal could do what was done in the *Re L* case. He referred me to what was said by Commissioner Parker in CSHB/379/02. Commissioner Parker, in the latter case, said at paragraph 26:-

> "An individual can choose whom he or she wishes to instruct and is free to judge whether he or she is satisfied with the representative's background. *Gillies* is about the possibility of the state imposing a biased doctor on the claimant, but the state has nothing to do with the individual's choice of representative. If the tribunal perceives a conflict, this could influence how it weighs points made. If this were the case, it would require to put that concern to the parties for comment and then take those comments into account."

He submitted that the nature of the jurisdictions of the Commissioner and the appeal tribunal was inquisitorial as opposed to an adversarial jurisdiction, see R(I) 4/65. Accordingly the Commissioner and the tribunal can form their own view on the issues before them, notwithstanding the submissions put to them by parties. In these circumstances he submitted there would be no requirement or necessity to intervene in respect of the representation appointed by the claimant. He also submitted that the Commissioners and appeal tribunals had no inherent powers of the type that the courts had because the former were created by statute and they were restricted by what the legislature gave them power to do. In the event, it is not necessary to come to any concluded view on whether either the Commissioner or the appeal tribunal have any inherent power to intervene in respect of the representative nominated by the claimant. Indeed this would not be a suitable case in which to do so. It is clear that the courts would intervene only in extreme circumstances. On the other hand I can say that I did not find the distinction sought to be drawn between the nature of the jurisdictions of the courts and Commissioners and Tribunals persuasive for the purposes of

determining whether there was an inherent jurisdiction invested in the Commissioners and tribunals. I would find it extraordinary if the courts possessed and particularly the Commissioners as an appellate body of high standing did not possess an inherent jurisdiction to "prevent abuse of its procedures". If Commissioners and tribunals do not possess such a jurisdiction it is something which statute ought to provide for. In the instant case the circumstances are not ones which would suggest there was an abuse of the procedures of the Commissioner or tribunal or a risk of the type envisaged by Lady Justice Arden. In these circumstances I consider that the tribunal did not err in law in entertaining the appeal with the representation from the local authority which the claimant had. In the appeal before me I find that there would be no basis to intervene. I do however underline that in doing so I am not making a decision as to whether there is an inherent power that could be exercised by the Commissioner or an appeal tribunal in different circumstances.

10. It was accepted by Mrs Platt that there was some sensitivity in housing benefit cases where the local authority was one of the parties and also provided representation to the other party. It is clear from the written response made by Mrs Gibson that she too is aware of such sensitivity. In a written submission she said:-

> "…. I would accept however that an appellant may perceive the possibility of conflict in interest between an officer of the council representing them in a forum against a decision made by another member of the same council. This is a possibility as a Welfare Rights officer I fully accept and address. I point out to clients on first meeting with them why such a perception could arise and that they are free to seek representation elsewhere. I offer assurance that my efforts on their behalf will be pursued with the same enthusiasm and rigor (sic) I would employ in any case."

I commend Mrs Gibson for her practice and consider that it is one which should generally be adopted. It would also be good practice to record the claimant's acceptance of the points put to him in writing.

11. The appeal fails.

(Signed)
D J MAY QC
Commissioner
Date: 17 March 2004