Re-assessment of DLA claim following HL Decision in Mallinson 61/96

PLH

Commissioner's Files: CA 7018/95
CDLA 4109/95

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF DISABILITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Eric Mallinson

[ORAL HEARING]

1. The claimant Mr Eric Mallinson, now 52, has been registered blind since 1973. On 21 April 1994 the House of Lords decided by a bare majority that the basis on which his claim for attendance allowance made on 24 August 1989 had been dealt with by the Attendance Allowance Board, Mrs Commissioner Heggs, and the Court of Appeal was wrong, and that the matter had to be remitted for the statutory medical conditions now in s.72 Social Security Contributions and Benefits Act 1992 to be reapplied to his case. In particular it was held that whatever guidance he might reasonably require when walking in unfamiliar surroundings or in traffic had to be taken into account as "attention in connection with his bodily functions", as distinct from supervision needed to keep him out of danger, which was the head under which such guidance had hitherto consistently been considered: [1994] 1 WLR 630.

2. On reconsideration of his attendance allowance claim following the House of Lords decision, the adjudication officer determined on 4 August 1994 that taking into account the occasions when guidance would be needed on outings "reasonably required to maintain Mr Mallinson's wellbeing", the totality of his needs for attention in connection with his bodily functions still did not amount to a need for "frequent attention throughout the day" so as to qualify him for attendance allowance as regards the period before 6 April 1992: pages T140-145 in file CA 7018/95.

3. From 6 April 1992, attendance allowance was replaced by disability living allowance comprising both care and mobility components, each of which Mr Mallinson claimed on 2 March 1992. By an award made on 23 March 1992 he was given entitlement to the *low rate care component* and *lower rate mobility component* for life from 6 April 1992. Thus it was accepted, and has not since been disputed, that he meets the conditions of needing attention for a significant portion of the day, etc., and needing guidance or supervision out of doors, etc., to qualify under ss. 72(1)(a) and 73(1)(d)).

4. By a further decision on review of Mr Mallinson's entitlement in the light of the House of Lords decision, (at pages T94-96 in file CDLA 4109/95) the adjudication officer determined that he was not entitled to the *middle rate care component* of disability living allowance from 6 April 1992. The conditions for this rate in s.72(1)(b) are the same as for the lower rate of attendance allowance, and the claim to it was rejected for the same reasons as those referred to in 2 above. The adjudication officer also rejected Mr Mallinson's further claim that he now met the conditions for *higher rate mobility component* because of difficulties he had developed with his feet.

5. Mr Mallinson appealed to the tribunal against the attendance allowance decision, claiming that the decision of the House of Lords in his favour had not been given full effect. In particular he contended that a blind person needs assistance in a very wide range of activities to make up for his lost sight, and that these had been wrongly excluded from the reckoning. He also asked for a further review of his disability living allowance entitlement, as he was entitled to do under s.30(1) Social Security Administration Act 1992.

6. The adjudication officer's decision on this further review, issued on 3 January 1995, is at pages T112-115 of file CDLA 4109/95. As regards mobility he quite rightly rejected on the facts the assertion that the claimant had now developed a severe physical disability in his feet that prevented him walking. As regards care, he dealt separately with the periods before and after 14 October 1994, following guidance issued by the chief adjudication officer that on that date there had been a change in the law on the inclusion of "social activities" in attendance needs, as a result of the decision of another Commissioner in case CA 780/91 *Fairey*. For the period down to 14 October 1994 the adjudication officer rejected the claim to any higher rate of benefit and merely confirmed the previous entitlement to the *low rate care* and *lower rate mobility* components, for the reasons already given.

7. From 14 October 1994 however, he revised the claimant's entitlement by awarding him the *middle rate care component* for life, saying: "I consider that the decision [CA 780/91 *Fairey*] also applies to leisure activities... Mr Mallinson... states that he needs help to listen to music, watch the television, read books and newspapers and to be introduced to people... In the light of the decision given on 14.10.94 I accept that the attention required with the bodily function of seeing in connection with [visits to friends] and with listening to music and watching television can now be taken into account when considering the aggregate of attention reasonably required." Adding these to the list of other occasions when attention in connection with bodily functions was required, he accepted that the test in s.72(1)(b) was satisfied by the claimant, and likely to remain so for life: T114-5.

8. The claimant was still not satisfied with what he had been awarded. Through his welfare rights officer, he appealed to the tribunal against being turned down for *middle rate care* before 14 October 1994, and for *higher rate mobility* altogether: see letter of appeal dated 20 January 1995, page T116. This and his earlier appeal against the refusal of attendance allowance came before the tribunal together on 22 March 1995.

9. On the appeal hearing the only issue argued on the *care component* was whether the decision in *Fairey* had in fact effected a substantial upheaval in the law. Consistently with the basis of the review decision issued on 3 January 1995, the adjudication officer contended it had: and accordingly that while the claimant now had to be accepted as meeting the benefit conditions as reinterpreted, s.69 of the Administration Act prevented his previous award being revised in his favour for any period before 14 October 1994. For Mr Mallinson it was argued that what had been said by the Commissioner in *Fairey* was merely declaratory of the principle well established in many other Commissioners' decisions that "required" in the context of the statutory medical conditions means reasonably required, not medically essential for mere continued existence. On this footing, if it was right that Mr Mallinson met the medical conditions, there was nothing to prevent a review decision to this effect awarding him the benefit for the period before 14 October 1994 as well as afterwards, as the restriction in s.69 on retrospective reviews for error of law would not apply.

10. The tribunal gave careful consideration to the arguments on this issue, and decided it in favour of the claimant and against the adjudication officer. Counsel on behalf of the adjudication officer then immediately conceded that if *Fairey* had not altered the existing law, Mr Mallinson had satisfied the conditions for daytime attendance allowance from 24 August 1989 to 5 April 1992 inclusive, and for disability living allowance *middle rate care component* before as well as after 14 October 1994, and that a decision to this effect should be issued by the tribunal, awarding him the extra benefit he had previously been refused. In view of this concession by the adjudication officer, the tribunal quite understandably gave their decision entitling the claimant to these benefits without themselves considering or making any findings of fact about whether he did satisfy the statutory conditions: see paras 2 and 19 on pages T143-145. They rejected his contentions on the *mobility component* and there is no appeal against that aspect of their decision.

11. With the leave of the tribunal chairman, the adjudication officer now appeals against the decisions of 22 March 1995 on attendance allowance and *care component*, as being erroneous in law. His two main grounds, set out in a commendably clear and economically expressed notice of appeal dated 5 May 1995, are that *Fairey* was wrongly decided, or if it was right the tribunal were wrong in not holding that s.69 prevented a retrospective review of the claimant's entitlement for the period before 14 October 1994. The premise underlying both of these grounds is that *Fairey* did in fact represent a departure from previous law. It is implicit, and accepted before me by Mr Mallinson's advisers, that the concession made before the tribunal about entitlement depends on *Fairey*: it does not hold good if that decision is overturned. To that end the chief adjudication officer is pursuing an appeal against it, which has been dismissed by the Court of Appeal (unrep. CA 15 June 1995); but is now on its way to the House of Lords, and due to be heard on 17 December 1996.

12. This was the background against which the adjudication officer's two appeals in Mr Mallinson's case came before me for first hearing on 5 August 1996. Mr Paul Stinchcombe of Counsel appeared for the adjudication officer, instructed by the solicitor to the Department of Social Security, and Mr David Wolfe of Counsel appeared for the

claimant, instructed by the solicitor to the Child Poverty Action Group. Each provided helpful skeleton submissions aimed at defining the areas in dispute and how much of them I could deal with at this stage. The Secretary of State had been given an opportunity to apply to be joined as an additional party to the appeals, but declined.

13. It was apparent from the parties' submissions, and I think in the end both Counsel were agreed, that a proper hearing of the substantive issues affecting Mr Mallinson's entitlement to attendance allowance from 24 August 1989 and disability living allowance care component from 6 April 1992 cannot take place while the outcome of the adjudication officer's appeal in *Fairey* remains uncertain. The Court of Appeal (unrep. CA 15 June 1996) were not unanimous, and even disagreed on what the ratio decidendi of *Mallinson* itself had been. In my judgment the issues their Lordships have to consider are too wide, and too close to those raised by these appeals (as well as virtually every other affecting a blind claimant), to make it safe or sensible for me to proceed pending more authoritative guidance. I therefore adjourn further consideration of both appeals to a date to be fixed, not earlier than 30 days after the decision of the House of Lords in *Fairey*, with general liberty to either side to apply in the meantime. I am sorry that this will impose additional delay in determining Mr Mallinson's entitlement but it is a course I have already had to take in numerous other appeals raising similar points in relation to blind people.

14. In particular, the interaction of the principle favoured in *Mallinson* by Lord Woolf, that the phrase "attention in connection with his bodily functions" may include help of a kind designed to make up generally for inability to see, with that attributed to the Commissioner in *Fairey* that a whole range of leisure time activities can now be taken into account in determining what attention is "reasonably required", makes it possible to argue for a range of help far beyond the established bounds of this benefit, even though the speeches in *Mallinson* give no indication of any intention to depart from earlier authority. As a direct result, it is being seriously submitted in this and many other appeals now being brought involving blind people, that help with such matters as choosing matching coloured clothes in the morning, choosing which brand of cereal or soap powder to buy in the supermarket, cleaning up the furniture and the garden after the guide dog, and choosing and "watching" television programmes, must all be brought into the reckoning as attention reasonably required in connection with seeing. The implications extend to many other people suffering from disabilities of perception or understanding, who may be able to say with equal justice that if blind people are to be compensated for the absence of seeing as a bodily function, many other sensory or cognitive functions of the central nervous system (or their absence) deserve to be taken into account in the same way. For my part, I find it difficult to believe that these far reaching effects were in the mind of Parliament when the test of a person being so severely disabled physically or mentally as to need frequent attention in connection with *his* bodily functions was laid down. Nor do they sit happily with the passages in *R v National Insurance Commissioner ex p Packer* [1981] 1 WLR 1017 *per* Lord Denning at 1022, and CA 6/72, generally relied on as defining the proper scope of this benefit and cited with approval in *Mallinson* itself. It is greatly to be hoped that their Lordships will take the opportunity to resolve these apparent difficulties when they consider *Fairey*.

15. The only matter it is convenient for me to give a decision on at this stage is the proper scope of these appeals themselves. I was asked to do this as I heard submissions on the effect of the concession by the adjudication officer recorded in the tribunal record, on which they based their decision awarding benefit to the claimant, in conjunction with the adjudication officer's own award of middle rate care component to the claimant from 14 October 1994. The claimant did not of course appeal against this award, and nor did the adjudication officer because he had made it himself.

16. I was initially concerned about how far an appeal to me could properly reopen either the concession or the adjudication officer's own award which had not been disputed on appeal to the tribunal. Having heard argument from both sides I am satisfied that the fact that the tribunal's decision on the earlier periods was based primarily on the concession, rather than on any independent assessment of the detailed facts by the tribunal themselves, does not and should not prevent a full inquiry into whether in the result the decision was based on an error of law. That it seems to me follows necessarily from the terms of s.23(7) Social Security Administration Act 1992 under which I have a duty to set aside the decision of the tribunal if I find it for any reason erroneous in law. Whatever concessions may or may not have been made below, a Commissioner has to form his own view of whether the result has been erroneous, and if so to set it aside.

17. I was more troubled by the absence of any appeal to the tribunal as regards care for the period from 14 October 1994. If there was no such appeal to the tribunal, I have difficulty seeing how they could have made any effective decision covering that period which could give rise to an appeal to me. The reality however is that the correctness of the chief adjudication officer's understanding of the state of the law following 14 October 1994 is so bound up with the issues raised in the appeal in *Fairey* that it will be overwhelmingly more sensible to have the period after that date dealt with on the rehearing of this appeal along with all the rest. If therefore I do not have jurisdiction to deal with it under the appeal on file CDLA 4109/95 as at present constituted, I propose to exercise the jurisdiction I undoubtedly do have under s.36 of the Administration Act to deal with and determine, as a "matter first arising" in the course of the appeal to me, the question of whether the claimant's award of benefit from 14 October 1994 should be reviewed for error of law or any other reason. I therefore direct that the submissions to be made on the further consideration of this appeal are also to cover this later period.

(Signed)

P L Howell
Commissioner
20 September, 1996